A joint publication of:

Advocating for our communities

870 Market Street, Suite 370
San Francisco, CA 94102
(415) 392-6257
www.nclrights.org

870 Market Street, Suite 823
San Francisco, CA 94102
(415) 865-0176
www.transgenderlawcenter.org

LGBT Legal Issues for School Attorneys

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Attachment

A

LGBT Definitions[1]

Transgender Law Center
870 Market Street, Ste #823
San Francisco, CA 94102
(415) 865-0176

Transgender
An umbrella term that can be used to describe people whose gender expression is nonconforming and/or whose gender identity is different from their birth assigned gender.

Gender Identity
A person's internal, deeply-felt sense of being either male, female, something other, or in between. Everyone has a gender identity.

Gender Expression
An individual's characteristics and behaviors such as appearance, dress, mannerisms, speech patterns, and social interactions that are perceived as masculine or feminine.

Sexual Orientation
A person's emotional and sexual attraction to other people based on the gender of the other person. A person may identify their sexual orientation as heterosexual, lesbian, gay, bisexual, or queer. It is important to understand that sexual orientation and gender identity are two different things. Not all transgender youth identify as gay, lesbian, bisexual, or queer. And not all gay, lesbian, bisexual, and queer youth display gender non-conforming characteristics.

LGBTQ
An umbrella term that stands for "lesbian, gay, bisexual, transgender, and questioning." The category "questioning" is included to incorporate those that are not yet certain of their sexual orientation and/or gender identity.

Female or Male Cross Dressers
Individuals who occasionally wear clothing that is perceived to be conflicting with their anatomical genital structure.

Drag Queens or Kings
Female or male cross dressers who are lesbian, gay, or bisexual.

[1] The following definitions were excerpted from two sources. The San Francisco Human Rights Commission's *Compliance Guidelines to Prohibit Gender Identity Discrimination* and Beyond the Binary: A Tool-Kit for Gender Identity Activism in Schools.

Masculine Females
Biological females who have or are perceived to have masculine characteristics. They may have either a feminine or masculine gender identity, and will usually identify with their body if asked to specify.

Feminine Males
Biological males who have or are perceived to have feminine characteristics. They may have either a masculine or feminine gender identity, and will usually identify with their body if asked to specify.

Transsexual
A term most commonly used to refer to someone who transitions from one gender to another. It includes people who were identified as male at birth but whose gender identity is female, people who were identified as female at birth but whose gender identity is male, and people whose gender identity is neither male nor female. Transition often consists of a change in style of dress, selection of a new name, and a request that people use the correct pronoun when describing them. Transition may, but does not always, include necessary medical care like hormone therapy, counseling, and/or surgery.

Gender Non-Conforming
A person who is or is perceived to have gender characteristics and/or behaviors that do not conform to traditional or societal expectations. Gender non-conforming people may or may not identify as lesbian, gay, bisexual, transgender, or queer.

Genderqueer
People who do not identify as, or who do not express themselves as completely male or female. Genderqueer people may or may not identify as transgender.

The Transgender Umbrella: one view

Shannon Minter, Legal Director
National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
(415) 392-6257

Transgender people have been around for a long time. However, the term transgender, as it is currently used, is a relatively new term. It has only been in general, popular use since the early 1990s. As currently used, “transgender” is an umbrella term that is analogous to other umbrella terms like people of color or people with disabilities.

Like those terms, the word transgender was deliberately designed to create and foster a sense of commonality and common purpose between otherwise different and specific groups. The same way that the term “people of color” includes a variety of specific racial groups, such as African-Americans, Asian-Americans, Native-Americans and so forth, the term “transgender” also includes a variety of more specific identities.

It includes transsexual people, cross-dressers, transvestites, drag queens, butch lesbians, feminine gay men, and even more generally any women who have so called masculine characteristics and any men who have so called feminine characteristics.

The underlying idea or concept is that “transgender” includes anyone whose behavior, appearance, or identity falls outside of gender stereotypes or outside of stereotypical assumptions about how men and women are supposed to be. It is a very broad term that includes a very wide range of people.

For the transgender community, gender identity might be thought of as the core concept that is equivalent to sexual orientation for lesbian, gay and bisexual people. Gender identity refers to a person’s internal, deeply felt sense of being male or female (or both or neither). It is a person’s psychological identification as masculine or feminine. For most people, your gender identity corresponds to your physical body, to your anatomical sex. The whole premise of transgender identity is that this is not necessarily true for everybody.

Transsexual people might be thought of as the most extreme example of people whose gender identity does not correspond to the body they were born with. In my case, I was born with a female body and raised as a girl, but my gender identity is male. Like a lot of other transsexual people, I underwent medical treatment to change my body to correspond with my gender identity.

It’s important to make it clear, however, that not all transgender people choose to undergo any medical treatment. Not even all transsexual people do. There are female bodied people who identify as male and as transsexual without any medical treatment, and then there are some of us who really need the medical treatment.

That diversity is really the key to the liberating aspect of transgender identity and politics. We have been taught that if you are born in a female body, you should dress and behave in a feminine way, and you should be attracted to men. Lesbian and gay people know that is not true when it comes to sexual orientation. The transgender community shows another different, but similar kind of truth. Gender characteristics can be combined in any number of different ways. Helping people to see and understand that is really the heart of the liberating aspect of transgender identity.

Bathroom Conversation: A discussion with a Human Resources Manager about bathrooms and transsexual employees.

By Jamison Green

The HR manager of a San Francisco subsidiary of a major New York-based corporation received advice from his New York legal department to instruct a local newly-transitioning FTM employee that he couldn't use the men's bathroom until he had had genital reconstruction (which many transmen never have) and until he was listed with the health insurance carrier as male.

The HR manager had called me at the request of the very agitated and frustrated FTM employee. I told him that it would soon be highly inappropriate for the young man to be using the women's room, and that he would be using a stall in the men's room, so there was no forced or required nudity (as in a shower situation), and no violation of privacy. The manager seemed to understand me, and he was relieved that I had a sense of humor about the matter while I explained to him about the puberty-like nature of hormonal transition and its biochemical processes, surgery issues, and the fact that social maleness is really more important on a day-to-day basis than the shape of one's genitals. But somehow I had to bring the point home, because I wasn't sure he was getting it in a way that would resolve the young man's problem and solidify the HR manager's position with respect to his corporate legal department.

"How many men do you meet every day, feel comfortable with, do business with, etc., etc.?" I asked him rhetorically. "And how many of those men do you know for a fact has a penis?" He was stunned.

"So how important would you say a man's penis is in your employer/employee relationship?" I inquired. He was contrite.

"You assume all the men you meet have penises and started their lives in male bodies. This may not be true. And if that is so, what difference does it make to you?"

"I see," he said, thoughtfully.

"So the difference in the case of this employee," I went on, "is that you actually know an intimate detail of his life that you are not privileged to know in other cases. Transsexualism is a medical condition, treated by doctors to improve the quality of life for their patient. It is difficult, at best, to go through this process at all, and virtually impossible without some social support, unless one does it in secret, obliterating their past and cutting all ties with people who had any knowledge of their previous embodiment. Many people have lived that way and made their transitions a secret. What your employee is doing now is a courageous act, worthy of your respect. He has thought long and hard about this transition he is making, and he is not hiding, masquerading, or playing games. He is required by established medical standards to live completely as a man before he can have surgery. Your corporate refusal to cooperate feels like a game to him and is highly frustrating and demoralizing. You acknowledge that he gets along with his co-workers and they accept him as a man, so your refusal to accept him becomes a productivity obstacle for your entire staff. Your resistance unnecessarily calls attention to a personal situation that should be

none of your business beyond your privileged awareness that it exists and is a condition of his life."

The outcome of this conversation was that the company permitted the young man to use the men's restroom. They also changed his employment records to reflect his sex as male in correspondence with his newly issued legal California driver's identification, which was supported by his medical records. No incidents of complaint arose from other employees. In addition, the company installed a single-occupant unisex restroom for any employee to use, and the young man was NOT REQUIRED to use that facility.

This outcome is fully in compliance with San Francisco Public Ordinances prohibiting adverse discrimination on the basis of gender identity, though other forms of mitigation may have been negotiated had a complaint been filed with the San Francisco Human Rights Commission.

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For more information about Jamison Green's work, go to www.jamisongreen.com

Attachment

B

expansive interpretation of Title VII in other contexts.[3] As a result, the Ninth Circuit, the First Circuit, and as is discussed in more detail late in this publication, the Sixth Circuit have issued favorable decisions holding that transgender, or more broadly, gender non-conforming persons, are protected from discrimination under Title VII and other sex discrimination statutes.[4] In addition, federal district courts are increasingly refusing to dismiss Title VII claims brought by transsexual plaintiffs and permitting such claims to proceed to trial.[5]

During this same time period, courts and administrative agencies in Connecticut,[6] Massachusetts,[7] New Jersey,[8] and New York[9] have all found that transgender plaintiffs, who had been discriminated against because of their gender identity, had a right of action under existing state and/or local anti-discrimination laws.

This guide apprises California employers and employment law attorneys of federal and state developments and provides guidance on steps that can be taken to create a non-discriminatory

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[3] *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Title VII prohibits an employer from discriminating against a woman who was considered to be too masculine); *see also Oncale v. Sundowner Offshore Oil Services*, 523 U.S. 75 (1998) (Title VII prohibits men from sexually harassing other men, even though same-sex harassment was not the "principal evil" Congress intended to combat when it enacted Title VII).

[4] *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (holding that the "initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*"). *See also Rosa v. Park West Bank & Trust Co*., 214 F.3d 213 (1st Cir. 2000) (reinstating Equal Credit Opportunity Act claim on behalf of transgender plaintiff who alleged that he was denied an opportunity to apply for a loan because he was not dressed in "masculine attire"). *Finally, see Smith v. City of Salem*, 369 F.3d 912 (6th Cir. 2004) *later amended and superceded by Smith v. City of Salem, Ohio* 2004 WL 1745840 (6th Cir. Aug 5, 2004).

[5] *See*, *e.g*., *Doe v. United Consumer Financial Services*, Case No. 1:01CV1112 (N.D. Ohio 2001) (holding that a transsexual had stated a claim under Title VII where the allegations indicated that her termination may have been based, "at least in part, on the fact that her appearance and behavior did not meet United Consumer's gender expectations (particularly in light of United Consumer's alleged inability to categorize her as male or female 'just from looking')"). For a complete list of federal cases holding that discrimination on the basis of gender non-conformity and/or transgender status is a form of sex discrimination, see http://www.transgenderlaw.org/cases/federalcases.htm. For an exception to this trend, see *Oiler v. Winn-Dixie*, 2002 U.S. Dist. LEXIS 17417 (E.D. LA, Sept. 16, 2002) (denying Title VII protection to a male Winn-Dixie employee who wore female clothing off the job).

[6] *Declaratory Ruling on Behalf of John/Jane Doe* (Conn. Human Rights Comm'n 2000) (relying on Price Waterhouse, Schwenk, Rosa, and other recent federal court decisions in holding that the Connecticut state statute prohibiting discrimination on the basis of sex encompasses discrimination against transgender individuals).

[7] *Lie v. Sky Publishing Corp.*, 15 Mass. L. Rptr. 412, 2002 WL 31492397 (Mass. Super. 2002) (holding that transsexual plaintiff had established a prima facie case of discrimination based on sex and disability under state law prohibiting employment discrimination).

