Unique Concerns Addressing Day-to-Day Issues

The Changing Face of Gender Discrimination

By Tami Hannon and Amily Imbrogno

What the law requires overall is consideration of the specific request and well-reasoned and supported bases for any decisions to treat an individual based upon biological sex rather than gender identity.

Aside from some cases in the 1990s, and a few trailblazers from the 1970s, transgender discrimination has largely been off the legal radar. With these issues garnering attention, how do you advise your clients about the best practices for responding to the myriad of questions raised by this unique issue? What is the current status of the law, and where may it head next? Is there room for "personal" objections or "religious" objections in a workplace to certain policies by your client's other employees or customers or the general public?

This article will review case law from each circuit to evaluate transgender discrimination law as it currently stands throughout the United States, pertaining to correctional settings, workplaces, schools, housing, and criminal protections. Guidance will be given on how to address these areas.

Definitions and Medical Backdrop

As many readers may be unfamiliar with this area, we have provided definitions of specific terms used in this article. While legal obligations do not vary depending on the status of the transgender individual, understanding these terms may assist in understanding specific situations that may arise.

"Transgender" is an adjective that refers to someone's internal sense of feeling male or female. "Transsexual" is another adjective that is sometimes used to communicate someone's psychological identification with the sex opposite to the biological sex or that assigned at birth and who may seek to live as a member of that sex, especially by undergoing surgery and hormone therapy to achieve the necessary physical appearance. These terms are not synonymous with sexual orientation, and transgender individuals may be homosexual, bisexual, or heterosexual, or they may associate with a different sexual orientation. *See* "Transgender-Specific Terminology," in *GLADD Media Reference Guide,* 14–16 (9th ed. 2014), http://www.glaad.org/reference/.

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A diagnosis of "gender identity disorder" under the Diagnostic and Statistical Manual of Mental Disorders IV from the American Psychiatric Association (DSM-IV) required a strong and persistent cross-gender identification, discomfort with the individual's own sex or a sense of inappropriateness in that gender role. "Gender identity disorder" is not contained in the Diagnostic and Statistical Manual of Mental Disorders 5th edition (DSM-5), which was published in 2013. Rather the DSM-5 lists "gender dysphoria," defined as emotional distress over a marked conflict between one's expressed gender and one's assigned gender. Left untreated, these conditions can cause anxiety, depression, suicidal ideations, and attempted genital mutilation.

While these are recognized conditions, transgender status is excluded as a disability under the Americans with Disabilities Act (ADA) when it is unrelated to an underlying physical impairment. 29 C.F.R. §1630.3(d)(1). A court is currently considering whether this exclusion violates the Equal Protection Clause. *Blatt v. Cabela's Retail*, Case No. 5:14-cv-4822 (E.D. Pa.). The U.S. Department of Justice filed a Statement of Interest in that case supporting the plaintiff. The district court heard oral arguments on the Defendant's Motion to Dismiss in December of 2015. No ruling has been issued.

Transgender Inmates in Prison Settings

The greatest amount of law currently found in this area is in the corrections setting. This is not to imply that transgender individuals are more likely to commit crimes, but rather a reflection that once an inmate is confined, the correctional institution becomes responsible for every aspect of his or her life. This presents a large stage for considering rights, entitlements, and responsibilities.

Addressing Medical Needs in Prison Settings

Transgender individuals often require ongoing medical treatment, which has been the subject of much litigation under the Eighth Amendment. The Eighth Amendment requires a correctional facility to provide treatment for the serious medical needs of its inmates, and it prohibits deliberate indifference to those needs. When an inmate is in pre-trial detention, these protections are provided by the Fifth or the Fourteenth Amendments, but the same analysis applies. *Cuoco v. Mortisugu*, 222 F.3d 99 (2nd Cir. 2000); *Andujar v. Rodriguez*, 486 F.3d 1199, 1203 fn. 3 (11th Cir. 2007).

