

# The Bathroom Case: Creating a Supportive School Environment for Transgender and Gender Nonconforming Students

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## Abstract

The recent federal guidance and litigation on transgender students have increased public awareness of the legal rights of transgender students. Title IX regulations have long permitted school districts to segregate male and female students in separate but comparable toilet, shower, and locker room facilities, but the legal issue presented by transgender students is how to gain access to facilities that match their gender identity. This case examines the nuances of accommodating transgender student needs, while examining the legal requirements for schools, and the practical implications of these requirements.

## Keywords

transgender, Title IX, FERPA, nongender conforming, administration

A lot of people say, “Oh, you’re that transgender girl.” And that’s not how I want to be labeled at all. I want to be labeled as Jazz, the girl who just happens to be transgender.

—Jazz Jennings

## The Case

Robert (Bobby) Gonzalez, formerly Susan Gonzalez, is a gifted student at Shirley Chisholm High School in the Springfield Heights School District. Dawn Adams, a

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White female in her mid-30s, is a lifelong resident of the community. She has served the district for 15 years, first as a classroom teacher, literacy coach, gifted intervention specialist, and the district gifted coordinator. She did not know Bobby personally yet, as he was a new transfer student, but she did recognize a mismatch with Bobby's name on the course rosters (Robert) and the official computer system (Susan). After some investigating, Ms. Adams learned that Bobby's gender was listed as female (F) in the computer system as well. As the school typically used a student's name and gender as listed in the computer system when mailing information home, which relied upon recorded birth certificate information as their source, Ms. Adams was unsure what to do. She did not know if this was a mistake: Was this student mixed up with another student with the same last name? Or, was this a transgender student?

Ms. Adams knew the importance of following the regulations outlined in the Family Education Rights Privacy Act (FERPA). As the student was still under the age of 18, she needed parental consent to gain access to the information contained in the student's records. Information regarding a student's transgender status could only be disclosed for the following reasons: "1) a health or safety emergency; 2) to employees with a legitimate educational interest in the information; or 3) in various other circumstances explicitly permitted by FERPA" (Farina, 2017, p. 4). However, it is within a transgender student's right to decide how much of their private information they wish to openly discuss and share with others.

Ms. Adams searched the Internet to determine whether she could find any precedent from district possessing policies on name changes that could be applied to this situation. She learned that when a transgender student transitions, there are many opportunities for a student's previous name or sex assigned at birth to inadvertently appear on document generated by school systems (Orr et al., 2015), which can have negative consequences for the student. She also learned that although there are ideal standards to which schools can adhere to protect transgender students, such as using their preferred name and preferred pronouns, there is not a universal standard.

New to the school and unfamiliar with all of the district and school policies, she decided to consult the school administrator, Principal Romeo. For 15 years, Principal Romeo, a White male in his late 50s, had served the district as a middle school science teacher, resource teacher, and technology enrichment coordinator. His administrative experience consisted of 5 years as elementary school assistant principal before his appointment as high school principal 3 years ago. Mr. Romeo had moved to the district at the start of his education career more than 20 years ago. Since then he has worked to stay connected to his school community by volunteering for the Rotary Club and serving as a Court Appointed Special Advocate for children along with his wife. He had also become fluent in Spanish so that he could better communicate with the Spanish-speaking families in his school. Ms. Adams asked for the story on this student. Principal Romeo replied,

Bobby's gender identity is male. Everyone in the school is aware of Bobby's gender identity and expression: that he is male. However, simple things like taking attendance or enrolling in classes often can compromise a student's privacy. We do what we can, but these legal documents still pose a problem for us.

Principal Romeo indicated that since Bobby's name was never legally changed that she could not place the name "Robert" on the forms, instead, she had to use the legal name of Susan. Ms. Adams ruminated on this. An issue such as this was something that she had never thought of. On one hand, she thought, "What's the big deal? It is only a letter, M or F, and it is only the paperwork that is mailed home. How bad can that be?" On the other hand, she thought about the logical extension of this issue. She wondered, "What is the worst-case scenario here?" She thought about a teacher inadvertently calling a student by the wrong name (and thus potentially gender) when taking attendance; she thought about teachers unintentionally outing students in front of their peers, and she thought about bullying. What she did not think about was the intentional outing of a student by a teacher. She then came to the following conclusion, "We should always think about the worst-case scenario when making decisions impacting our students." Whatever action these actors take will have implications for students and community members, as well as for policies in the district (Kaiser, Seitz, & Walters, 2014).