[8] *Enriquez v. West Jersey Health Systems*, 342 N.J. Super. 501, 777 A.2d 365 (N.J. Super.), cert. denied, 170 N.J. 211, 785 A.2d 439 (N.J. 2001) (concluding that transsexual people are protected by state law prohibitions against sex and disability discrimination).

[9] *Maffei v. Kolaeton Industry*, Inc., 626 N.Y.S. 2d 391 (N.Y. Sup. Ct. 1995) (holding that city ordinance prohibiting "gender" discrimination protects transsexuals); *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996) (refusing to dismiss transsexual woman's claim that she had been discriminated against on the basis of sex in violation of the New York State Human Rights Law and the New York City Human Rights Law).

environment. It also includes basic information about the transgender community and highlights one of the main issues that transgender employees face: restroom access. Both NCLR and TLC regularly offer on-site trainings to California based employers, firms, and attorney associations. On a case-by-case basis, we also provide technical assistance to employers and who are trying to create non-discriminatory workplaces and employment attorneys bringing a cause of action based on gender identity related discrimination.

II. Title VII of the 1964 Civil Rights Act

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[10]

In *Smith v. City of Salem*, the 6th Circuit found that this language includes protection for transgender employees because discrimination based on sex-stereotyping is unlawful:

> "Such analyses cannot be reconciled with *Price Waterhouse,* which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual--and therefore fails to act and/or identify with his or her gender--is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse,* who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination."[11]

As you'll see from reading the full opinion in *Smith* (included in Appendix X), the Court in that case favorably cited a 9th Circuit Opinion, *Schwenk v. Hartford* that analyzed Title VII is a post *Price Waterhouse* environment. Therefore, while *Smith* does not apply directly to California employees, employers would be wise to expect California based Federal District Courts and the 9th Circuit to follow the reasoning of this landmark decision.

III. California's Fair Employment and Housing Act

Beginning in 2004 California's Fair Employment and Housing Act (FEHA) explicitly protects all applicable transgender employees. FEHA was amended through the Gender Nondiscrimination Bill of 2003 (AB 196). AB 196 changed the California Government Code in two places. First, it amended California Government Code 12926(p) which defines sex to read:

> (p) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. *"Sex" also includes, but is not limited to, a*

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[10] 42 U.S.C. § 2000e-2(a)

[11] *Smith,* 2004 WL 1745840 at 8

> *person's gender, as defined in Section 422.56 of the Penal Code.* **California Government Code 12926** (Italicized portion is the amended language)[12]

For the sake of statutory consistency, AB 196 did not create a new definition of gender to add to the statute. Instead it incorporated the definition from California's Hate Crimes Statute. That statute defines gender as:

> "Gender" means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. **California Penal Code 422.56(c)**[13]

Second, AB 196 added new language to FEHA pertaining to dress codes. Again, in order to bring California in line with trends seen in other states and in local jurisdictions within the state, AB 196 clarified the effect of this new language on an employer's existing ability to set standards for workplace appearance:

> Nothing in this part relating to gender-based discrimination affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity. **California Government Code 12949**

Section 12949 simply makes clear that in order to comply with state law, any such appearance or grooming policy must judge a transgender person's compliance by the standards appropriate for that person's gender identity.

IV. Changing Workplace Environments

While many employers have already been proactively creating workplaces that are free of gender identity discrimination, others need to take strong steps in order to do so. Gender identity discrimination is premised on the idea that the sex a person was assigned at birth is always accurate and/or unchangeable. However, as many transgender people can attest, it is not.

Therefore, employer policies and practices must incorporate the needs and experiences of transgender people in order to comply with state law. Aside from meeting the legal duties under federal and state law, updating such policies make for a better working environment, demonstrate

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[12] This language was just adopted by the state legislature through AB 1234 and will become law on January 1, 2005. The original AB 196 language was: "Sex" also includes, but is not limited to, a person's gender, as defined in Section 422.76 of the Penal Code, except that, for purposes of this part, the reference in that definition to the "victim" shall mean the employee or applicant and the reference in that definition to the "defendant" shall mean the employer or other covered entity or person subject to applicable prohibitions under this part.

[13] This language was just adopted by the state legislature through AB 1234 and will become law on January 1, 2005. Until that time, the definition in Penal Code section 422.76 is: "gender" means the [individual's] actual sex or the defendant's perception of the [individual's] sex, and includes the defendant's perception of the [indiviudal's] identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the [individual's] sex at birth.

respect for diversity, alleviate wasteful and counter-productive stress, and set clear standards for workplace behavior.

Following are examples of areas in which employers should make clear, understandable policies. As workplaces can vary widely, this publication only seeks to identify the most common changes employers need to make. Individual employers are again encouraged to contact either NCLR or TLC at the numbers or emails above to get answers to specific questions.

A. Anti-Discrimination Policies

Employers who have not already done so, should bring their employment policies in line with state law by clearly defining "sex" or "gender" to include gender identity or by adding the phrase "gender identity and expression" to their existing policy. Such modifications are important in order to put all employees on notice that transgender employees are respected and protected in the workplace.

Such policies obviously apply to hiring, promoting, training, and retaining employees. Managers and other decision makers should be explicitly trained about the employer's duty to not allow gender identity bias to play a role in any of these areas.

B. Names and Pronouns

An employee who transitions on the job has the right to be addressed by the name and pronoun that corresponds to the employee's gender identity. Employee records and identification documents should be changed accordingly. While state law does not likely prohibit other employees from making inadvertent slips or honest mistakes about a person's name or gender, it does outlaw intentional or persistent refusal to respect a co-worker's or employee's gender identity. Intentionally addressing a co-worker or employee by the incorrect name or pronoun after having been informed of that person's gender identity is an actionable form of discrimination.

While some employers believe that an employee must get a court order to legally change the employee's name, this is not correct. California explicitly recognizes "common law" name changes for a majority of people in the state.[14] Furthermore, an employee does not need to get court recognition of a change of gender prior to requesting that an employer change the employee's gender marker in records and on identity documents. An employer also should not require such an order prior to effectuating such a request. To do so, would run counter to the policies of the majority of government agencies that keep records on a person's gender. For instance, a transgender person can get the gender marker changed on their state identification or drivers license without having first gotten a court order. The same is true of a person's gender marker in their social security records and on their passport.

C. Restroom accessibility

All employees have a right to safe and appropriate restroom facilities. This includes the right to use a restroom that corresponds to the employee's gender identity, regardless of the employee's sex assigned at birth. No other employee's privacy rights are compromised by such a policy. While no such case has been heard in California (likely because of the ridiculous nature of the arguments

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[14] *see* California Code of Civil Procedure, section 1279.5 and affirmed in *In re Ritchie* 206 Cal.Rptr. 239 (Cal.App. 1 Dist.,1984) and *Lee v. Superior Court* 11 Cal.Rptr.2d 763 (Cal.App. 2 Dist.,1992).

involved), the only known case any where in the nation of a non-transgender person seeking legal remedy to the presence of a transgender person in the same restroom was dismissed for lack of a cause of action.[15]

In addition, where possible, an employer should provide an easily accessible unisex single stall bathroom for use by any employee who desires increased privacy, regardless of the underlying reason. In fact, a private restroom of this type can be utilized by an employee who does not want to share a multi-restroom with a transgender co-worker or employee. Clearly, though, use of a unisex single stall restroom should always be a matter of choice for an employee. No employee should be compelled to use one either as a matter of policy or due to continuing harassment in a gender appropriate facility.

D. Dress Codes

As clarified above in section III, California state law explicitly prohibits an employer from denying an employee the right to dress in a manner suitable for that employee's gender identity. While the most efficient way to avoid liability on this issue is to do away with all dress codes based on gender, any employer who does enforce gender based dress codes must do so in a non-discriminatory manner. This means not only allowing a transgender woman (for instance) to dress the same as other women, but that her compliance with such a dress code cannot be judged more harshly than the compliance of non-transgender women.

E. Sex segregated job assignments

AB 196 does not prohibit an employer from making job assignments based on sex so long as those assignments are otherwise in compliance with state law. However, in most cases, transgender employees must be classified and assigned in a manner consistent with their gender identity.

F. Training

Training employees in transgender sensitivity is clearly one way to improve the work environment and reduce liability. While transgender people in the workplace are certainly not a new phenomenon, many non-transgender people have questions when they find out that a fellow employee is transgender. Creating a space for these employees to ask such questions in a controlled environment is an incredibly helpful way to prevent bias related incidents. More and more professionals and government agencies are acquiring the skills necessary to provide trainings of this sort and employers are strongly recommended to avail themselves of these services.

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[15] *Cruzan v. Special School Dist., #1,* 294 F.3d 981 (8th Cir. 2002).

ADVANCEMENTS IN STATE AND FEDERAL LAW REGARDING TRANSGENDER EMPLOYEES

Attachment

2004 WL 1745840
--- F.3d ----
6th Cir.(Ohio), 2004

United States Court of Appeals,
Sixth Circuit.

Jimmie L. SMITH, Plaintiff-Appellant,
v.
CITY OF SALEM, OHIO, Thomas Eastek, Walter Greenamyer, Brooke Zellers, Larry D. DeJane, James A. Armeni, Joseph Julian, and Harry Dugan, Defendants-Appellees.

No. 03-3399.

Argued: March 19, 2004.
Decided and Filed: Aug. 5, 2004.

Before COLE and GILMAN, Circuit Judges; SCHWARZER, Senior District Judge. [FN*]

AMENDED OPINION

COLE, Circuit Judge.

***1** Plaintiff-Appellant Jimmie L. Smith appeals from a judgment of the United States District Court for the Northern District of Ohio dismissing his claims against his employer, Defendant-Appellant City of Salem, Ohio, and various City officials, and granting judgment on the pleadings to Defendants, pursuant to Federal Rule of Civil Procedure 12(c). Smith, who considers himself a transsexual and has been diagnosed with Gender Identity Disorder, alleged that Defendants discriminated against him in his employment on the basis of sex. He asserted claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* and 42 U.S.C. § 1983. The district court dismissed those claims pursuant to Rule 12(c). Smith also asserted state law claims for invasion of privacy and civil conspiracy; the district court dismissed those claims as well, having declined to exercise pendent jurisdiction over them.

For the following reasons, we reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

In reviewing a motion for judgment on the pleadings pursuant to Rule 12(c), we construe the complaint in the light most favorable to the plaintiff and accept the complaint's factual inferences as true. *Ziegler v. IBP Hog Market, Inc.,* 249 F.3d 509, 511-12 (6th Cir.2001). The following facts are drawn from Smith's complaint.

Smith is--and has been, at all times relevant to this action--employed by the city of Salem, Ohio, as a lieutenant in the Salem Fire Department (the "Fire Department"). Prior to the events surrounding this action, Smith worked for the Fire Department for seven years without any negative incidents. Smith--biologically and by birth a male--is a transsexual and has been diagnosed with Gender Identity Disorder ("GID"), which the American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 576-582 (4th ed.2000). After being diagnosed with GID, Smith began "expressing a more feminine appearance on a full-time basis"-- including at work--in accordance with international medical protocols for treating GID. Soon thereafter, Smith's co-workers began questioning him about his appearance and commenting that his appearance and mannerisms were not "masculine enough." As a result, Smith notified his immediate supervisor, Defendant Thomas Eastek, about his GID diagnosis and treatment. He also informed Eastek of the likelihood that his treatment would eventually include complete physical transformation from male to female. Smith had approached Eastek in order to answer any questions Eastek might have concerning his appearance and manner and so that Eastek could address Smith's co-workers' comments and inquiries.