The first question to consider in litigating these claims is whether or not "gender identity disorder" is a serious medical need. Two circuits consider it to be a *per se* serious medical need, given the potential effects of a failure to treat the condition. *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011); *Druley v. Patton*, 601 F. App'x 632 (10th Cir. 2015). Two circuits apply the same case-by-case analysis used to consider other medical needs. *See Long v. Nix*, 86 F.3d 761 (8th Cir. 1996); *Hood v. Dep't of Children and Families*, 2015 WL 686922 (M.D. Fla. 2015). The remaining circuits have provided no definitive rulings on the matter because in the cases that the authors uncovered the parties have conceded the issue, and the courts chose not to address the issue or assumed that this element was met for purposes of appeal. *Kosilek v. Spencer,* 774 F.3d 63 (1st Cir. 2014); *Cuoco,* 222 F.3d at 106; *Wolfe v. Horn*, 130 F. Supp. 2d 648 (E.D. Pa. 2001); *Arnold v. Wilson*, 2014 WL 7345755 (E.D. Va. 2014); *Young v. Adams*, 693 F. Supp. 2d 635 (W.D. Tex. 2010). A case-by-case determination aligns best with the existing law and is the position advocated by the U.S. Department of Justice. This position will likely be the one adopted by the courts which have not yet considered this issue.

The second question in the analysis becomes what treatment is constitutionally required. Courts generally hold that an inmate is not entitled to specify the type of treatment received and that no particular course of treatment is always required. Rather, treatment is to be determined by what is medically necessary and appropriate for a particular individual. The Ninth Circuit requires these decisions to be made by a specialist or a practitioner familiar with treating transgender individuals. Failing to do this may violate the Eighth Amendment by itself. *Norsworthy v. Beard*, 87 F. Supp. 3d 1104 (N.D. Cal. 2015); *Rosati v. Igbinoso*, 791 F.3d 1037 (9th Cir. 2015). Many courts emphasize prison security when evaluating whether a particular treatment is constitutionally required. Even if a form of treatment may be helpful to an inmate, courts are unlikely to find that the particular form of treatment is necessary if the security costs outweigh the benefits to the inmate.

The recent case of *Diamond v. Owens*, 2015 WL 5341015 (M.D. Ga. 2015), has placed this issue in the national spotlight.

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Diamond had been diagnosed with and treated for gender dysphoria for over 17 years. She largely appeared female with female attributes. At the time of her incarceration, the prison had a "freeze-frame" policy for the medical treatment of transgender individuals, "freezing" into place the diagnosis and the treatment that a transgender individual had when he or she came into the prison. Diamond was not screened for gender dysphoria or evaluated for proper treatment during her intake, despite her feminine appearance. Because of this, her medications were discontinued, resulting in depression, anxiety, and numerous attempts at suicide and self-castration. Treatment was repeatedly requested and recommended by the prison's psychologist. Despite this, treatment was denied under the prison's freeze-frame policy. Numerous other issues arose during Diamond's incarceration, including repeated sexual assaults by other inmates, which were allegedly ignored by the prison officials, or for which Diamond was told that she "brought [the] assaults upon herself" by being a transgender individual, giving rise to separate issues surrounding an alleged failure to protect her.

The prison officials sought to dismiss Diamond's complaint on the basis of qual-

ified immunity, arguing that the law had not clearly established what treatment was required. The district court found that the plaintiff was not required to show binding precedent addressing the medical needs of transgender inmates to overcome qualified immunity. Rather, the court looked to general Eighth Amendment case law. The court found that the complaint sufficiently alleged that the prison officials unreasonably denied treatment under the Eighth Amendment because they were aware of both the effect that the failure to treat had on her and of the recommended treatment for her condition. As such, the court denied qualified immunity. The matter was settled for an undisclosed amount approximately five months after the ruling. This case law sets difficult precedent for qualified immunity on these claims given that no specific case law guidance on addressing transgender needs was required.