Ms. Adams shared this idea with Principal Romeo, and he nodded. They both verbally agreed that they would need to seek district support to create better and more inclusive policies to protect transgender students. Ms. Adams was troubled about Principal Romeo's direction for her to use the student's legal name for home mailings, but she complied, understanding that this was a case of policy lagging behind rapidly changing social norms (Kaiser et al., 2014). She expected that more of these issues would present themselves. As Ms. Adams turned to leave, another thought occurred to her. She stopped in her tracks and turned around to face Principal Romeo. "This is my first experience working with a transgender student," Ms. Adams began. "This is my first experience as well," Principal Romeo concurred. "So . . ." Ms. Adams paused. "What are we going to do about the bathrooms?"

Shirley Chisholm High School honored Bobby's request to be treated as a male, in that he was called by his male name and referred to by his chosen male pronouns; however, he was denied access to the boys' restrooms and boys' locker room at the school. The school and the district relied on a board decision and subsequently offered Bobby a single-stall unisex restroom and a private changing station in the locker room, which, according to Superintendent Brown, ". . . appropriately serves the dignity and privacy of all students in our educational environment." Anne and Frank Gonzalez expressed dissatisfaction with that arrangement, stating, "This will ostracize our son and draw attention to the fact that he must change separately." They also complained about the lack of access to the boys' locker room for gym class.

The Gonzalez family communicated their dissatisfaction with the board's decision with Principal Romeo and Superintendent Brown. They also consulted an attorney and wrote an appeal to the decision that they submitted to Principal Romeo and Superintendent Brown as well as to the board. However, the decision remained firm. At this point, the Gonzalez family filed a formal complaint with the Civil Rights Office in their region. The Civil Rights Office subsequently filed suit on behalf of the Gonzalez's claim of sex discrimination. The issue was litigated for the rest of the academic year, and it was not until Bobby's sophomore year in high school that he was finally permitted access to the boys' locker room and restroom.

Soon after that, some parents and a minority of board members staged a protest of Bobby Gonzalez's use of the boys' locker room. A board member was overheard saying that transgender students suffer from a "mental disorder" and that it is not "a real thing." The board member stepped down after his comments were reported in the press. Despite all of this, the district still had not formulated a policy addressing transgender issues. District leaders felt pressured by both sides of the issue—the National LGBTQ Alliance, empathetic parents and students as well as those who argued that the rights of other students were threatened by transgender students' use of bathroom and locker rooms that correspond with their gender identity. This conflict caused many students, parents, teachers, and community members to take a side. What could have remained a private issue between the Gonzalez family and the school became a political issue, which led to the outing of Bobby's transgender status. This outing could potentially lead to the teasing and harassment of Bobby. Research indicates that LGBTQ+ (Lesbian, Gay, Bisexual, Trans, Queer/Questioning, and others) students experience harassment more than their heterosexual peers (Gay, Lesbian and Straight Education Network [GLSEN], 2016), which can cause severe anxiety, stress, and decreased academic performance.

In addition, in the wake of this policy wavering, the U.S. Justice and Education Departments sent letters to the Springfield Heights School District directing that the school permit transgender students to use the bathrooms and locker rooms of their choice. Violations of this dictate could result in the loss of federal education funding. The district ignored this guidance and, instead, filed suit to prevent the U.S. Department of Education from enforcing the law. The Gonzalez family elected to sue on the side of the government indicating that the Springfield Heights School District discriminated against Bobby and violated his right to privacy. The Gonzalez family argued that the "drop your trousers" policy, which would result if these informal and discriminatory policies would be allowed to continue, was ridiculous and unconstitutional. As Mr. Gonzalez argued in the press, "No one would know anything about biology unless they got down and peeked under the stall divider. What about the right to privacy?"

The Springfield Heights superintendent was well aware that districts across the country were struggling with how to accommodate transgender students, so he desired to attempt to benefit from this confusion to appease his board. He was also well aware that some state legislatures passed laws requiring bathroom usage to accord to biological sex and desired to ride that wave. The Springfield Heights board decided that its policies would treat students based on their gender recorded at birth. They decided that they would sue the U.S. Department of Education if they were found in violation of Title IX, which prohibits sex discrimination (including sexual harassment based on gender identity and expression) in any education program or activity receiving federal funds.