Smith specifically asked Eastek, and Eastek promised, not to divulge the substance of their conversation to any of his superiors, particularly to Defendant Walter Greenamyer, Chief of the Fire Department. In short order, however, Eastek told Greenamyer about Smith's behavior and his GID.

***2** Greenamyer then met with Defendant C. Brooke Zellers, the Law Director for the City of Salem, with the intention of using Smith's transsexualism and its manifestations as a basis for terminating his employment. On April 18, 2001, Greenamyer and Zellers arranged a meeting of the City's executive body to discuss Smith and devise a plan for terminating his employment. The executive body included Defendants Larry D. DeJane, Salem's mayor; James A. Armeni, Salem's auditor; and Joseph S. Julian, Salem's service director. Also present was Salem Safety Director Henry L. Willard, now deceased, who was never a named defendant in this action.

Although Ohio Revised Code § 121.22(G)--which sets forth the state procedures pursuant to which Ohio municipal officials may meet to take employment action against a municipal employee--provides that officials "may hold an executive session to consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of [considering such matters]," the City did not abide by these procedures at the April 18, 2001 meeting.

During the meeting, Greenamyer, DeJane, and Zellers agreed to arrange for the Salem Civil Service Commission to require Smith to undergo three separate psychological evaluations with physicians of the City's choosing. They hoped that Smith would either resign or refuse to comply. If he refused to comply, Defendants reasoned, they could terminate Smith's employment on the ground of insubordination. Willard, who remained silent during the meeting, telephoned Smith afterwards to inform him of the plan, calling Defendants' scheme a "witch hunt."

Two days after the meeting, on April 20, 2001, Smith's counsel telephoned DeJane to advise him of Smith's legal representation and the potential legal ramifications for the City if it followed through on the plan devised by Defendants during the April 18 meeting. On April 22, 2001, Smith received his "right to sue" letter from the U.S. Equal Employment Opportunity Commission ("EEOC"). Four days after that, on April 26, 2001, Greenamyer suspended Smith for one twenty-four hour shift, based on his alleged infraction of a City and/or Fire Department policy.

At a subsequent hearing before the Salem Civil Service Commission (the "Commission") regarding his suspension, Smith contended that the suspension was a result of selective enforcement in retaliation for his having obtained legal representation in response to Defendants' plan to terminate his employment because of his transsexualism and its manifestations. At the hearing, Smith sought to elicit testimony from witnesses regarding the meeting of April 18, 2001, but the City objected and the Commission's chairman, Defendant Harry Dugan, refused to allow any testimony regarding the meeting, despite the fact that Ohio Administrative Code § 124-9-11 permitted Smith to introduce evidence of disparate treatment and selective enforcement in his hearing before the Commission.

***3** The Commission ultimately upheld Smith's suspension. Smith appealed to the Columbiana County Court of Common Pleas, which reversed the suspension, finding that "[b]ecause the regulation [that Smith was alleged to have violated] was not effective[,] [Smith] could not be charged with violation of it."

Smith then filed suit in the federal district court. In his complaint, he asserted Title VII claims of sex discrimination and retaliation, along with claims pursuant to 42 U.S.C. § 1983 and state law claims of invasion of privacy and civil conspiracy. In a Memorandum Opinion and Order dated February 26, 2003, the district court dismissed the federal claims and granted judgment on the pleadings to Defendants pursuant to Federal Rule of Civil Procedure 12(c). The district judge also dismissed the state law claims without prejudice, having declined to exercise supplemental jurisdiction over them pursuant to 28 U.S.C. § 1367(c)(3).

II. ANALYSIS

On appeal, Smith contends that the district court erred in holding that: (1) he failed to state a claim of sex stereotyping; (2) Title VII protection is unavailable to transsexuals; (3) even if he had stated a claim of sex stereotyping, he failed to demonstrate that he suffered an adverse employment action; and (4) he failed to state a claim based on the deprivation of a constitutional or federal statutory right, pursuant to 42 U.S.C. § 1983.

We review *de novo* the dismissal of a complaint pursuant to Rule 12(c). *Grindstaff v. Green,* 133 F.3d 416, 421 (6th Cir.1998). A motion for judgment on the pleadings shall be granted only where, construing the complaint in the light most favorable to the plaintiff, and accepting all of its factual allegations as true, the plaintiff can prove no set of facts in support of the claims that would entitle him to relief. *Id.* (citation omitted).

A. ***Title VII***

The parties disagree over two issues pertaining to Smith's Title VII claims: (1) whether Smith properly alleged a claim of sex stereotyping, in violation of the Supreme Court's pronouncements in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and (2) whether Smith alleged that he suffered an adverse employment action.

Defendants do not challenge Smith's complaint with respect to any of the other elements necessary to establish discrimination and retaliation claims pursuant to Title VII. In any event, we affirmatively find that Smith has made out a *prima facie* case for both claims. To establish a *prima facie* case of employment discrimination pursuant to Title VII, Smith must show that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position in question; and (4) he was treated differently from similarly situated individuals outside of his protected class. *Perry v. McGinnis,* 209 F.3d 597, 601 (6th Cir.2000). Smith is a member of a protected class. His complaint asserts that he is a male with Gender Identity Disorder, and Title VII's prohibition of discrimination "because of ... sex" protects men as well as women. *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.,* 462 U.S. 669, 682, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983). The complaint also alleges both that Smith was qualified for the position in question--he had been a lieutenant in the Fire Department for seven years without any negative incidents--and that he would not have been treated differently, on account of his non-masculine behavior and GID, had he been a woman instead of a man.

***4** To establish a *prima facie* case of retaliation pursuant to Title VII, a plaintiff must show that: (1) he engaged in an activity protected by Title VII; (2) the defendant knew he engaged in this protected activity; (3) thereafter, the defendant took an employment action adverse to him; and (4) there was a causal connection between the protected activity and the adverse employment action. *DiCarlo v. Potter,* 358 F.3d 408, 420 (6th Cir.2004) (citation omitted). Smith's complaint satisfies the first two requirements by explaining how he sought legal counsel after learning of the Salem executive body's April 18, 2001 meeting concerning his employment; how his attorney contacted Defendant DeJane to advise Defendants of Smith's representation; and how Smith filed a complaint with the EEOC concerning Defendants' meeting and intended actions. With respect to the fourth requirement, a causal connection between the protected activity and the adverse employment action, "[a]lthough no one factor is dispositive in establishing a causal connection, evidence ... that the adverse action was taken shortly after the plaintiff's exercise of protected rights is relevant to causation." *Nguyen v. City of Cleveland,* 229 F.3d 559, 563 (6th Cir.2000); *see also Oliver v. Digital Equip. Corp.,* 846 F.2d 103, 110 (1st Cir.1988) (employee's discharge "soon after" engaging in protected activity "is indirect proof of a causal connection between the firing and the activity because it is strongly suggestive of retaliation."); *Miller v. Fairchild Indus., Inc.,* 797 F.2d 727, 731 (9th Cir.1986) ("Causation sufficient to establish a prima facie case of unlawful retaliation may be inferred from the proximity in time between the protected action and the allegedly retaliatory discharge."). Here, Smith was suspended on April 26, 2001, just days after he engaged in protected activity by receiving his "right to sue" letter from the EEOC, which occurred four days before the suspension, and by his attorney contacting Mayor DeJane, which occurred six days before the suspension. The temporal proximity between the events is significant enough to constitute direct evidence of a causal connection for the purpose of satisfying Smith's burden of demonstrating a *prima facie* case.

We turn now to examining whether Smith properly alleged a claim of sex stereotyping, in violation of the Supreme Court's pronouncements in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and whether Smith alleged that he suffered an adverse employment action.

1. ***Sex Stereotyping***

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color,

religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

In his complaint, Smith asserts Title VII claims of retaliation and employment discrimination "because of ... sex." The district court dismissed Smith's Title VII claims on the ground that he failed to state a claim for sex stereotyping pursuant to *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). The district court implied that Smith's claim was disingenuous, stating that he merely "invokes the term-of-art created by *Price Waterhouse,* that is, 'sex-stereotyping,' " as an end run around his "real" claim, which, the district court stated, was "based upon his transsexuality." The district court then held that "Title VII does not prohibit discrimination based on an individual's transsexualism."

***5** Relying on *Price Waterhouse*--which held that Title VII's prohibition of discrimination "because of ... sex" bars gender discrimination, including discrimination based on sex stereotypes--Smith contends on appeal that he was a victim of discrimination "because of ... sex" both because of his gender non-conforming conduct and, more generally, because of his identification as a transsexual.

We first address whether Smith has stated a claim for relief, pursuant to *Price Waterhouse'* s prohibition of sex stereotyping, based on his gender non-conforming behavior and appearance. In *Price Waterhouse,* the plaintiff, a female senior manager in an accounting firm, was denied partnership in the firm, in part, because she was considered "macho." 490 U.S. at 235, 109 S.Ct. 1775. She was advised that she could improve her chances for partnership if she were to take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* (internal quotation marks omitted). Six members of the Court agreed that such comments bespoke gender discrimination, holding that Title VII barred not just discrimination because Hopkins was a woman, but also sex stereotyping--that is, discrimination because she failed to *act* like a woman. *Id.* at 250-51, 109 S.Ct. 1775 (plurality opinion of four Justices); *id.* at 258-61, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272-73, 109 S.Ct. 1775 (O'Connor, J., concurring) (accepting plurality's sex stereotyping analysis and characterizing the "failure to conform to [gender] stereotypes" as a discriminatory criterion; concurring separately to clarify the separate issues of causation and allocation of the burden of proof). As Judge Posner has pointed out, the term "gender" is one "borrowed from grammar to designate the sexes as viewed as social rather than biological classes." Richard A. Posner, Sex and Reason, 24-25 (1992). The Supreme Court made clear that in the context of Title VII, discrimination because of "sex" includes gender discrimination: "In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Price Waterhouse,* 490 U.S. at 250, 109 S.Ct. 1775. The Court emphasized that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251, 109 S.Ct. 1775.

Smith contends that the same theory of sex stereotyping applies here. His complaint sets forth the conduct and mannerisms which, he alleges, did not conform with his employers' and co-workers' sex stereotypes of how a man should look and behave. Smith's complaint states that, after being diagnosed with GID, he began to express a more feminine appearance and manner on a regular basis, including at work. The complaint states that his co-workers began commenting on his appearance and mannerisms as not being masculine enough; and that his supervisors at the Fire Department and other municipal agents knew about this allegedly unmasculine conduct and appearance. The complaint then describes a high-level meeting among Smith's supervisors and other municipal officials regarding his employment. Defendants allegedly schemed to compel Smith's resignation by forcing him to undergo multiple psychological evaluations of his gender non-conforming behavior. The complaint makes clear that these meetings took place soon after Smith assumed a more feminine appearance and manner and after his conversation about this with Eastek. In addition, the complaint alleges that Smith was suspended for twenty-four hours for allegedly violating an unenacted municipal policy, and that the suspension was ordered in retaliation for his pursuing legal remedies after he had been informed about Defendants' plan to intimidate him into resigning. In short, Smith claims that the discrimination he experienced was based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.