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In reviewing issues with your correctional-based clients, they should maintain policies addressing these medical needs; the failure to have any policy has been considered an implied policy of denying treatment or care. Policies should not ban any particular treatment, but they should provide treatment based on a case-by-case assessment of an inmate's medical needs by an appropriate provider familiar with the treatment of transgender individuals. Freeze-frame policies should be eliminated. The World Professional Association for Transgender Health (WPATH) has promoted treatment recommendations for transgender individuals, which should be considered by prison officials (though it is unclear if those standards are binding). *Druley v. Patton*, 601 F. App'x 632 (10th Cir. 2015).

In litigating these suits, the burden is on an inmate to prove that the medical treatment offered was medically inadequate and deliberately indifferent to his or her medical needs. Much discretion is given to correctional institutions in determining the treatment provided, as long as the treatment is medically sufficient. If reasonable minds could disagree on the necessary treatment, or if the treatment was merely negligent, then no constitutional claim exists. A finding of qualified immunity remains a possibility, but it is less likely to be a successful defense if this issue is analyzed under the general Eighth Amendment requirement to provide medical treatment.

Daily Needs of Transgender Inmates

Correctional facilities may receive requests from transgender inmates for female clothing or undergarments, to be permitted to wear makeup, or to have access to specific hygiene products. These cases are analyzed as either an Eighth Amendment or a Fourteenth Amendment Equal Protection issue. There is a split among the circuits about whether or not "transgender" is a suspect or a quasi-suspect class, with the majority of the courts finding that it is not. Those courts uphold the denial of these requests under a "rational basis" review, particularly when the requested items create security concerns. The few courts defining transgender as a "quasi-suspect class" have upheld these denials even under the intermediate scrutiny applied, provided that the denials are linked to a legitimate penological purpose. Consideration should be given to these requests when a request is part of a treatment prescribed by a medical provider.

Inmates may also request to be referred to by a name or a pronoun that reflects the gender with which they identify. The best defense to claims dealing with such a request is to state that this is, at best, non-actionable verbal harassment. *Stevens v. Williams*, 2008 WL 916991 (D. Or. 2008). Other courts have questioned whether there is any security purpose in the use of a particular first name or pronoun, especially since most corrections institutions use last names and ID numbers to identify inmates on prison records. *Konitzer v. Frank*, 711 F. Supp. 2d 874 (E.D. Wis. 2010). Under this line, you will need to explain any security issues or concerns created by using something other than a legal name. This defense is more difficult if officers use nicknames or street names to refer to other inmates. If there are no security concerns or issues raised, then an institution can refer to an inmate by the name and the pronouns that reflect the inmate's internal gender identity.

The Effect of the Prison Rape Elimination Act

The Prison Rape Elimination Act (PREA) provides specific protections to and duties toward transgender inmates. Housing, in particular, has experienced a huge shift. There is no *constitutional* right to be housed in a facility that corresponds to an inmate's gender identity, and courts have upheld housing based on biological sex. PREA, however, requires case-by-case determinations on appropriate housing with consideration given to an inmate's view regarding his or her safety. Segregated units can only be used if it is voluntarily chosen by an inmate, required by a court order, or imposed under the same conditions as those for protective custody of other vulnerable inmates.

PREA also places numerous limits on cross-gender interactions, including showering, dressing, and strip searches. The PREA Resource Center recommends three options for conducting transgender searches. Searches can be conducted only by medical staff or only by female staff, or an inmate can specify a preference for the gender of the staff performing a search. A clear policy should be adopted by a correctional facility, and the staff should be trained and prepared to conform to it. Note that PREA also prohibits strip searches for the sole purpose of determining an inmate's biological sex.

In addition to PREA limits, one district court was inclined to consider an Eighth Amendment privacy challenge to corrections officers of the gender opposite to that of an inmate's gender identity viewing the inmate while using the restroom. The court ultimately dismissed the claim, finding that the factual allegations were not stated with sufficient specificity to maintain the claim. *Collins v. Correct Care Solutions,* 2013 WL 2458502 (D. Kan. 2013). Again, a clear policy and guidance on these areas will help reduce potential litigation issues.

Transgender Employees in the Workplace

Four circuit courts have addressed transgender discrimination in the workplace since the U.S. Supreme Court issued the case that started it all, *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989). Although it's early days, some consistent legal issues and general principles have started to emerge.