## **Teaching Notes**

A person's gender identity is based on their intrinsic feeling of "being male or female or some combination of both or neither," whereas an individual's appearance or behavior may be displayed differently from the traditional norms associated with the person's sex at birth (Farina, 2017, p. 3). According to Orr et al. (2015), "Transgender

describes a person whose gender identity is different from what is generally considered typical from their sex assigned at birth” (p. 6). Transgender individuals live the gender they identify with, which can include changes in name, style of dress, pronoun usage, and the like.

Federal decisions affecting transgender students in public schools are becoming more common. The Obama administration’s position on allowing transgender students to use facilities that correspond to their gender identities has been asserted in legal briefs and civil rights agreements in school districts (Blad, 2016). For example, in May 2016, a *Dear Colleague Letter* issued by the Office of Civil Rights (OCR) and the U.S. Department of Justice (DOJ) stated, “A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity” (p. 4). However, many state and local policy makers, as well as local school district officials, have disagreed with the Obama administration’s stance on transgender school policies, and districts have been found in violation of federal civil rights guidance. In February 2017, under the new Trump administration,

Joint action taken by the U.S. Department of Education and the U.S. Department of Justice is expected to revoke the federal guidelines adopted by the Obama administration in May 2016 to protect the rights of transgender students at schools by allowing them to use bathrooms and locker rooms matching their chosen gender identity. (Torlakson, 2017, para. 3)

Reversing the 2016 *Dear Colleague Letter* forces a new approach to Title IX enforcement and transgender students’ rights. Title IX regulations have long permitted school districts to segregate male and female students in separate but comparable toilet, shower, and locker room facilities (34 C.F.R. 106.22), but the legal issue presented by transgender students is how to define male or female when a student’s expressed gender identity does not match the student’s assigned sex at birth (Texas Association of School Boards, Legal Services, 2017).

Attorney General Jeff Session’s decision to remove specific transgender guidance from overall Title IX guidance written during the Obama Administration in early 2017 will only serve to muddy the waters of civil rights protections. The protections against sex discrimination are still embedded within the law, and parents can still sue if their transgender children face sexual harassment or sex discrimination within schools. Sessions effectively opened schools up to lawsuits, particularly if they do not know where to turn to answer the question of what to do regarding transgender students.

The current administration forces educational policy as related to transgender students onto state legislature with states mixed approaches to transgender students. Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon, Vermont, Washington, and the District of Columbia have laws that protect transgender students from harassment and discrimination based on gender identity (American Civil Liberties Union [ACLU], 2017). The support of transgender students’ rights has been asserted by California State Superintendent of Public Instruction, Torlakson (2017), who said, “All students deserve a safe and supportive school environment. California

will continue to work to provide that environment for our lesbian, gay, bisexual, and transgender students regardless of any misguided directives by the federal government and the Trump administration” (para. 2).

Although numerous states have taken the stance of pro-transgender students’ rights, there remains states that have enacted legislation that restricts the rights of transgender students. In May 2017, the Texas House of Representatives passed a law that required transgender students to use the restrooms that correspond with their sex at birth (Balingit, 2017). Similar legislation has been passed in Idaho and North Carolina. Individual school districts have also developed policies on this topic. The Fort Worth Independent School District in Texas guidance on transgender students will not accommodate students unless parents are involved and supportive of a student’s identity and gives parents the ability to override the gender their child identifies with (Ford, 2016).

This dilemma may be reduced to one ethical question: Should school districts do the bare minimum to reach civil rights compliance, or should they go above and beyond, and do as much as they possibly can to accommodate and protect all of their students (Kaiser et al., 2014)? School districts often wait until they experience legal problems, such as being sued by families for civil rights violations, instead of getting ahead of lawsuits by creating policies protecting the civil rights of all students. Teachers and administrators should in fact accommodate the rights of transgender students by, for example, using their preferred name whether or not the students have had their names legally changed. Some districts create a two-tiered system, with the legal name of the student in a computer system, and the preferred name of the student on classroom documents to ensure that the student is not “outed,” which may put them at risk for harassment. Districts should have policies in place for this, and for other issues facing transgender students (Kaiser et al., 2014).