***6** Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.

In so holding, we find that the district court erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because "Congress had a narrow view of sex in mind" and "never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex." *Ulane v. Eastern Airlines, Inc.,* 742 F.2d 1081, 1085, 1086 (7th Cir.1984); *see also Holloway v. Arthur Andersen & Co.,* 566 F.2d 659, 661-63 (9th Cir.1977) (refusing to extend protection of Title VII to transsexuals because discrimination against transsexuals is based on "gender" rather than "sex"). It is true that, in the past, federal appellate courts regarded Title VII as barring discrimination based only on "sex" (referring to an individual's anatomical and biological characteristics), but not on "gender" (referring to socially-constructed norms associated with a person's sex). *See, e.g., Ulane,* 742 F.2d at 1084 (construing "sex" in Title VII narrowly to mean only anatomical sex rather than gender); *Sommers v. Budget Mktg., Inc.,* 667 F.2d 748, 750 (8th Cir.1982) (holding that transsexuals are not protected by Title VII because the "plain meaning" must be ascribed to the term "sex" in the absence of clear congressional intent to do otherwise); *Holloway,* 566 F.2d at 661-63 (refusing to extend protection of Title VII to transsexuals because discrimination against transsexualism is based on "gender" rather than "sex;" and "sex" should be given its traditional definition based on the anatomical characteristics dividing "organisms" and "living beings" into male and female). In this earlier jurisprudence, male-to-female transsexuals (who were the plaintiffs in *Ulane, Sommers*, and *Holloway*)--as biological males whose outward behavior and emotional identity did not conform to socially-prescribed expectations of masculinity--were denied Title VII protection by courts because they were considered victims of "gender" rather than "sex" discrimination.

However, the approach in *Holloway, Sommers*, and *Ulane*--and by the district court in this case--has been eviscerated by *Price Waterhouse. See Schwenk v. Hartford,* 204 F.3d 1187, 1201 (9th Cir.2000) ("The initial judicial approach taken in cases such as *Holloway* [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse.*"). By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to "sex" encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms. *See Price Waterhouse,* 490 U.S. at 251, 109 S.Ct. 1775; *see also Schwenk,* 204 F.3d at 1202 (stating that Title VII encompasses instances in which "the perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like' one" and that "sex" under Title VII encompasses both the anatomical differences between men and women and gender); *Rene v. MGM Grand Hotel, Inc.,* 305 F.3d 1061, 1068 (9th Cir.2002) (en banc) (Pregerson, J., concurring) (noting that the Ninth Circuit had previously found that "same-sex gender stereotyping of the sort suffered by Rene--i.e. gender stereotyping of a male gay employee by his male co-workers" constituted actionable harassment under Title VII and concluding that "[t]he repeated testimony that his co-workers treated Rene, in a variety of ways, 'like a woman' constitutes ample evidence of gender stereotyping"); *Bibby v. Philadelphia Coca Cola Bottling Co.,* 260 F.3d 257, 262-63 (3d Cir.2001) (stating that a plaintiff may be able to prove a claim of sex discrimination by showing that the "harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender"); *Nichols v. Azteca Rest. Enters., Inc.,* 256 F.3d 864, 874- 75 (9th Cir.2001) (holding that harassment "based upon the perception that [the plaintiff] is effeminate" is discrimination because of sex, in violation of Title VII), *overruling DeSantis v. Pac. Tel. & Tel. Co., Inc.,* 608 F.2d 327 (9th Cir.1979); *Doe v. Belleville,* 119 F.3d 563, 580-81 (7th Cir.1997) (holding that "Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles" and explaining that "a man who is harassed because his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of his sex' "), *vacated and remanded on other grounds,* 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998).

***7** After *Price Waterhouse,* an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex. *See, e.g., Nichols,* 256 F.3d 864 (Title VII sex discrimination and hostile work environment claim upheld where plaintiff's male co-workers and supervisors repeatedly referred to him as

"she" and "her" and where co-workers mocked him for walking and carrying his serving tray "like a woman"); *Higgins v. New Balance Athletic Shoe, Inc.,* 194 F.3d 252, 261 n. 4 (1st Cir.1999) ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity." (internal citation omitted)); *see also Rosa v. Park West Bank & Trust Co.,* 214 F.3d 213 (1st Cir.2000) (applying *Price Waterhouse* and Title VII jurisprudence to an Equal Credit Opportunity Act claim and reinstating claim on behalf of biologically male plaintiff who alleged that he was denied an opportunity to apply for a loan because was dressed in "traditionally feminine attire").

Yet some courts have held that this latter form of discrimination is of a different and somehow more permissible kind. For instance, the man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination "because of ... sex," but rather, discrimination against the plaintiff's unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as "transsexual" on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification. *See, e.g., Dillon v. Frank,* No. 90-2290, 1992 WL 5436 (6th Cir. Jan.15, 1992).

Such was the case here: despite the fact that Smith alleges that Defendants' discrimination was motivated by his appearance and mannerisms, which Defendants felt were inappropriate for his perceived sex, the district court expressly declined to discuss the applicability of *Price Waterhouse.* The district court therefore gave insufficient consideration to Smith's well-pleaded claims concerning his contra-gender behavior, but rather accounted for that behavior only insofar as it confirmed for the court Smith's status as a transsexual, which the district court held precluded Smith from Title VII protection.

***8** Such analyses cannot be reconciled with *Price Waterhouse,* which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual--and therefore fails to act and/or identify with his or her gender--is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse,* who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.

Finally, we note that, in its opinion, the district court repeatedly places the term "sex stereotyping" in quotation marks and refers to it as a "term of art" used by Smith to disingenuously plead discrimination because of transsexualism. Similarly, Defendants refer to sex stereotyping as "the *Price Waterhouse* loophole." (Appellees' Brief at 6.) These characterizations are almost identical to the treatment that Price Waterhouse itself gave sex stereotyping in its briefs to the U.S. Supreme Court. As we do now, the Supreme Court noted the practice with disfavor, stating:

> In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. Although the parties do not overtly dispute this last proposition, the placement by Price Waterhouse of "sex stereotyping" in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance. We reject both possibilities.

Price Waterhouse, 490 U.S. at 250, 109 S.Ct. 1775.

2. ***Adverse Employment Action***

Despite having dismissed Smith's Title VII claim for failure to state a claim of sex stereotyping--a finding we have just rejected--the district court nevertheless addressed the merits of Smith's Title VII claims *arguendo.* Relying on *White v. Burlington Northern & Sante Fe Ry. Co.,* 310 F.3d 443 (6th Cir.2002), the district court held that Smith's suspension was not an adverse employment action because the Court of Common Pleas, rendering the "ultimate employment decision," reversed the suspension, and that accordingly, Smith's Title VII claim could not lie. Because this Circuit has since vacated and overruled

White, 364 F.3d 789 (6th Cir.2004) (en banc), and joined the majority of other circuits in rejecting the "ultimate employment decision" standard, we hold that the district court erred in its analysis and that Smith has successfully pleaded an adverse employment action in support of his employment discrimination and retaliation claims pursuant to Title VII.

***9** Common to both the employment discrimination and retaliation claims is a showing of an adverse employment action, which is defined as a "materially adverse change in the terms and conditions of [plaintiff's] employment." *Hollins v. Atlantic Co.,* 188 F.3d 652, 662 (6th Cir.1999). A "bruised ego," a "mere inconvenience or an alteration of job responsibilities" is not enough to constitute an adverse employment action. *White,* 364 F.3d at 797 (quoting *Kocsis v. Multi-Care Mgmt. Inc.,* 97 F.3d 876, 886 (6th Cir.1996)). Examples of adverse employment actions include firing, failing to promote, reassignment with significantly different responsibilities, a material loss of benefits, suspensions, and other indices unique to a particular situation. *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *White,* 364 F.3d at 798. Here, the Fire Department suspended Smith for twenty-four hours. Because Smith works in twenty-four hour shifts, that twenty-four hour suspension was the equivalent of three eight-hour days for the average worker, or, approximately 60% of a forty-hour work week. Pursuant to the liberal notice pleading requirements set forth in Fed.R.Civ.P. 8, this allegation, at this phase of the litigation, is sufficient to satisfy the adverse employment requirement of both an employment discrimination and retaliation claim pursuant to Title VII. [FN1]

It is irrelevant that Smith's suspension was ultimately reversed by the Court of Common Pleas after he challenged the suspension's legality. In *White,* this Court recently joined the majority of other circuits in rejecting the "ultimate employment decision" standard whereby a negative employment action is not considered an "adverse employment action" for Title VII purposes when the decision is subsequently reversed by the employer, putting the plaintiff in the position he would have been in absent the negative action. *White,* 364 F.3d 789 (holding that the suspension of a railroad employee without pay, followed thirty-seven days later by reinstatement with back pay, was an "adverse employment action" for Title VII purposes). Even if the "ultimate employment decision" standard were still viable, the district court erred in concluding that, because the Court of Common Pleas overturned the suspension, it was not an adverse employment action. There is no legal authority for the proposition that reversal by a *judicial* body--as opposed to the employer--declassifies a suspension as an adverse employment action.

Accordingly, Smith has stated an adverse employment action and, therefore, satisfied all of the elements necessary to allege a *prima facie* case of employment discrimination and retaliation pursuant to Title VII. We therefore reverse the district court's grant of judgment on the pleadings to Defendants with respect to those claims.

B. ***42 U.S.C. § 1983 Claims***

The district court also dismissed Smith's claims pursuant to 42 U.S.C. § 1983 on the ground that he failed to state a claim based on the deprivation of a constitutional or federal statutory right.

***10** 42 U.S.C. § 1983 provides a civil cause of action for individuals who are deprived of any rights, privileges, or immunities secured by the Constitution or federal laws by those acting under color of state law. Smith has stated a claim for relief pursuant to § 1983 in connection with his sex-based claim of employment discrimination. Individuals have a right, protected by the Equal Protection clause of the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment. *Davis v. Passman,* 442 U.S. 228, 234-35, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). To make out such a claim, a plaintiff must prove that he suffered purposeful or intentional discrimination on the basis of gender. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 264-65, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). As this Court has noted several times, "the showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim under section § 1983." *Gutzwiller v. Fenik,* 860 F.2d 1317, 1325 (6th Cir.1988) (citing *Kitchen v. Chippewa Valley Schs.,* 825 F.2d 1004, 1011 (6th Cir.1987)); *Daniels v. Bd. of Educ.,* 805 F.2d 203, 207 (6th Cir.1986); *Grano v. Dep't of Dev.,* 637 F.2d 1073, 1081-82 (6th Cir.1980); *Lautermilch v. Findlay City Schs.,* 314 F.3d 271, 275 (6th Cir.2003) ("To prove a violation of the equal protection clause under § 1983, [a plaintiff] must prove the same elements as are required to establish a disparate treatment claim under Title VII.") (quotation and citation omitted). The facts Smith has alleged to support his claims of gender discrimination pursuant to Title VII easily

constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution, pursuant to § 1983. *See Back v. Hastings on Hudson Union Free Sch. Dist.,* 365 F.3d 107, 117-21 (2d Cir. 2004) (holding that claims premised on *Price Waterhouse* sex stereotyping theory sufficiently constitute claim of sex discrimination pursuant to § 1983).