Breaking Out of the Closet: The Case That Started It All

The main case cited for the development of transgender law did not involve transgender law. Rather, *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), addressed the issue of "traditional" gender discrimination. Hopkins alleged that her promotion to partner was delayed because she was not "feminine" enough. Specifically, she was told that she had a better chance of being made a partner if she "walk[ed] more femininely, talk[ed] more femininely, dress[ed] more femininely" and did things like "wear makeup, have her hair styled and wear jewelry." *Id.* at 1782. Hopkins filed suit under Title VII of the Civil Rights Act of 1964, alleging that she was subjected to gender discrimination.

Title VII provides that "it 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… sex…." However, "sex" is not defined within this statute. (It was only in 1983 that it was established that the term "sex" created protections for men!)

In affirming judgment for Hopkins, the U.S. Supreme Court confirmed that gender discrimination includes discrimination for failing to conform to the stereotypical idea of how a person of a particular gender should behave. *Id.* at 1791. And thus the door was opened for the law to develop in the area of transgender discrimination because a transgender individual may not fit into the stereotypical idea of how one of his or her biological or assigned sex should appear or behave.

Developing Case Law: Employees in the Workplace Post-*Price Waterhouse*

Since *Price Waterhouse*, the four circuit courts that have addressed transgender discrimination have made it clear that a transgender plaintiff may bring a claim based on a *Price Waterhouse* theory of failure to conform to a gender identity stereotype, though they have rejected the idea that transgender status itself is protected under Title VII (though this issue is currently being litigated by the U.S. Attorney's Office in a case filed against Southeastern Oklahoma State University). District courts in the Tenth Circuit have recognized the *Price Waterhouse* theory but have held that "gender stereotyping" does not include an individual of one gender affirmatively attempting to change gender and appearance. *Etsitty v. Utah Transit Authority*, 2005 WL 1505610 (D. Utah 2005). The Tenth Circuit Court of Appeals had the opportunity to address this issue, but it declined to do so. *Etsitty v. Utah Transit Authority,* 502 F.3d 1215 (10th Cir. 2007). The remaining circuit courts have not yet considered the issue, but guidance from the district courts seems to follow the *Price Waterhouse* gender-stereotyping theory.

The most prominent case extending *Price Waterhouse* to the transgender realm was *Smith v. Salem*, 378 F.3d 566 (6th Cir. 2004). Smith, who was born a male, worked as a lieutenant in the City of Salem Fire Department. After working for the fire department for about seven years, Smith was diagnosed with gender identity disorder and began "expressing a more feminine appearance on a full-time basis." Coworkers subsequently made comments that she was not "masculine enough," and Smith advised her supervisor of the diagnosis and recommended treatment. This information was provided to city officials who determined that Smith's employment should be terminated. It was decided that Smith would undergo a series of psychological evaluations, hoping that Smith would either resign or refuse to comply, after which the city could terminate her for insubordination. Smith learned of the plan and obtained legal counsel. Several days later, Smith was suspended for an alleged violation of city policy. Smith claimed that the suspension was retaliatory and appealed the suspension to the city's civil service commission. When the commission upheld the suspension, Smith filed a Title VII action in federal court, alleging that the city's actions constituted gender discrimination as defined by *Price Waterhouse*. The city moved to dismiss.

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The *Smith* court held that Smith stated a valid sex-stereotyping claim by sufficiently alleging that a failure to conform to stereotypes about how a man should look and behave was a driving force behind the defendants' actions. In denying the city's motion, the Sixth Circuit held that "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." *Id.* at 575. In issuing this decision, the Sixth Circuit paved the way for Title VII claims.

Employee's Failure to Conform to Sexual Stereotypes

Courts are careful to not allow plaintiffs to "bootstrap" a claim for discrimination based on transgender status, which is not currently a protected class. Merely disliking someone for his or her status as a transgender individual, or disagreeing with such a concept, is not a basis for a valid claim. In *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), Vickers was harassed because his co-workers believed him to be homosexual. This argument did not prove successful for Vickers; the court held that although people who are perceived as or identify as homosexuals are not barred from bringing Title VII claims, they must still allege that they did not conform to gender stereotypes in any observable way at work. Though the harassment was "unacceptable and repugnant" to the court, it did not fit within the protections of Title VII.