Although the transgender population represents a very small percentage of students, a growing acceptance of gender fluidity has encouraged many students to come out at younger ages than in past years (Blad, 2015). The culture seems to be progressing faster than schools and school policies. A lack of knowledge about transgender individuals and the concept of gender in particular on the part of many teachers and administrators impede the development of a supportive school environment for transgender and gender nonconforming students and have the potential to create legal problems for schools (Fusarelli & Eaton, 2011). This case examines the nuances of accommodating transgender student needs, while examining the legal requirements for schools, as well as the practical implications of these requirements.

Schools require that the legal name on a student’s permanent record be taken from the student’s birth certificate or another legal document. The name submitted to Education Information Management Systems and the name recorded on the student’s academic record must be the same. Any changes in the record must be dated, explained, and kept as part of the student’s permanent file. In contrast to permanent school records, school districts often use preferred names or nicknames for document items such as class rosters, attendance sheets, identification badges, awards, and so on. A school district should apply this practice equally with transgender students. Parents or students may request that a district change a student’s name and gender in educational

records based on a claim that such records are incorrect, misleading, or a violation of privacy under FERPA (Farina, 2017). When faced with a request to change or correct records, a school district should seek guidance from the U.S. Department of Education's Family Policy Compliance Officer (FPCO) and the district's legal counsel.

School districts and their employees should exercise caution in the release of information about a transgender student, and seek the guidance of the FPCO and the district's attorney. FERPA may protect transgender students from disclosure information that would be considered nonconfidential directory information for another student. For example, a student may request to be addressed by a new first name and gender. The student may want to keep the previous name and gender private. For most students, name and gender are categorized under FERPA regulations and local policy as directory information that may be released without parental consent. For the transgender student, however, the former name and gender in the student records would not meet the definition of directory information because to release the information could be harmful and an invasion of privacy.

Title IX is a federal law, which prohibits sex discrimination in schools and protects transgender students from bullying, harassment, and discrimination (National Center for Transgender Equality, 2016). The U.S. Department of Education, through the Office for Civil Rights written policy guidance on preventing and responding to sexual harassment, makes clear that Title IX protects a transgender student's gender identity. A transgender student is entitled to Title IX protections. It does not matter whether or not a harasser is the same or opposite sex in relation to the transgender student's assigned sex or gender identity. School districts may be liable under Title IX and other federal laws for employee or student harassment of transgender students when there is knowledge of harassment, followed by deliberate indifference and a failure to effectively prevent the harassment (*Gebser v. Lago Vista Indep. Sch. Dist.*, 1998). The U.S. Department of Education, through the Office for Civil Rights, enforces Title IX, which applies to all K-12 and postsecondary schools that accept federal funds. Furthermore, many states such as California, Colorado, Connecticut, New Jersey, Oregon, Vermont, and Washington have laws that protect students from discrimination based on gender identity or expression and sexual orientation. Other laws that offer protection for transgender and nonconforming students are as follows:

The Equal Access Act requires all school affiliated student organizations, such as a Gay Straight Alliance to be treated equally.

- The Family Educational Rights and Privacy Act protects personal information about students in school records and in most circumstances prohibits the release of information without consent.
- The First Amendment of the U.S. Constitution protects the right of students to free speech and freedom of expression including of one's gender identity. (National Center for Transgender Equality, 2016, para. 7)

The student, family, and school must work together to establish the most positive scenario for the student—Planning is essential.