Defendants urge us to hold otherwise, on the ground that Smith's complaint fails to refer specifically to the Equal Protection Clause of the U.S. Constitution. But the Federal Rules of Civil Procedure provide for a liberal system of notice pleading. Fed.R.Civ.P. 8(a). A plaintiff need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). "Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' " *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Claims made pursuant to 42 U.S.C. § 1983 are not subject to heightened pleading standards. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 165-66, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) (rejecting heightened pleading standard for § 1983 claims); *Jones v. Duncan,* 840 F.2d 359 (6th Cir.1988) (holding that § 1983 claims need not set forth in detail all the particularities of a plaintiff's claim against a defendant). Moreover, legal theories of recovery need not be spelled out as long as the relevant issues are sufficiently implicated in the pleadings; in considering motions pursuant to Fed.R.Civ.P. 12(c), we ask not whether a complaint points to a specific statute, but whether relief is possible under any set of facts that could be established consistent with the allegation. Because Smith's sex discrimination claim so thoroughly and obviously sounds in a constitutional claim of equal protection, Defendants had fair notice of his claim and the ground upon which it rests. As such, we hold that Smith has satisfied the liberal notice pleading requirements set forth in Fed.R.Civ.P. 8 with respect to his claim of sex discrimination, grounded in an alleged equal protection violation, and we therefore reverse the district court's grant of judgment on the pleadings dismissing Smith's § 1983 claim.

***11** In his appellate brief, Smith also contends that his complaint alleges a violation of his constitutional right to due process, based on the City's failure to comply with the state statutory and administrative procedures that an Ohio municipality must follow when taking official employment action against a public employee. His complaint outlines the statutory procedures, governed by O.R.C. § 121.22(G), pursuant to which members of an Ohio municipality may meet for purposes of taking official employment action against a public employee, and it alleges that those procedures were not followed. The complaint also discusses O.A.C. § 124-9-11, which would have permitted Smith to call witnesses at his post-suspension hearing in front of the Salem Civil Service Commission; and the complaint alleges that he was barred from calling witnesses. Smith contends that these allegations implicate his right to due process pursuant to the Fourteenth Amendment of the U.S. Constitution.

However, it is well-settled that state law does not ordinarily define the parameters of due process for Fourteenth Amendment purposes, and that state law, by itself, cannot be the basis for a federal constitutional violation. *See Purisch v. Tennessee Technological Univ.,* 76 F.3d 1414, 1423 (6th Cir.1996) ("Violation of a state's formal [employment grievance] procedure ... does not in itself implicate constitutional due process concerns."). Neither Smith's complaint nor his brief specifies what deprivation of property or liberty allegedly stemmed from the City's failure to comply with state procedural and administrative rules concerning his employment. Accordingly, he has failed to state a federal due process violation pursuant to § 1983.

In sum, we hold that Smith has failed to state a § 1983 claim based on violations of his right to due process. However, he has stated a § 1983 claim of sex discrimination, grounded in an alleged equal protection violation, and, for that reason, we reverse the district court's grant of judgment on the pleadings dismissing Smith's § 1983 claim.

III. CONCLUSION

Because Smith has successfully stated claims for relief pursuant to both Title VII and 42 U.S.C. § 1983, the judgment of the district court is REVERSED and this case is REMANDED to the district court for further proceedings consistent with this opinion.

FN* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

FN1. Smith's complaint does not state whether he was suspended with or without

pay. Because we must construe the complaint in the light most favorable to the plaintiff, *Ziegler,* 249 F.3d at 512, and given the liberal pleading standards of Federal Rule of Civil Procedure 8, we do not find this failure dispositive. A "materially adverse change" in employment conditions often involves a material loss of pay or benefits, but that is not always the case, and "other indices that might be unique to a particular situation" can constitute a "materially adverse change" as well. *Hollins,* 188 F.3d at 662. Because no discovery has been conducted yet, we do not know the full contours of the suspension. For now, however, for the reasons just stated, we find that Smith has sufficiently alleged an adverse employment action.

Attachment

C

THE CALIFORNIA INSURANCE EQUALITY ACT
HOW TO USE IT AND WHAT IT MEANS FOR YOU AND YOUR FAMILY

What is the California Insurance Equality Act?

The California Insurance Equality Act (AB 2208) is a non-discrimination statute that prohibits insurance providers from issuing policies or plans that treat registered domestic partners and married spouses differently. It requires all policies and plans that provide benefits to spouses or registered domestic partners to provide them to both categories and do so in an identical manner.

Does the bill apply to all types of insurance?

Yes, in addition to health insurance plans (including managed care plans), the Act applies to auto, rental, disability, life, and all other forms of insurance regulated by the Department of Insurance.

How does the Act prohibit discrimination against registered domestic partners?

The Act makes it illegal for an insurance provider to issue any insurance policy or plan that fails to provide the same coverage, with the same terms and conditions, for registered domestic partners that is provided for spouses. For example, a car insurance company that automatically extends coverage to the spouse of a policy holder must also provide the same coverage to the registered domestic partner of a policy holder. Similarly, employers will not be able to purchase health insurance that provides coverage for their employees' spouses but does not provide identical coverage for their employees' domestic partners.

Does the law require employers to provide coverage for spouses and registered domestic partners?

The law does not require employers to provide coverage for spouses or registered domestic partners. If the employer does provide coverage for spouses, however, the employer will only be able to buy a plan that provides equal coverage for registered domestic partners.

Who authored the Act?

The Act was authored by Assemblywoman Christine Kehoe and sponsored by Equality California and Insurance Commissioner Garamendi. Governor Schwarzenegger signed the bill into law on September 13, 2004.

When does the Act go into effect?

The new law goes into effect on January 2, 2005 for group health insurance plans and on January 1, 2005 for other types of insurance.

How is the law enforced? What do I do if my insurance company refuses to provide equal coverage for my registered domestic partner?

For any problems concerning managed health care plans and health maintenance organizations, consumers should contact the Department of Managed Health Care at 888-466-2219. Their website is **www.dmhc.ca.gov**. For problems concerning other types of insurance, consumers should contact the Consumer Services Division of the California Department of Insurance, at 800-927-HELP (4357). Their website is **www.insurance.ca.gov/docs/FS-Consumer.htm**.

For more information about registering as domestic partners with the State of California, visit the Secretary of State's website at www.ss.ca.gov/dpregistry.

For more information, contact:

National Center for Lesbian Rights	Equality California
www.nclrights.org	www.eqca.org

Attachment

D

SCHOOL SAFETY & VIOLENCE PREVENTION FOR LESBIAN, GAY, BISEXUAL & TRANSGENDER STUDENTS:

A Question & Answer Guide for California School Officials & Administrators

1. What are school districts' legal responsibilities under state and federal anti-discrimination laws?

Under state law, public schools and non-religious private schools that receive state funding, have a legal duty to protect students from discrimination and harassment on the basis of actual and perceived sexual orientation or gender identity, or on the basis of association with a person with one or more of these actual or perceived characteristics. Student Safety and Violence Prevention Act of 2000 (AB 537); California Education Code §§ 200-220. The Department of Education regulations implementing this law state that:

> [N]o person...shall be subjected to discrimination, or any form of illegal bias, including harassment. No person shall be excluded from participation in or denied the benefits of any [school] program or activity on the basis of sex, sexual orientation, gender, ethnic group identification, race, ancestry, national origin, religion, color, or mental or physical disability. Title 5, California Code of Regulations, § 4900(a).

The law defines “gender” very broadly:

> “Gender” means sex, and includes a person’s gender identity and gender related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth. Cal. Penal Code § 422.56(c); see also Cal. Educ. Code §§ 200, 220 (cross referencing Cal. Penal Code § 422.56).

All students also have constitutional rights to equal protection under the law, and are protected under Title IX of the federal Education Amendment Acts of 1972 from sex discrimination in educational programs that receive federal funds. Schools must protect lesbian, gay, bisexual, and transgender (LGBT) students and those perceived to be LGBT from harassment, just as they must protect students from harassment on the basis of race, religion, sex, and other characteristics. Schools cannot ignore harassment on the basis

that LGBT students should expect to be harassed, or have brought the harassment upon themselves by being open about their sexual orientation or gender identity.

Also, students have constitutional rights to freedom of expression, including the right to be open about their sexual orientation and gender identity.

2. What are some examples of discrimination and harassment based on sexual orientation or gender identity?

Examples of unlawful discrimination include: refusing to allow a same-sex couple to attend the school prom; treating displays of affection by same-sex couples differently than displays of affection by different-sex couples; and refusing to allow a student to wear clothing that is consistent with the student's gender identity.

Examples of harassment include name-calling, threats or violence based on a student's actual or perceived sexual orientation or gender identity.

3. Why are these laws necessary?

These laws are necessary because research has shown that hostile learning climates undermine students' ability to focus on their education.

Studies consistently demonstrate that LGBT students uniformly encounter a pervasive atmosphere of hostility at school. The 2004 Safe Place to Learn Report, which examines school-based harassment based on actual or perceived sexual orientation and gender in California schools, found:

- 91% of students reported hearing students make negative comments based on sexual orientation.
- 46% of students said their schools were not safe for LGBT students.
- 24% of students who had been harassed based on actual or perceived sexual orientation had low grades (Cs or below), compared to 17% of their peers.
- 27% of students who had been harassed based on actual or perceived sexual orientation had missed school in the past month because they felt unsafe in school, compared to 7% of their peers.

Even more troubling than skipping school, LGBT students are dropping out of school at alarming rates. For those who do remain, data from the National Longitudinal Study of Adolescent Health suggests they fall below their peers in standard measures of academic performance. See http://www.casafeschools.org/getfacts.html#research for more information about the Safe Place to Learn Report.

4. How do we make sure we comply with these laws?

The law requires schools to ensure that no student is discriminated against or harassed on the basis of actual or perceived sexual orientation or gender identity.

The California Department of Education created an AB 537 Advisory Task Force to recommend steps schools should take to ensure compliance. These recommendations include: adopting and enforcing clear written policies; informing and training all school personnel on the law's requirements; providing

guidance for students about their rights and responsibilities, and supporting student participation in preventing harassment, violence and discrimination; and developing anti-bias education programs for students. For more information about the Task Force's report and recommendations, refer to the "Task Force Reports" page of the Department of Education web site, http://www.cde.ca.gov/ls/ss/se/documents/ab537report.pdf.

While the law does not mandate specific steps that the school must take in order to be in compliance, failure to take appropriate, pro-active steps can place a school at risk of liability. For detailed information about lawsuits brought against districts for failing to prevent and properly respond to harassment and discrimination on the basis of sexual orientation, many of which resulted in monetary settlements and consent decrees that requires teacher training, student training, improved policies, and other reforms, see www.gsanetwork.org/press and http://www.nclrights.org/publications/pubs/15reasons.pdf.

5. What steps does a school district need to take to ensure it has an effective anti-harassment policy?

Schools should adopt and implement an anti-harassment policy that includes a clear enumeration of the prohibited forms of conduct, including harassment on the basis of actual or perceived sexual orientation and gender identity. The form for filing a complaint under the policy should be easy to understand and readily available for students. The policy should include explicit procedures for responding to complaints made under this policy. The school should also provide training for all teachers and staff on how best to prevent and respond to harassment.

All of these elements help ensure that the policy is consistently enforced and that all staff and students know what is prohibited, how to report incidents of harassment, and what actions staff should take upon the filing of a complaint.