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Rather, to state an actionable Title VII claim, a plaintiff must identify evidence showing that an adverse employment action was motivated by his or her failure to conform to a stereotypical gender role. What constitutes a "failure to conform" is less clear. Gender stereotyping has been shown by the following:

- Comments that a preoperative male to female transgender individual lacked "command presence," should stop wearing makeup, and should appear more masculine. *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005);
- Refusing to refer to a person by his or her chosen name and stating that the person was "too much of a distraction." *Dawson v. H&H Electric*, 2015 WL 5437101 (E.D. Ark. 2015); and
- Stating that a biological male dressing as a female was inappropriate, unnatural, and unsettling and terminating the transgender employee based on the opinion that the behavior was inappropriate, disruptive, and immoral and made others uncomfortable. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

In contrast, statements requesting a female-identifying individual to "report [to work] as a male" and asking, "would it kill you to appear masculine for 8 hours," were determined to be comments related to the neutral workplace dress code policy and not stereotypical expectations of male behavior. *Creed v. Family Express*, 2007 WL 2265630 (N.D. Ind. 2007). The only distinctive factor here appears to be whether the comments and concerns are linked to a neutral company policy as opposed to general concerns over appearance and perception.

In addition to requiring evidence of gender stereotyping, at least one court requires an employee to present evidence that an employer is aware of the employee's transgender status if that status is not obvious. *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697 (8th Cir. 2012).

In litigating these claims, be careful to distinguish between claims of discrimination due to being a transgender individual (not actionable), from claims that an adverse action was due to a person not behaving in a way that was expected of a person based on biological sex (actionable).

Analysis of Transgender Employment Discrimination Cases

Gender stereotyping cases are analyzed under the familiar *McDonnell Douglas* framework in which a plaintiff may establish a prima facie case of discrimination by proving that he or she is a member of a protected class (in this case, it is a type of gender discrimination), is qualified for the position, suffered an adverse employment action, and was treated differently from similarly situated individuals outside of the protected class. Comparator employees appear to be either members of the opposite biological gender, or "gender conforming" employees. *Creed v. Family Express*, 2009 WL 35237 (N.D. Ind. 2009); *James v. Ranch Mart Hardware*, 881 F.Supp. 478 (D. Kan. 1995), *Parris v. Keystone Foods*, 959 F.Supp.2d 1291 (N.D. Ala. 2013). As the basis of a gender stereotyping claim is a failure to conform to the expectations of one's *biological* gender, it appears appropriate to use individuals of the identifying gender as comparators.

Cases can also be maintained based on direct evidence of discrimination or a mixed-motive analysis. An employer was denied summary judgment based on a mixed-motive analysis in a recent Eleventh Circuit decision. *Chavez v. Credit Nation Auto Sales, LLC*, 2016 WL 158820 (11th Cir. 2016). The employer had an admittedly legitimate, non-discriminatory basis for terminating the plaintiff (sleeping on the job); however, the court reversed summary judgment for the employer under a mixed-motive theory. The plaintiff testified that she been told not to wear a dress to and from work and not to talk about her transition. She had no past disciplinary history, but she was terminated three months after she announced her intended transition. In the same meeting during which she advised of her plans to transition, the vice president told the plaintiff that she was the best mechanic that they had. The timing of her termination, coupled with the comments and perceived change in treatment after the plaintiff announced her transition plans, was sufficient to show that her transgender status could have been a factor in the termination decision.

Use of Restrooms in the Workplace

One often discussed issue is restroom usage. Few courts have directly considered this issue. The Ninth Circuit upheld summary judgment in favor of an employer, which, citing security concerns, required

an employee to use restrooms associated with the employee's biological gender until after the employee underwent a sexual reassignment surgery. *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 324 F. App'x 492 (9th Cir. 2009). The Tenth Circuit reached the identical result, finding that the employer's stated concerns over potential liability arising from public restroom usage was a legitimate, non-discriminatory reason for the employee's termination. *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007). In that case, the court questioned whether restroom usage implicated a valid gender-stereotyping claim because requiring "employees [to] use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes." *Id.* at 1225.

