

## Trans(cending) Gender In Schools

By Paula Day (Kansas City)

A ninth grader at your school asks to be exempted from the school's dress and appearance requirements based on her gender identity. Another student advises that his doctor recommends that he no longer use the boy's bathroom due to intimidation that he is experiencing in the restroom by some of the boys who view him as too feminine.

These, and many other examples, represent the newest, evolving area of potential discrimination, harassment, and bullying within our educational environments – at all levels from elementary school through college. Administrators need to understand transgender issues and how to address them both to provide a comfortable learning environment and to comply with the law.

### What does “Transgender” Mean?

“Transgender” refers to a person whose gender identity, expression, or behavior differs from that person's physical sex characteristics or sex assigned at birth. While most transgender (or “trans”) students do not make the transition from their biological gender to the gender they “identify” with until high school or later, there are persons who begin this process at a much earlier age. For example, in Florida, a five year old who is genetically a boy began kindergarten as a girl, and in Colorado, a second grade student (also genetically a boy) will begin the third grade as a girl.

### The Issues Surrounding Transgendered Students

One of the top priorities for schools is to ensure that every student feels safe at school. Unfortunately, a recent study<sup>1</sup> concluded that much work is still needed in this area. Over half of the 1,732 transgender students (ages 13 to 20) who participated in the survey reported being subjected to verbal harassment (being called names or threatened) and physical harassment (being pushed or shoved) based on their gender expression and gender or sexual orientation. Ten percent of the trans students indicated that they had been physically assaulted at school (i.e., punched, kicked or injured with a weapon).

Moreover, now that email and text messaging are prevalent among students, “cyberbullying” – using an electronic medium to threaten or harm others – is yet another form of harassment directed toward transgender students. Four out of ten trans students surveyed reported that they

received a threatening email or text message during the school year. The hostility in schools is also directed toward trans students' property with more than half of the trans students having had their car, clothing or books stolen or deliberately damaged at school.

Because many schools lack adequate policies, reporting procedures and personnel knowledgeable about transgender students, more than half of the students harassed or assaulted in school never report it to school officials or even a family member. They hesitate to do so because they do not believe that a teacher or other school personnel would do anything about it.

In fact, some trans students reported that they were told by teachers to “ignore it.” Other students didn't complain because they had heard a teacher or principal make inappropriate comments about gays/bisexuals. Others felt they might suffer retaliation or be “outed” to their family members or others in the school.

### Existing laws Protect Transgender Persons.

Depending on your state, city, county or school district, there may already be a law, guideline or policy which protects transgender persons from discrimination. There are currently twelve states, the District of Columbia, and more than 100 counties and cities, with laws or ordinances addressing gender identity. Within the last year, three more Florida cities or counties (Broward County, Palm Beach County, and the City of Gainesville) added gender identity to their nondiscrimination provisions. Likewise, Kansas City, Missouri also amended an existing ordinance to update the anti-discrimi-

nation prohibition to include gender identity.

But not all of these laws extend to schools, so you may need to confer with legal counsel to determine the protections that apply in your jurisdiction. Likewise, the few states that have anti-bullying laws that address harassment based on sexual orientation often fail to address harassment based on gender identity. The absence of a specific law protecting gender identity will not necessarily shield a school from liability for the discrimination and harassment of a transgender student.

For instance, if a school learns that a transgender student is being harassed by his or her peers and takes no action, the school may be liable if the harassment has been sufficiently severe and persistent. In Minnesota,



Continued on page 3

<sup>1</sup> 2005 National School Climate Survey: The experiences of lesbian, gay, bisexual and transgender youth in our nation's schools (Kosciw, J. G. and Diaz, E. M. (2006))

# Why Your School Needs An Employee Handbook

By Jennifer Sandberg (Atlanta)

No matter the school size, any school will benefit from an up-to-date, lawful employee handbook. Comparatively, the larger the school, the larger the benefit to the school.

An employee handbook serves many purposes. It communicates the rules and performance standards to employees, encourages employees to behave in a certain way, helps ensure that employees are treated in a consistent fashion, publicizes the benefits you offer, and can help win employment claims and lawsuits.

A well-written, lawful employee handbook has no downsides and provides an employer with all of the flexibility necessary to address the myriad of possibilities when it comes to employee actions and inactions. If you ever believed that an employee handbook could do more harm than good, those days are gone.

## Employees Want to Know the Rules

Even though employees won't always follow the rules, they do like to know them. Employees – both good and bad – like to know what conduct is expected by the school and what punishment they might expect if they fail to follow the rules. An employee handbook is many things, but primarily a rule book. Written correctly, the handbook allows a school to address a wide variety of rule violations without limiting the school's ability to respond on a case-by-case basis as necessary.