State law also requires that school districts follow the Uniform Complaint Procedures, for receiving and investigating complaints of harassment and discrimination. Title 5, California Code of Regulations §§ 4600-4671. Specifically, students, parents, and staff must be notified annually regarding the district's complaint procedures, including the opportunity to appeal, and the person(s) designated to receive complaints. School districts are responsible for preventing retaliation and for keeping complaints confidential.

6. Is it necessary to include enumerated categories in the anti-harassment policy?

Yes. A specific, detailed list of the prohibited forms of conduct is essential to guarantee that all staff and students have a consistent understanding of what is prohibited by the policy. This is particularly important with respect to harassment on the bases of sexual orientation and gender identity because students and staff are less familiar with these forms of harassment.

7. How can we prevent discrimination and harassment without taking resources away from other responsibilities, such as improving test scores?

A safe, fair, and respectful school environment helps all students learn. Preventing harassment and discrimination is not a new, separate responsibility. It is part of activities that schools already engage in,

such as developing and implementing School Safety Plans; ensuring compliance with Educational Equity requirements, and providing an effective complaint process; informing students and parents about rules of conduct, and enforcing these rules; providing staff development programs for teachers to learn skills needed to maintain a safe and fair classroom; and preparing students for adult life in a diverse society. Moreover, making schools safe for all students is consistent with the goal of improving test scores, as students cannot focus on tests when they are worried about their safety.

8. Some of our students want to form a Gay-Straight Alliance (GSA) club. How should we handle this?

If a public secondary school allows any voluntary, non-curricular, student-initiated and student-led group to meet, it must allow all such groups to meet. Equal Access Act, 20 U.S.C. §§ 4071-4074. Moreover, all such groups must be treated equally, meaning that they must all get equal meeting facilities and privileges. This is true regardless of the religious, political, philosophical, or other content of the speech at such meetings; schools cannot pick and choose which student groups can meet. In California, secondary schools include high schools, middle schools, and junior high schools. California Education Code § 52001(i), (j).

Refusal to allow a GSA to meet may also constitute discrimination on the basis of sexual orientation, in violation of the anti-discrimination laws as well as free speech protections. In addition to these legal requirements, having a GSA on-campus is an important way to combat anti-LGBT harassment and may help a school fulfill its legal obligation to ensure a safe environment for all students.

9. How do we comply with anti-discrimination laws and still respect the religious and cultural diversity of our students and their families?

Schools may have to address claims that efforts to prevent discrimination and harassment on the basis of sexual orientation or gender identity violate students' and parents' religious views about homosexuality and gender roles. Teaching students that violence, name-calling and other harassment are wrong, and ensuring that all students are treated equally, does not violate any student's religious beliefs or disrespect any student's cultural background.

Students are free to hold any beliefs they choose regarding homosexuality and gender, so long as they do not harass or threaten other students.

10. Can parents "opt out" of their children's participation in school programs that discuss sexual orientation and gender identity?

State law explicitly provides that "instruction or materials that discuss gender, sexual orientation, or family law and do not discuss human reproductive organs or their functions" is *not* subject to the parental notice and opt out laws. Thus, where issues of sexual orientation or gender identity are raised in school programs other than HIV/AIDS or sexual health education, such as programs designed to encourage respect and tolerance for diversity, parents are not entitled to have notice of or the opportunity to opt their children out of such programs. California law does not support a broad parental veto regarding the contents of public school instruction.

With regard to surveys and tests, state law requires written parental consent for student participation in any surveys or tests that contain questions about students' or their families' beliefs or practices concerning sex, family life, morality, or religion. However, only notice and the opportunity to opt out is required for voluntary, anonymous, and confidential surveys concerning students' health behaviors and risks, including attitudes and practices relating to sex.

11. What if our anti-bias education programs, or the formation of a GSA club, cause controversy in the community?

Because anti-bias education programs (including curricula, presentations by outside groups, and activities) are fairly new, there may be misunderstandings about the purpose and content of such programs. Although these misunderstandings can lead to controversy, school districts are still required by law to protect students from harassment and discrimination.

Involving and informing parents and community organizations, such as the PTA, at the outset may help stem any controversy before it arises. School officials should be prepared to discuss with parents the school's obligations under the law, the need for such laws and programs, and the content of the programs. In addition, it is important to communicate to parents that these programs provide accurate, age-appropriate, objective, and up-to-date information that is relevant to subject matter in schools and in accordance with state standards and local school district policies and that the purpose of anti-bias programs is not to "promote sexuality" or "advocate the homosexual lifestyle" but to promote tolerance and the safety and well-being of all students.

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For More Information

If you have questions about the content of this publication, or would like more information, resources, assistance or training, please contact one of our member organizations:

ACLU of Southern California
1616 Beverly Boulevard
Los Angeles, CA 90026
(213) 977-9500, ext.269
www.aclu-sc.org

ACLU of Northern California
1663 Mission Street, Suite 460
San Francisco, CA 94103
(415) 621-2493
www.aclunc.org

Gay-Straight Alliance Network
www.gsanetwork.org
Northern California:
160 14th Street
San Francisco, CA 94103
(415) 552-4229

Central California:
985 North Van Ness
Fresno, CA 93728
(559) 442-4777

Southern California
4477 Hollywood Boulevard, Suite 202
Los Angeles, CA 90027
(323) 662-3160

Gay, Lesbian and Straight Education Network (GLSEN)
Western Field Office
870 Market Street, Suite 547
San Francisco, CA 94102
(415) 551-9788
www.glsen.org

Lambda Legal
Western Regional Office
6030 Wilshire Boulevard
Los Angeles, CA 90036-3617
(323) 937-2728
www.lambdalegal.org

L.A. Gay & Lesbian Center
Safe Haven Project
1625 North Schrader Boulevard
Los Angeles, CA 90028
(323) 993-7671
www.laglc.org

Los Angeles Unified School District
Project 10
1320 West Third Street
Los Angeles, CA 90017
(213) 625-6411
www.project10.org

National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
(415) 392.6257
www.nclrights.org

Parents, Family and Friends of Lesbians and Gays (PFLAG)
1726 M Street NW, Suite 400
Washington, DC 20036
(202) 467-8180
www.pflag.org

San Francisco Unified School District
Support Services for Sexual Minority Youth
1515 Quintara Street
San Francisco, CA 94116
(415) 242-2615
http://storm.sfusd.edu/

Attachment

E

870 Market Street, Suite 570
San Francisco, CA 94102
(415) 392-6257
www.nclrights.org

HARASSMENT & DISCRIMINATION: A LEGAL OVERVIEW

FEDERAL LAW

Equal Protection Clause of the 14th Amendment (applies to public schools)

All students have a federal constitutional right to **equal protection** under the law. This means that schools have a duty to protect lesbian, gay, bisexual, and transgender (LGBT) students from harassment on an equal basis with all other students. If school officials failed to take action against anti-LGBT harassment because they believed that the LGBT student should have expected to be harassed, or because they believed that the LGBT student brought the harassment upon him or herself simply by being openly LGBT, or because the school was uneducated about LGBT issues and was uncomfortable addressing the situation, then the school has failed to provide equal protection to the student.[1]

Title IX (applies to all schools that receive federal financial assistance)

Title IX[2] of the Education Amendment Acts of 1972 prohibits discrimination based on sex in education programs and activities receiving federal financial assistance. Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at an LGBT student is prohibited by Title IX if it is sufficiently severe and pervasive.[3]

Title IX also prohibits gender-based harassment, including harassment on the basis of a student]s failure to conform to stereotyped notions of masculinity and femininity.[4]

Standard of Liability

Under Title IX, a school district can be held liable if it knew about sex-based harassment of a student by another student or a teacher and failed to take reasonable steps to stop it.[5] In other words, in order for a school district to be held liable under Title IX, an individual or body with the authority to take corrective action must have known about the harassment and failed to take reasonable corrective actions.[6]

Enforcement

Title IX permits a student to sue for money damages in state or federal court.[7] Alternatively, anyone may file a complaint with the Office of Civil Rights (OCR) of the Department of Education. OCR has the power to initiate investigations upon receiving a complaint, and can cut off the school]s federal funding if it finds Title IX has been violated. OCR has negotiated settlements on behalf of LGBT students who were harassed because of their sexual orientation and/or gender identity.

Affirmative Requirements

Title IX requires all schools receiving federal financial assistance to adopt a policy prohibiting discrimination on the basis of sex and to notify employees, students, and elementary and secondary school parents of the policy.[8] Title IX also requires the school to adopt and publish grievance procedures for resolving sex discrimination complaints,[9] and requires schools to have at least one employee designated to be responsible for coordinating efforts to comply with Title IX.[10]

1st Amendment, Equal Protection & Due Process Clauses (apply to public schools)

A transgender student]s right to dress in accordance with his or her gender identity may also protected under the First Amendment and the Equal Protection and Due Process Clauses of the U.S. Constitution. The **First Amendment** limits the right of school officials to censor a student]s speech or expression. Students also have a protected liberty interest (under the **Due Process Clause**) in their personal appearance. In addition, a transgender student also has a right under the **Equal Protection Clause** to be treated similarly to other students of the same gender identity. If the school treats the student differently than it would treat other students of the same gender identity (i.e. if it imposes a dress code on a male-to-female transsexual that is different than the dress code that is applied to biological females), then the school is applying rules in a sex discriminatory way (i.e. it is applying the code differently based on the student]s biological sex).[11]

STATE LAW

In addition to these federal protections, currently eight states plus the District of Columbia have statutes prohibiting discrimination or harassment on the basis of sexual orientation in educational facilities.[12] The eight states are: California, Connecticut, Massachusetts, Minnesota, New Jersey, Vermont, Washington, and Wisconsin. California, Minnesota, and New Jersey also explicitly prohibit discrimination or harassment on the basis of gender identity.

FOR MORE INFORMATION, CONTACT:

Jody Marksamer, Equal Justice Works Fellow
415.392.6257 x308
marksamer@nclrights.org

Courtney Joslin, Staff Attorney
415.392.6257 x305
joslin@nclrights.org

National Center for Lesbian Rights
870 Market St., Ste. 370
San Francisco, CA 94102

FOOTNOTES

1. See Flores v. Morgan High School District, 324 F.3d 1130 (9th Cir. 2003) (holding that students could maintain claims alleging discrimination on the basis of sexual orientation under the Equal Protection Clause where school district failed to protect the students to the same extent that other students were protected from harassment and discrimination); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (holding student could maintain claims alleging discrimination on the basis of gender and sexual orientation under the Equal Protection Clause where school district failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student]s gender and sexual orientation). In Nabozny, after the student and his parents reported the incidents of physical violence to the appropriate school administrator, the administrator told the student and his parents that such acts should be expected because the student was openly gay. Id. at 451. See also Montgomery v. Independent Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000) ("We are unable to garner any rational basis for permitting one student to assault another based on the victim]s sexual orientation, and the defendants do not offer us one.") (citing Nabozny, 92 F.3d at 458).
The school district eventually settled the *Flores* case for over $1.1 million, in addition to mandatory training for all school staff and all 7th and 9th grade students. For more information about this case, see Our Youth Docket. The school district in *Nabozny* eventually settled the case for almost $1 million in damages. For an overview of 15 lawsuits against school districts, see *Fifteen Expensive Reasons Why Safe Schools Legislation Is In Your State's Best Interest*, available at pubs/15reasons.pdf.