## Questions for Discussion

1. In your own district, what policies are in place regarding students who identify as transgender? What do you recall about the content of these policies? Has there been any progress on policies regarding transgender students' rights in your district?
2. Think about how familiar, knowledgeable, and/or comfortable you are with realities facing students who identify as transgender. Discuss with your peers.
3. What legal and ethical responsibilities do educators have to promote the educational and social integration of transgender and gender nonconforming students, and to ensure a safe learning environment free from discrimination and harassment?
4. Should a district change school records to reflect a transgender student's preferred name and gender? What implications does this have on policy?
5. Should principals go above and beyond the minimum legal standards to protect their students, or wait until the law "catches up"? Please justify your answer.
6. How does name and pronoun usage potentially violate a student's privacy? Should students be required to obtain parental consent or a court ordered name/gender change as a prerequisite to being addressed to the name and/or pronoun that corresponds to their gender identity? Please justify your answer.
7. Do you think schools' Title IX obligations related to transgender students are clear? Has this been an issue in your school? What are the implications of the Trump administrations removal of Title IX guidance?
8. What is the evidence that the district is in violation of Title IX for subjecting Robert (Bobby) Gonzalez to different rules of behavior and subjecting him to different treatment on the basis of sex?
9. Where district leaders may argue that by providing a student a private area to change and use the restroom that they are respecting the rights of all students. How is this a violation of law?
10. What is the best solution to safeguard the rights of transgender students under Title IX and the rest of the student population's rights?
11. Would a principal in a state that passes a law prohibiting transgender students from using the bathroom that matches their gender identity be in violation of federal civil rights laws if they abide by that new state law? Explain your answer.
12. Religious minority students may also be offended by the general lack of privacy in school bathrooms and locker rooms. In what ways might you provide more space and privacy in these two areas? Compare and contrast the need for privacy between religious minority and transgender students. Are there other student populations with similar needs?
13. A student's transgender identity can easily be disclosed by student records. For example, a substitute teacher may call attendance using an attendance sheet that only lists students' legal names on it. Consider other records or documents that may cause distress. What solutions can you provide that would allow compliance with school recordkeeping and reporting requirements and also safeguard a transgender student's privacy?



14. In physical education and intramural sports, should transgender or nonconforming students participate in accordance with the student's gender identity consistently asserted at school or their sex assigned at birth? What about competitive athletic activities and contact sports?

## Additional Activities

1. Read the following policy guidance for protecting transgender students provided by the GLSEN, which is a national education organization focused on ensuring safe and supportive environments for LGBTQ+ students through research and education: <https://www.glsen.org/article/transgender-model-district-policy>

Examine your own school/district policy (provided one exists), and compare it with the guidance provided by GLSEN. What are the areas of need/weakness in your district policy? What changes would you make? If your school/district does not have a policy, create one based on the guidance provided by GLSEN.

2. Review your school's dress code. Determine whether or not the dress code is sex segregated? Would it be permissible for a transgender student to wear the clothing that corresponds to their gender identity? What changes would you make to the dress code?
3. Read the following two articles:

Barnes, R., & Balingit, M. (2016, August 29). School board, sued by transgender student, asks for Supreme Court review in bathroom case. *The Washington Post*. Retrieved from [https://www.washingtonpost.com/local/education/school-board-sued-by-transgender-student-asks-for-supreme-court-review-in-bathroom-case/2016/08/29/7c5c5fc4-6bc3-11e6-ba32-5a4bf5aad4fa\\_story.html](https://www.washingtonpost.com/local/education/school-board-sued-by-transgender-student-asks-for-supreme-court-review-in-bathroom-case/2016/08/29/7c5c5fc4-6bc3-11e6-ba32-5a4bf5aad4fa_story.html)

Rinehart, E. (2016, September 26). Federal judge rules in favor of transgender student in case against Highland school district. *The Columbus Dispatch*. Retrieved from <http://www.dispatch.com/content/stories/local/2016/09/26/judge-sides-with-transgender-student-in-case-against-highland.html>

Discuss how these current events coincide with this case. In small groups, discuss your views on these two recent stories.

4. Examine the following three websites:

Lamda legal. (n.d.). *FAQ about identity documents*. Retrieved from <http://www.lambdalegal.org/know-your-rights/article/trans-identity-document-faq>

Grant, J. M., Mottet, L. A., Tanis, J., Harrison, J., Herman, J. L., & Keisling, M. (2011). *Injustice at every turn: A report of the national transgender discrimination survey*. National Council for Transgender Equality. Retrieved from [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf)

Lamda legal. (n.d.). *Transgender youth*. Retrieved from <http://www.lambdalegal.org/know-your-rights/article/youth-transgender>

How would knowledge of this guidance have helped the actors in this case? Work in small groups to gain understanding of the rights of and issues facing transgender students in our schools.

## Additional Resources

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## Professional Development for Educators

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Human Rights Campaign. (2017). *Welcoming schools: Creating safe and welcoming schools for all children & families*. Author. Available from <http://www.welcomingschools.org/>

The Queering Education Research Institute. (2017). *Professional development: The reduction of stigma in schools (RSIS)*. Retrieved from <http://www.queeringeducation.org/rsis/about-rsis>

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