Your school handbook should tell employees what your school expects not only to avoid disciplinary action but also how they can succeed. For example, the employee handbook should tell employees how to: request time off; inform the appropriate manager about possible harassment or discrimination; keep time records; report possible theft; dress in an appropriate manner; refrain from drug and alcohol use; maintain confidential information; use various electronic resources; and, comply with applicable laws.

Ideally, various administrators and managers will respond to similar rule and performance violations in a similar manner. A well-written handbook tailored to the way the school does business helps ensure this desired consistency. While a handbook should not be an "instruction book" on how to manage or deal with every conceivable problem or issue, it should provide a framework for managers to follow in dealing with various circumstances.

## Sell the Benefits

Schools spend a great deal of money on each employee in ways that the employee often does not see or appreciate. An employee handbook is an excellent way for a school to take credit for all that it does and pays for. Without going into excessive detail about any one policy, an employee handbook should list all of the benefits, whether they are: provided by the school at no cost to the employee (for example, workers' compensation in most states); subsidized by the school (for example, many types of insurance benefits); or available for purchase at reduced rates due to the school's group purchasing power (for example, credit union membership or vision insurance). Additionally, a handbook should include the various types of paid and unpaid time off offered to employees – even if such leave is mandated by the government.

## Winning Litigation

In most states, winning an unemployment claim for a terminated employee requires proof that the terminated employee was on notice of a certain rule (or rules) and had been warned that violating the rule would lead to disciplinary action up to and including immediate termination. A well-written employee handbook is the beginning of a successful



defense. The page of the handbook containing the applicable policy, as well as the signed acknowledgement page, should be the first step of any unemployment paperwork submission for a rule violation or poor performance termination.

## You Want to win Lawsuits

Many employment-based lawsuits hinge on consistent treatment of employees or ensuring that employees were on notice of important school policies and procedures. A handbook that reflects a school's actual practices serves both of these purposes. The handbook and the employee's signed acknowledgement form are almost always exhibits in a lawsuit and can help your school win.

Imagine a jury looking at your employee handbook today. What does it say about your school? Could it be a better reflection of your school? If so, consider revising and updating your handbook right away.

## Important Considerations for Any Employee Handbook

Your handbook needs to reflect compliance with applicable federal, state and local law. This does not mean that every law needs to be specifically addressed and reiterated in detail. Rather, the handbook *should not conflict with* any applicable law and should contain a clear statement that the school intends to comply with all applicable laws.

Your handbook should be tailored to your school and should clearly reflect how your school does business. Copying another school's handbook or just adopting a handbook you find on-line – even from a very reputable source – may create problems.

Your handbook is a reflection of the school. Handbooks that contain typos, are copied askew, are out-of-date, contain another school's name, contain policies that don't apply to your school in whole or in part, and look sloppy or unprofessional, send a message that the school doesn't really care about its employees. For the investment of a few dollars per employee, any school can publish a well-edited, well-written, professional looking, bound employee handbook. Alternatively, publishing the handbook on-line saves printing costs and is just as effective so long as all employees have easy access to the handbook and the school obtains proof that each employee "has read or will read" the employee handbook. This acknowledgement is equally important with a printed handbook.

In the end, even the very best handbook fails to provide a benefit to the school if employees did not have easy access to it and if the school can

*Continued on page 4*

a court held that a school district's failure to protect a gay student from peer harassment violated, among other things, the Equal Protection Clause of the U.S. Constitution.

To protect transgender students, schools should add references to sexual orientation, gender identity or gender expression to their anti-harassment and anti-discrimination policies, and should train teachers, administrators, counselors and students to treat *all* persons respectfully and equally. Many schools have allowed students to establish student clubs or organizations to support or educate students on lesbian, gay, bisexual and transgender issues, often appointing an LGBT teacher or professor to assist in the creation of the organization. Of course, it is key that the rules regarding the establishment of such a student organization should be applied in the *same* manner as any other student organization.

### Recent Developments

In several schools, students have openly accepted transgender students for who they are – not the gender assigned to them at birth. Last year a transgender student (transitioning from female to male) was elected homecoming king at Pasadena City College. The college's homecoming committee initially ruled that he could *not* serve as king because of his pierced ears. After students lodged complaints, the committee reversed its decision.

Similarly, in Fresno, California, a transgender student nominated for prom king was told by school administrators that he (a female to male) could only run for prom queen. Only after a teacher complained about the legality of the decision, did the school reverse a previous district policy that only permitted boys to run for prom king and girls to run for prom queen. This complied with a state law protecting students' ability to express their gender identity on campus. The 17-year-old trans student was added to the ballot for prom king.