2. 20 U.S.C. § 1681(a). Title IX provides, in relevant part: "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."

3. See Office of Civil Rights, Revised Sexual Harassment Guidance, § III (Jan. 2001) ("OCR Revised Guidance") ("Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student]s ability to participate in or benefit from the school]s program constitutes sexual harassment prohibited by Title IX under circumstances described in this guidance. For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim]s ability to participate in or benefit from the school]s program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual."). See also Montgomery, 109 F. Supp. 2d 1081.

4. See OCR Revised Guidance, § III ("Though beyond the scope of this guidance, gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to the level that denies or limits a student]s ability to participate in or benefit from the educational program. . . . A school must respond to such harassment in accordance with the standards and procedures described in this guidance. In assessing all related circumstances to determine whether a hostile environment exists, incidents of gender-based harassment combined with incidents of sexual harassment could create a hostile environment, even if neither the gender-based harassment alone nor the sexual harassment alone would be sufficient to do so.") (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (holding sex-stereotyping is a form of sex discrimination prohibited by Title VII) (emphasis added). See also Montgomery, 109 F. Supp. 2d 1081; Miles v. New York Univ., 979 F. Supp. 248 (S.D.N.Y. 1997).

5. Davis v. Monroe County Sch. Dist., 119 S. Ct. 1661, 1673 (1999).
It is important to note, however, that in order for a school to be held liable, a person with authority to address the situation had to have known about the harassment. Thus, it may not be sufficient for a student to tell a teacher about the harassment. Students and their parents should be advised to report any harassment to the principal, vice-principal, and or district officials, preferably in writing.

6. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998).

7. See Franklin v. Gwinnett Co. Public Schs., 503 U.S. 60 (1992).

8. 34 C.F.R. 106.9.

9. 34 C.F.R. 106.8(b).

10. 34 C.F.R. 106.8(a).

11. *See, e.g., Doe v. Yunits*, 2000 WL 33162199 (Mass. Super. 2000) (holding that transgender student had first amendment right to wear clothing consistent with her gender identity and that treating transgender girl differently than biological girls was discrimination on the basis of sex).

12. *See* CONN. GEN. STAT. § 10-15c; D.C. CODE 1981 § 1-2520; MASS. GEN. LAWS Chp. 76, § 5; MINN. STAT. § 363.03, subd. 5; N.J. STAT. 10:5-12f(1); N.J. STAT. 10:5-5(l); N.J. A.B. 1874 (effective Sept. 6, 2002, supplementing chapter 37 of Title 18A of the New Jersey Statutes); 16 VT. STAT. § 11(a)(26); 16 VT. STAT. § 565; WASH. REV. CODE §§ 28A.320; 28A.600; WIS. STAT. 118.13.

Attachment

F

BOARD OF EDUCATION ADMINISTRATIVE REGULATION

R5163

ARTICLE 5: STUDENTS
SECTION: Non-Discrimination for Students and Employees

This regulation is meant to advise school site staff and administration regarding transgender and gender non-conforming student concerns in order to create a safe learning environment for all students, and to ensure that every student has equal access to all components of their educational program.

California Law Prohibits Gender-Based Discrimination in Public Schools

The California Education Code states that "all pupils have the right to participate fully in the educational process, free from discrimination and harassment." Cal. Ed. Code Section 201(a). Section 220 of the Education Code provides that no person shall be subject to discrimination on the basis of gender in any program or activity conducted by an educational institution that receives or benefits from state financial assistance. The Code further provides that public schools have an affirmative obligation to combat sexism and other forms of bias, and a responsibility to provide equal educational opportunity to all pupils. Cal. Ed. Code Section 201(b).

The California Code of Regulations similarly provides that "No person shall be excluded from participation in or denied the benefits of any local agency's program or activity on the basis of sex, sexual orientation, gender, ethnic group identification, race, ancestry, national origin, religion, color, or mental or physical disability in any program or activity conducted by an 'educational institution' or any other 'local agency'. . .that receives or benefits from any state financial assistance." 5 CCR Section 4900(a).

The California Code of Regulations defines "gender" as: "a person's actual sex or perceived sex and includes a person's perceived identity, appearance or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with a person's sex at birth." 5 CCR Section 4910(k).

SFUSD Board Policy Prohibits Gender-Based Harassment

SFUSD Board Policy 5163 requires that "All educational programs, activities and employment practices shall be conducted without discrimination based on . . .sex, sexual orientation, [or] gender identity . . ." Board Policy 5162 requires that "students should treat all persons equally and respectfully and refrain from the willful or negligent use of slurs against any person" based on sex or sexual orientation.

Therefore, transgender and gender non-conforming students must be protected from discrimination and harassment in the public school system. Staff must respond appropriately to ensure that schools are free from any such discrimination or harassment.

Names/Pronouns

Students shall have the right to be addressed by a name and pronoun corresponding to their gender identity that is exclusively and consistently asserted at school. Students are not required to obtain a court ordered name and/or gender change or to change their official records as a prerequisite to being addressed by the name and pronoun that corresponds to their gender identity. This directive does not prohibit inadvertent slips or honest mistakes, but it does apply to an intentional and persistent refusal to respect a student's gender identity. The requested name shall be included in the SIS system in addition to the student's legal name, in order to inform teachers of the name and pronoun to use when addressing the student.

Official Records

The District is required to maintain a mandatory permanent pupil record which includes the legal name of the pupil, as well as the pupil's gender. 5 Cal. Code Reg. 432(b)(1)(A), (D). The District shall change a student's official records to reflect a change in legal name or gender upon receipt of documentation that such legal name and/or gender have been changed pursuant to California legal requirements.

Restroom Accessibility

Students shall have access to the restroom that corresponds to their gender identity exclusively and consistently asserted at school. Where available, a single stall bathroom may be used by any student who desires increased privacy, regardless of the underlying reason. The use of such a single stall bathroom shall be a matter of choice for a student, and no student shall be compelled to use such bathroom.

Locker Room Accessibility

Transgender students shall not be forced to use the locker room corresponding to their gender assigned at birth. In locker rooms that involve undressing in front of others, transgender students who want to use the locker room corresponding to their gender identity exclusively and consistently asserted at school will be provided with the available accommodation that best meets the needs and privacy concerns of all students involved. Based on availability and appropriateness to address privacy concerns, such accommodations could include, but are not limited to:

- Use of a private area in the public area (i.e., a bathroom stall with a door, an area separated by a curtain, a PE instructor's office in the locker room);
- A separate changing schedule (either utilizing the locker room before or after the other students); or
- Use of a nearby private area (i.e., a nearby restroom, a nurse's office).

Sports and Gym Class

Transgender students shall not be denied the opportunity to participate in physical education, nor shall they be forced to have physical education outside of the assigned class time. Generally, students should be permitted to participate in gender-segregated recreational gym class activities and sports in accordance with the student's gender identity that is exclusively and consistently asserted at school. Participation in competitive athletic activities and contact sports will be resolved on a case by case basis.

Dress Codes

School sites can enforce dress codes that are adopted pursuant to Education Code 35291. Students shall have the right to dress in accordance with their gender identity that is exclusively and consistently asserted at school, within the constraints of the dress codes adopted at their school site. This regulation does not limit a student's right to dress in accordance with the Dress/Appearance standards articulated in the Student and Parent/Guardian Handbook, page 23.

Gender Segregation in Other Areas

As a general rule, in any other circumstances where students are separated by gender in school activities (i.e., class discussions, field trips), students shall be permitted to participate in accordance with their gender identity exclusively and consistently asserted at school. Activities that may involve the need for accommodations to address student privacy concerns will be addressed on a case by case basis. In such circumstances, staff shall make a reasonable effort to provide an available accommodation that can address any such concerns.

Attachment

G

GAY-STRAIGHT ALLIANCES: COMMON LEGAL QUESTIONS AND ANSWERS

Does a public school have to allow a Gay-Straight Alliance (GSA) to form at a high school or middle school?

Generally, yes. Under the Equal Access Act (EAA),[1] a federal law passed in 1984 that applies to all public secondary schools that receive federal funding, a secondary school that allows at least one student-initiated non-curriculum-related club to meet on school groups during lunch or after school *must allow* all other non-curricular student groups, including GSAs, access to the school and cannot otherwise discriminate against the group, even if the club represents an unpopular viewpoint.[2]

As a federal judge concluded in an Equal Access Act case:

> The Board Members may be uncomfortable about students discussing sexual orientation and how all students need to accept each other, whether gay or straight. . . . [But] [school officials] cannot censor the students' speech to avoid discussions on campus that cause them discomfort or represent an unpopular viewpoint. In order to comply with the Equal Access Act, Anthony Colin, Heather Zeitin, and the members of the Gay-Straight Alliance must be permitted access to the school campus in the same way that the District provides access to all clubs, including the Christian Club and the Red Cross/Key Club.[3]

Can the school refuse to allow the GSA to meet if other students or community members oppose the group and create a disruption?

No. A federal judge in Kentucky recently addressed this issue.[4] In that case, more than one-half of the students from the high school boycotted class to protest the decision of the Boyd County School Board to allow the GSA to meet. Subsequently, the school board reversed itself and decided that the GSA could not meet. In court, the school argued that it did not have to allow the GSA to meet on the ground that the GSA created a significant disruption to the school's functioning.

This argument was rejected by the court, which held that the negative reaction of others cannot be a basis upon which to refuse to allow the club to meet. Specifically, the court stated: "[A] school may not deny equal access to a student group because student and community opposition to the group substantially interferes with the school's ability to maintain order and discipline."[5] If the

school allows at least one other non-curricular student club to meet, it can only deny access to another non-curricular student club if the club members' "*own* disruptive activities have interfered with [the school officials'] ability to maintain order and discipline."[6]

Does the school have to give a GSA the same privileges as other clubs?

Yes. Under the EAA, if a public school allows at least one non-curriculum related student group to use its facilities for a meeting place during non-instructional time, it cannot "deny equal access or a fair opportunity to, or discriminate against" any students who wish to conduct club meetings, such as a GSA.

This means that the school must give the GSA the *same privileges* and treat it the same as other clubs, including equal access to such things as meetings spaces, bulletin boards, use of the PA system, etc.[7]

Failure to grant a GSA the same privileges may also violate the Equal Protection Clause of the federal or state constitutions, the First Amendment, and/or state statutes prohibiting discrimination on the basis of sexual orientation.

Can the school create different tiers or categories of non-curricular student clubs?

No. As discussed above, the school must treat all non-curricular student clubs equally. So, the school cannot create different categories of non-curricular student clubs and grant the categories different privileges or impose different rules on them.

So, for example, it is a violation of the Equal Access Act for a school to create a category of "school-sanctioned" non-curricular clubs that are allowed to use the bulletin board and PA system, while, at the same time having a category of "non-school sanctioned" non-curricular student clubs (i.e. the ones that are "more controversial") that are denied the right to use the bulletin board and PA system.

Can the school require the club to change its name to something less "divisive" like the "Tolerance Club" or to broaden its mission statement?

