

New State Regulation on Accommodating a Transgender Individual's Use of Gender-specific Facilities

By

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State law prohibits schools from discriminating against students or staff based on gender expression or identity. Consistent with that prohibition, **effective December 26, 2015**, the Washington Human Rights Commission adopted a new regulation requiring places of public accommodation, including schools, to allow transgender individuals to access the gender-specific facilities that are consistent with their gender expression or identity. This new regulation is consistent with prior *informal* guidance from the Office of the Superintendent of Public Instruction ("OSPI"). Although this new regulation does not deviate from existing law and guidance, its adoption clarifies school districts obligations towards transgender individuals.

Existing Anti-Discrimination Requirements

State law defines "gender expression or identity" as "having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth." RCW 49.60.040. Individuals that experience or express their gender identity differently from what is traditionally expected are commonly referred to as "transgender."

There are two separate state statutes that prohibit schools from discriminating against students or staff based on gender identity or expression. Chapter 49.60 RCW generally prohibits such discrimination in places of public accommodation, such as schools. The Washington Human Rights Commission ("HRC") is responsible for developing regulations to implement that statute. Chapters 28A.640 and .642 RCW specifically prohibit sex discrimination, which includes gender expression and identity, in education. OSPI is responsible for developing regulations to implement those statutes.

Although those rules and regulations generally prohibit schools from discriminating against a transgender individual, they do not specify how a school should address the needs of a transgender individual that wishes to use a gender-specific facility, such as a locker room or bathroom. However, prior informal guidance from both the [HRC](#) and [OSPI](#) (click hyperlinks to review) instructs schools to permit transgender individuals to use the gender-specific facilities that are consistent with the individual's gender identity.

New HRC Regulation

On December 26, 2015, the HRC adopted a new regulation requiring entities employing over eight individuals, including school districts and schools, to "allow individuals the use of gender-segregated facilities, such as restrooms, locker rooms, dressing rooms, and homeless or

emergency shelters, that are consistent with that individual's gender expression or gender identity.” WAC 162-32-060(1). This regulation applies to all gender-specific facilities, without limitation, including “such facilities where undressing in the presence of others occurs.” *Id.* The HRC specifically rejected allowing schools to treat transgender individuals different than any other place of public accommodation.

Potential Issues in Implementing the New Regulation

We will explore some of these potential issues with a hypothetical student, Andy, as our guide. Imagine that the previous school year, Andy used the boys’ bathroom and changed in the boy’s locker room before and after P.E. class. This school year, Andy has confided in certain classmates and staff that he wishes to be called “Sarah” and prefers to be referred to using the pronouns “she” and “her.” Before P.E. class, Sarah informed the P.E. teacher that she would feel most comfortable changing in the girls’ locker room.

Under the new regulation, the school must accommodate Sarah’s request. The new regulation does allow schools to provide separate, gender-neutral facilities for *any* students that desire privacy, transgender or not. Although it may be appropriate to suggest the use of a private facility to the student, the new regulation expressly prohibits schools from “request[ing]” or “requir[ing]” that transgender individuals use a separate or gender-neutral facility. The following would likely be a permissible response to Sarah’s request:

“Yes, you may use the girls’ restroom. The school also provides a private restroom or changing area for your use, if that option would make you more comfortable. It is your choice.”

School officials must be very careful not to use language that could be interpreted as a request that Sarah use the private, gender-neutral facility, and clearly may not require her to do so.

Anti-discrimination laws require that the school allow Sarah to use the facilities in the same manner as any other student. A Chicago school district is currently involved in a reported dispute with the federal government arising from the school’s requirement that a transgender student employ a privacy screen while using a locker room consistent with her gender identity. Although that dispute is ongoing, it serves as a reminder that requiring differential treatment of transgender individuals may run afoul of anti-discrimination laws.

Suppose another female student, Cindy (or her parents), complains to the P.E. teacher that Cindy feels uncomfortable using the girls’ locker room alongside Sarah. The discomfort of other students is not a permissible basis for removing the transgender student from the gender-specific facility. Instead, the new regulation instructs schools to direct any complaining individual to use a separate, gender-neutral facility, such as a private restroom, if available. The regulation does not address the required response if the school does not have a private facility available. If Sarah, Cindy, or any other student chooses to access the private bathroom or changing area, it is important to continue to provide appropriate supervision for those students.

A transgender student may only be removed from the gender-specific facility of their choice on a basis that is unrelated to gender expression or identity, and must be related to their actions or behavior while in the facility. For example, the P.E. teacher may remove Sarah from the girls’

locker room if Sarah initiates a physical fight with another student, if such behavior would result in the same punishment for any other student. If a transgender student does engage in behavior that justifies removal, carefully document the specific code of conduct provision or rule that was violated and ensure that the provision or rule has been routinely applied to other students exhibiting the same behavior.

Whatever Sarah decides, her school must be careful of her privacy rights. Previous OSPI guidance stated that schools should not share information about a student's transgender status, legal name, or gender assigned at birth with anyone, including parents and school staff members, unless the student authorizes such disclosures or the law requires it. But the guidance document was silent on how exactly schools should respond when and if other individuals disclose the student's transgender-related information without the student's consent or otherwise as permitted by law. Under the new HRC regulation, intentional disclosure of an individual's gender expression or identity, transgender status, or sex assigned at birth may constitute harassment. If such harassment is found severe enough to interfere with a student's access to educational opportunities, that harassment may be imputed to the school.

In the event your district has additional questions or concerns about this new HRC regulation or how to address implementation issues, you are encouraged to contact your district's legal counsel for assistance. While this new HRC regulation may be controversial or unwelcome in certain portions of your communities, it is the current rule in Washington. However, there are reports of potential legislative responses to the new HRC regulation, so stay tuned for further developments in this evolving area.