Inspired by this example, a transgirl at a rival high school in Fresno ran for prom queen – and won the crown by a 5-1 margin. In her acceptance speech, she told the crowd "For me, it's about more than a crown. It's about saying to people, 'Come out and be who you want to be.' You have to say, 'I am who I am, and I'm proud of who I am. My spirit will never be down on the floor.'"

Schools should respect transgender students and provide the same environment to them as any other student – a safe learning atmosphere. While this may require adjustments, it will enable transgender students to obtain a quality education, regardless of their biological gender.

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# New Requirements for 403(b) Plans

*By Callan Carter (San Francisco)*

403(b) plans are tax-qualified retirement plans maintained only by nonprofit organizations and public school systems. Plan assets are invested in annuity contracts or custodial accounts instead of a tax-exempt trust, like 401(k) plan assets. Historically, 403(b) plans were subject to very little regulation by the IRS and DOL.

In July, 2006, the IRS issued new 403(b) regulations, some of which are just now taking effect. In addition, the DOL issued new regulations which increase the qualification and reporting requirements of 403(b) plans, making them just as closely regulated as 401(k) plans. This article is a discussion of two of the new requirements: written plan documents and an annual audit.

### Plan Documents

The IRS's 403(b) regulations provide that all sponsors of 403(b) plans – even those plans with no employer contribution which are not subject to Title I of ERISA – must establish a written plan document by the beginning of the 2009 Plan Year. The DOL has confirmed that simply maintaining a written plan document to comply with this IRS requirement would not cause a 403(b) plan to be subject to Title I of ERISA if it was otherwise exempt.

There are penalties for non-compliance. If a 403(b) plan sponsor fails to timely adopt a written plan document with basic provisions relating to eligibility, benefits, distributions, and information relating to the annuity contracts or custodial agreements used by the 403(b) plan, then the annuity contract or custodial agreement purchased by the employer will not qualify as a 403(b) plan, and all contributions to the 403(b) plan will be fully taxable to the relevant employees.

Also part of the final 403(b) regulations is an IRS clarification of the "universal availability" requirement, which is the way a 403(b) plan satisfies its nondiscrimination requirement with regard to salary deferrals. With limited exceptions, all employees must be allowed to defer salary into the 403(b) plan. 403(b) plan sponsors should ensure they do have a written document in place and that those terms comply with the IRS regulations by the beginning of the 2009 Plan Year.

### Plan Audits

In November of 2007, the DOL issued regulations which make 403(b) plans that *are* covered by Title I of ERISA subject to the same annual reporting requirements that apply to other tax-qualified retirement plans. Currently, sponsors of 403(b) plans are only required to complete a limited number of line items on the annual Form 5500 report to satisfy applicable reporting requirements.

But these new reporting requirements include an annual audit of the 403(b) plan by an independent certified public account. While practitioners in the industry disagree when this new audit requirement is effective, with the 2008 or 2009 Plan Year, the DOL has stated informally that they intended the audit requirement to begin with the 2009 Plan Year.

### Simplified Reporting

Sponsors of certain small 403(b) plans can satisfy their reporting obligations by filing a new form (Short Form 5500 or Form 5500-SF), which requires less information and does not require audited financial statements. To be eligible for the short form, the 403(b) plan must:

*Continued on page 4*

## Why Your School Needs An Employee Handbook

Continued from page 2

not “prove” the employee received the handbook and understood that he or she was required to abide by it. To have such proof, a school needs a signed acknowledgement form for a printed handbook or electronic acknowledgement receipt for an on-line handbook.

By creating a custom handbook for your school that complies with the points listed above, both the school and the employee benefit.

For more information email the author at [jbsandberg@laborlawyers.com](mailto:jbsandberg@laborlawyers.com) or call 404-240-4152.

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## New Requirements for 403(b) Plans

Continued from page 3

- cover fewer than 100 participants as of the beginning of the Plan Year;
- be eligible for the small plan audit waiver;
- hold no employer securities;
- maintain 100 percent of its assets in investments that have a readily ascertainable fair market value; and
- not be a multi-employer plan.

Certain plan sponsors may include a “limited-scope audit.” This means that the independent accountant conducting the audit may exclude certain information from its review, resulting in lower audit fees. The auditor may exclude information prepared and certified by a bank or other institution, a state or federally regulated insurance carrier, or a 103-12 investment entity.

Sponsors of large 403(b) plans (100 or more employees) that are subject to ERISA Title I should begin working now to engage an auditor to perform the 403(b) plan audit. Since 403(b) plans have traditionally allowed for more than one annuity vendor under the plan, it is important to ensure the audit will include investments through each such vendor. This might make audit fees more expensive. As such, plan sponsors may want to take advantage of changes in the 403(b) regulations that allow for the consolidation and elimination of vendors.

For more information email the author at [ccarter@laborlawyers.com](mailto:ccarter@laborlawyers.com) or call 415.490.9000.



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