In both of these situations, a legitimate basis unrelated to gender stereotyping was cited as the basis for the employer's decision. The current status of Title VII law appears to permit restroom usage based on biological sex for the purposes of defending against potential claims. However, the Occupational Safety and Health Administration (OSHA) requires employees to be granted access to restrooms based on an employee's stated gender identity. As such, advising clients on restroom assignments should be made with the OSHA requirements in mind.

Combining restroom usage and coworker complaints is the case of *Cruzan v. Special Sch. Dist. #1*, 294 F.3d 981 (8th Cir. 2002). In *Cruzan*, a female employee filed a complaint that alleged religious discrimination and a hostile work environment as a result of her employer's decision to allow a biologically male employee identifying as female to use the female restroom. The court found that the complaining employee did not suffer an adverse employment action as a result of the decision permitting the transgender employee to use the restroom of her declared gender identity. The court further held that the restroom usage did not create a hostile work environment; there was no evidence of inappropriate conduct in the restroom. Rather, the complaint was based solely on the transgender employee having access to the restroom.

This case provides some precedent that general complaints or beliefs of coworkers are insufficient bases upon which to make employment decisions, without specific, identifiable incidents or complaints. In other employment discrimination contexts, courts will often refuse to allow the discriminatory beliefs of one person to form the basis upon which to discriminate against another individual. Again, a careful distinction must be drawn between concerns over someone being transgendered (not actionable), and disliking someone for not behaving in a certain way based on beliefs about how a male or female should behave (actionable). This can be a razor's edge, so the most solid response is to investigate each particular issue and have a non-gender-based reason for a particular employment action.

Employers' Right to Request Medical Evidence

Several employers have inquired whether or not they can request evidence of an employee's transgender status or progress through sexual reassignment surgery before permitting the employee access to gender-specific facilities. The courts have not yet addressed this issue. OSHA's best practices prohibit requesting medical or legal evidence of gender identity for facility access. The ADA governs all employer requests for medical information and limits such requests to requests that are "job related and consistent with business necessity." Unless gender is a specific requirement for a job, it is doubtful that such a request would meet the ADA's requirements. An employer can potentially consider other alternatives to assess the genuineness of an employee's gender identity statement, such as whether the employee appears as the opposite gender outside of work. It may also be permissible to have a transitional period to allow everyone to adjust to the new situation.

State-Specific Laws

As of 2015, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Utah, Vermont, Washington, and the District of Columbia had all enacted statewide nondiscrimination laws that cover both sexual orientation and gender identity.

Transgender Individuals Seeking Housing

The Department of Housing and Urban Development (HUD) prohibits discrimination based on a failure to conform to gender stereotypes under the Fair Housing Act. If an entity receives HUD funding or has loans through or is insured by the Federal Housing Administration, then it is subject to HUD's Equal Access Rule and regulations, which protect transgender individuals. Prohibited discrimination includes refusing to admit a transgender individual into a homeless shelter; stating that housing is unavailable if it is available; setting different terms, conditions, or privileges for the sale or rental of a unit; providing different housing services or facilities; denying a mortgage loan; imposing different terms or conditions on a mortgage loan; denying property insurance; conducting property appraisals "in a discriminatory manner"; or harassing, coercing, intimidating, or interfering with someone exercising his or her fair housing rights.

The push from the majority of administrative agencies, even if not yet widely accepted by the courts, is to make decisions based upon gender identity. This push is resulting in numerous administrative investigations and lawsuits.

Clients should not have policies restricting transgender individuals from applying for or receiving housing. They should not inquire into someone's status as a trans-

gender individual during the application process, and this inquiry is expressly forbidden for anyone that receives federal funding. Homeless shelters can ask for gender identity if they are uncertain about appropriate housing; however, a housing provider cannot demand medical or legal evidence of gender.