No. The group has first amendment speech and associational rights in its name and its mission.[8] As one federal court explained:

> A group's speech and association rights are implicated in the name that it chooses for itself. The board is not allowed to require the student group to change its name merely because the Board finds that it would be less "divisive." . . . [The students] testified that these name changes would attack the very core reason for having the club. . . . [One student] said that the use of the word

"Gay" in the title is important to announce that "being gay or homosexual is not bad, it's who you are." . . . [Another student] said that taking the word gay out would take the focus away from the issues people face and would imply that there's something wrong with the word "gay." . . . For all of the reasons that [the students] mentioned when talking about being forced to change the club's name, the Board's suggested name change clearly infringes on profound expressive meaning that the group attaches to its name.[9]

Moreover, as discussed above, once the Act has been triggered, a school cannot "deny equal access or a fair opportunity to, or discriminate against" a student club based on the content of the students' proposed discussions. Requiring the club to change its name or mission statement based on the content of the name or the mission violates the Act's prohibition against discrimination.

Is a club "curriculum-related" simply because the school says it is?

No. Whether a club is curriculum-related or not for purposes of the Act is a fact-based inquiry based on the connection between the subject matter of the group and the school's courses.[10]

The Supreme Court has defined a curriculum related group as one "that has more than just a tangential or attenuated relationship to the courses offered by the school."[11] "[A] student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit."[12]

Examples of groups likely to be found curriculum related include: the French club, student government, and the school band. A non-curriculum related club, on the other hand, is one "that does not directly relate to the body of courses offered by the school."[13] Examples of noncurriculum- related clubs include the juggling club, the ski club, the scuba club, and the Christian club.

For More Information, Contact:
Courtney Joslin, Staff Attorney
National Center for Lesbian Rights
870 Market St., Ste. 370
San Francisco, CA 94102
(415) 392-6257
www.nclrights.org

Footnotes

1 20 U.S.C. § 4071(a), (b).

2 *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 271 (1990).

3 *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1148 (C.D. Cal. 2000).

4 *Boyd County High School Gay Straight Alliance v. Board of Educ. of Boyd County*, 258 F. Supp. 2d 667 (E.D. Ky. 2003)

5 *Boyd County GSA*, 258 F. Supp. 2d at 690.

6 *Id.*

7 *Mergens*, 496 U.S. at 271 (1990) (Equal Access Act requires school to grant all non-curricular student clubs equal access to school newspaper, bulletin boards, public address system, and annual club fair); Prince v. Jacoby, 303 F.3d 1074, 1086 (9th Cir. 2002) (Equal Access Act requires school to grant all noncurricular

student clubs equal access to loudspeaker and use of bulletin boards).

8 *See, e.g., Latino Officers Ass'n v. City of New York*, 196 F.3d 458, 461, 465-66 (2d Cir. 1999) (describing as expressive conduct the marching of uniformed Latino policy officers in parade carrying banner bearing name of organization); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 570, 574 (1995) (noting that a group merely marching behind a "banner with the simple inscription 'Irish American Gay Lesbian and Bisexual Group of Boston'" expresses the point "that some Irish are gay, lesbian or bisexual" and suggests "their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals"); *Gay Activists Alliance v. Lomenzo*, 31 N.Y.2d 965, 966 (1973) (reversing secretary of state's refusal to accept filing of certificate of nonprofit

corporation because it used the word "gay" which the secretary of state deemed "inappropriate").

9 *Colin*, 83 F. Supp.2d 1335, 1147-48.

10 *Boyd County GSA*, at p. 27 ("Just as the Supreme Court had done in *Mergens*, the Third Circuit in *Pope* held that the EAA is triggered by what a school does, not what it says. While a school certainly has the right to maintain a closed forum to avoid the dictates of the EAA, it does so at its own peril, running the risk that one or more of its groups will be determined to be a noncurriculum-related group.'").

11 *Mergens*, 496 U.S. at 238.

12 *Id.*

13 *Id.* at 239.

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Attachment

H

Question & Answer Guide On California's Parental Opt-Out Statutes:

Parents' and Schools' Legal Rights And Responsibilities Regarding Public School Curricula

1. Why was this question and answer guide developed?

Public school administrators, board members, and teachers in California may face the difficult task of balancing their responsibilities to make decisions about the content of curricular and other school activities, against parents' desire to control the content of their children's instruction, and/or "opt out" of controversial aspects of the curriculum.

California's education laws are complex, and both parents and school administrators are sometimes misled by false claims about "parental rights." Specifically, some advocacy groups have inaccurately claimed that California public schools may not implement diversity or tolerance curricula without parental permission.

This question and answer guide was developed by the California Safe Schools Coalition to provide accurate, reliable information on the rights, duties, and options of public schools, teachers, parents and students under California law.

2. Who determines the curriculum in public schools, under California law?

The California Constitution guarantees each student the right to a free public education. The state sets a basic outline for public school education through the Education Code and through administrative frameworks issued by the state Board of Education on various curricular areas such as health and science. However, schools are governed primarily at the local school district level. Parents have a constitutional right to choose a private education for their children. If they elect to send their children to public schools, parents have very limited rights to prevent their children from receiving the entire range of instruction available in public schools.

3. Under California law, what rights do parents have regarding public school curricula?

Under California Education Code § 51101, parents and guardians have the right to:
Examine the curriculum materials of the class.

- Work with the schools to adopt policies that outline how parents, staff and students may
- share in the responsibility for development and well-being of the students.
- Observe classrooms and meet with teachers.
- Have a school environment for their child that is safe and supportive of learning.
- Be informed about the above rights to participate in the education of their children.

4. Are there any curriculum topics that public school parents have the right to receive prior notice about and/or opt their children out of?

There are some topics that parents have a right to notice about and the right to opt their children out of. Outside of these specific topics, however, parents do not have any general right to notice about or to veto or exempt their children from topics included in public school curricula.

Parents must receive written notice about and may opt their children out of the following topics of instruction in public schools:

- Comprehensive sexual health education. This includes instruction regarding human development and sexuality, including education on pregnancy, family planning, and sexually transmitted diseases. California Education Code §§ 51931(b), 51933. If a school chooses to provide such education, parents have the right to notice at the beginning of the school year, an opportunity to review the instructional materials, and an opportunity to request in writing that their children be exempted from such education. California Education Code §§ 51937, 51938.[1]
- HIV/AIDS prevention education. This includes instruction on the nature of HIV/AIDS, methods of transmission, strategies to reduce the risk of HIV infection, and social and public health issues related to HIV/AIDS. California Education Code §§ 51931(d), 51934. Schools must provide such education at least twice during grades 7-12, and may provide it in other grades. Parents have the right to notice at the beginning of the school year about such education, an opportunity to review the instructional materials, and an opportunity to request in writing that their children be exempted from such education. California Education Code §§ 51937, 51938.
- Surveys, tests, research, and evaluation. Parents must *opt in* by giving written permission for students to participate in any survey or test containing questions about students' or their families' beliefs or practices concerning sex, family life, morality, or religion. California Education Code § 51513. However, only notice and the opportunity to *opt out* is required for voluntary, anonymous, and confidential surveys concerning students' health behaviors and risks, including attitudes or practices relating to sex. California Education Code § 51938(b).

Other than the specific topics and areas of instruction listed above, parents do not have a right to prior written notice and opportunity to opt out of any part of public school curricula under California law.

5. Do parents have a constitutional right to prevent their children from receiving education in public schools on subjects they disapprove?

Almost never. Parents have filed a number of court cases seeking to prevent public schools from teaching their children controversial literature or subjects such as evolution, tolerance, or human sexuality, and have lost virtually every case. Courts have held that so long as the public school curricula are secular and reasonably related to educational goals, parents do not have veto power over the content of public school instruction. Parents do have a general right to control their children's upbringing, but if parents choose to place their children in public schools, parental rights are generally outweighed by the state's interests in educating students and avoiding disruption in the school curriculum.

When parents raise a specific objection to a part of the curriculum as violating their freedom of religion, the school should evaluate the nature of the claimed burden on religion to see whether

an accommodation is feasible. Schools may wish to excuse students from nonessential activities (such excusing a Jehovah's Witness student from a Valentine's Day party) but are not legally required to excuse students from curricular activities such as science or diversity education. The interests of the school and student in education outweigh parents' interests in preventing their children from being exposed to ideas that conflict with religious traditions.

6. May schools avoid controversy by deciding not to provide any instruction on human sexuality?

No. California law requires that public schools provide instruction on HIV/AIDS prevention at least once in junior high or middle school and once in high school. This instruction must emphasize that sexual abstinence, monogamy, avoidance of multiple sexual partners, and abstinence from intravenous drug use are the most effective means for AIDS prevention, but also must teach students other means of reducing the risk of transmission, including medically accurate information about condoms and other contraceptives. California Education Code § 51934.

Apart from this required HIV/AIDS prevention education, public schools are not required to offer comprehensive sexual health education. If schools choose to have sex education classes, they must satisfy criteria set out in California law, including a requirement that, no later than grade seven, students learn accurate information on the safety and effectiveness of all methods of contraception, and methods of reducing the risk of and treating sexually transmitted infections. California Education Code Section 51933.

7. Do parents have the right to notice about and to opt their children out of diversity education programs that include discussions of sexual orientation or other controversial topics?

No. State law explicitly provides that "instruction or materials that discuss gender, sexual orientation, or family life and do not discuss human reproductive organs and their functions" is not subject to the parental notice and opt-out laws. California Education Code § 51932(b). Where issues of sexual orientation or gender identity are raised in school programs other than HIV/AIDS prevention or sexual health education, such as programs designed to encourage respect and tolerance for diversity, parents are not entitled to have notice of or the opportunity to opt their children out of such programs. However, schools may choose to give parents information in advance to explain the purpose and content of these programs and enlist parental support and participation.

Diversity and tolerance education programs can help schools fulfill their obligation under California law to provide safe and supportive learning environments for all students, and to prohibit discrimination and harassment on the basis of sex, sexual orientation, gender, ethnic group identification, race, ancestry, national origin, religion, color, or mental or physical disability. California Constitution Art. 1, § 28(c); California Education Code § 51101; California Education Code § 200-220; Title 5, California Code of Regulations, § 4900(a). (Schools can seek assistance from the State Board of Education in developing these programs, because it is responsible for developing policies, curriculum guidelines, teacher and administrator training programs, grants, etc., to promote appreciation of diversity, discourage discriminatory attitudes, and prevent and respond to acts of hate violence in schools. California Education Code §§ 201(f), 233 & 233.8.)

Including discussions about how it is wrong to harass, threaten, or harm another person because of his or her sexual orientation or gender identity in diversity education programs is not only permissible, but important in ensuring schools' compliance with anti-discrimination laws. So long as these programs do not include sexually explicit content (i.e. discuss the human reproductive organs and their functions), parents are not entitled to prior notice and the opportunity to opt their children out. Also, these programs must not include content that reflects adversely on any person's religious beliefs, under California Education Code § 51500 and §51501, so they should avoid instructing students that any specific religious view concerning homosexuality or gender is correct or incorrect.

Thus, by carefully articulating the purpose and content of diversity education programs, schools can both fulfill their legal duty to ensure a safe and nondiscriminatory school environment for all students, and also avoid violating parents' notice and opt-out rights.

Footnote

1 This right to notice and opt-out does not apply to descriptions and illustrations of human reproductive organs that may appear in a textbook on physiology, biology, zoology, general science, personal hygiene or health. California Education Code § 51932(a). The right to notice and opt-out also does not apply to discussions of gender, sexual orientation, and family life outside the context of sex education. See Question 7, above.

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160 14th Street • San Francisco CA 94103 • (415) 626-1680 • www.casafeschools.org

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