Generally, the law is developing toward providing protections against differing treatment and recognizing individuals by their declared gender identity rather than biological gender, unless doing either has a good basis in more than a metaphysical objection.

Transgender Students in an Educational Setting

Arkansas, California, Connecticut, Delaware, Hawai'i, Iowa, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon, Vermont, and Washington have enacted laws prohibiting harassment or discrimination against transgender students enrolled in public schools. Colorado, Illinois, Maine, Nevada, New Jersey, and the District of Columbia have enacted laws prohibiting discrimination and harassment against transgender students enrolled in both public schools and private, non-religious schools.

Title IX of the Education Amendments Act of 1972 prohibits gender discrimination in schools that receive federal funding. Both the U.S. Department of Education and the U.S. Department of Justice take the position that "gender" includes gender identity or the failure to conform to stereotypical notions of masculinity or femininity, and they are taking steps to further that interpretation. A 2013 settlement between the U.S. Department of Education and a California school district required a student to be treated based upon his declared gender identity for all gender-specific purposes, including restroom usage. Administrative decisions from similar agencies follow suit.

In contrast, district courts in the Third and the Fourth Circuits have held that under Title IX, restroom and locker room usage can be assigned based upon "sex," as opposed to "gender," as long as the restrooms are of equal quality. It is unclear at this point whether "sex" is limited to biological sex, or whether it can be altered by reassignment surgery. In one district court case, the school was willing to allow the plaintiff to use the locker room of his gender identity sex as long as he provided a court order or a birth certificate listing his sex identity.

The push from the majority of administrative agencies, even if not yet widely accepted by the courts, is to make decisions based upon gender identity. This push is resulting in numerous administrative investigations and lawsuits. Complaints involving these issues are often initially addressed by the administrative agency itself, whose viewpoint is already clearly known.

Given the lack of clear guidance from the courts (and the friction between the administrative decisions and the scarce case law), it is difficult to advise clients on a "safe" policy. As with the other settings addressed, clients should have a clear basis for any decisions made not to treat a student based on gender identity. General unspecified or moral objections by themselves will likely be insufficient bases upon which to classify a student by biological gender. Rather, a school will likely need to show a particularized issue that merits its decision, *e.g.*, documented safety concerns surrounding a transgender student's use of a particular restroom or locker room or complaints of improper or inappropriate behavior.

Any decision is likely to meet critics. Decisions based on biological gender will face challenge by the administrative agencies and liberal courts. Decisions based on gender identity will face challenges by the public and conservative courts. Providing for or requiring transgender individuals to use a separate, individual restroom may result in those individuals feeling stigmatized, resulting in litigation. Counsel your clients on the risks involved in either decision so that they can make the most informed decision possible until clearer guidance is received from the courts, which will likely be coming in the next few years.

The California School Boards Association has developed a "model" anti-discrimination policy for gender identity. This policy may be a starting point for assisting educational clients with developing their own policies and addressing needs of transgender students. In addition, educational sessions can be held with students, faculty and members of the public to address their concerns.

Criminal Protections

Federal law prohibits willfully causing bodily injury or attempting to cause bodily injury through certain means to any person because of that individual's gender identity in circumstances involving travel across state lines or borders or using a channel, facility, or instrumentality of interstate or foreign commerce, or other limited circumstances. 18 U.S.C. §249(a)(2). This falls under the title "Hate crime acts." We were unable to locate any cases decided under this statute that would provide guidance on how it will be applied or interpreted. Challenges to the statute's constitutionality were raised and rejected.

Conclusion

Transgender law is still developing through the federal courts. The issues presented raise unique concerns addressing day-to-day issues. Generally, the law is developing toward providing protections against differing treatment and recognizing individuals by their declared gender identity rather than biological gender, unless doing either has a good basis in more than a metaphysical objection. While this does not mean that a transgender individual is always to be granted his or her request, what the law requires overall is consideration of the specific request and well-reasoned and supported bases for any decisions to treat an individual based upon biological sex rather than gender identity. FD