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Legal Brief

Legal Considerations: Pronoun Use



Sarah Campau
University of Arkansas



Peggy Schaefer-Whitby
University of Arkansas

Since the 2020 election cycle, there has been a significant increase in legislation across the United States targeting transgender youth. The existence of seemingly contrary laws, combined with a very public cultural debate, can make it difficult for educators to understand how the law and the public debate affects students. In addition, a series of recently passed state laws, likely destined for the U.S. Supreme Court, make it difficult to anticipate the impacts in public education settings. In this legal brief, we will take a closer look at pronoun use in the classroom through the lens of Title IX (Education Amendments Act of 1972, 2018) and the current state legislation.

Title IX: What Is "Sex"?

When examining the laws concerning pronoun use and teacher responsibilities, the first place to look is Title IX. Since its passing in 1972, Title IX has established a federal standard for anti-discrimination in education on the basis of sex.

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

The legal debate about Title IX, pronoun use, and gender identity hinges on the definition of sex, although gender identity and sex should not be confused. In other words, does the legal definition of sex include a student's gender identity, or is it strictly interpreted using a person's biological characteristics? While cases await challenge in the U.S. Supreme Court, lower

courts have issued rulings in both the affirmative and in disension of transgender rights for students in a school setting.

In 2016, the Office of Civil Rights (OCR) within the U.S. Department of Education released a "Dear Colleague" Letter (DCL; 2016) that was intended to help legally guide and support interpretation of Title IX by stating that schools generally have to treat transgender students in accordance with their gender identity. This issuance sparked further debate through legal cases (e.g., *Price-Waterhouse v. Hopkins*, 1989) on the authority of the DCL and whether "sex-stereotyping" protects gender identity. To further complicate defining sex within Title IX, the Trump administration rescinded the DCL, which removed protection for transgender students and reignited previous legal disputes.

Solutions outside of the courtroom could be addressed at the federal level. Congress could pass a law protecting all gender-identity-based discrimination, or could delegate authority to the OCR to make a determination given the ability to speak and interpret with the force of the law on debated statutes. The Department of Education and Department of Justice also have the ability to issue memorandums or additional DCLs protecting transgender students from harassment and discrimination. This would guarantee temporary protections, but a back-and-forth between political administrations does not provide lasting protections for transgender students. Ultimately, there has yet to be a clear determination if Title IX protects a student's right to participate in school aligned with their gender identity.

First Amendment

Pronouns are, at one of their most basic definitions, speech. While this seems like a gross oversimplification of the concept, this challenges the court to examine pronouns through the lens of free speech, as opposed to as an identity issue. If a teacher refuses to use a student's identified pronouns, is the school allowed to fire them, or is their speech protected by the First Amendment? If an educator chooses to call a student only by the pronouns that match their gender, could the teacher's speech be considered defamation and therefore not protected by the First Amendment?

There are a series of cases being argued in the courts to determine whether speech is exempt from the legal protections of the First Amendment if a person knowingly uses incorrect pronouns. Most recently, the Sixth Circuit U.S. Court of Appeals ruled in *Meriwether v. Hartop et al.* (2021) that a professor who was fired after refusing to use a student's identified pronouns can pursue a lawsuit against the school for wrongful termination. This ruling sides with advocates for expansive protections of free speech, particularly citing precedence that schools would be able to shape ideological conformity if professors feared retribution for speech. The case is being closely watched by educators, First Amendment advocates, and LGBTQ+ activists as it continues through the appeals process.

New Wave of State Legislation

In 2021 there have been a record number of attempts to pass anti-transgender legislation, including 82 bills introduced in state legislatures across the country in the first three months of the year (Ronan, 2021). The proposed bills, if successfully passed, will directly affect children with the creation of regulations regarding name use, bans on child athletes competing in team sports outside of their assigned sex, restricted access to bathrooms, and prohibitions on gender-affirming medical care. In contrast, there are local areas attempting to pass and defend strengthened protections for students (i.e., N.Y.C. Admin. Code § 8-102(23), 2002).

A large portion of the debate centers on who has the right to alter and interpret the rights of transgender students in the schools. Historically, states have independence to make decisions on topics not yet defined or in the legal authority of the

federal government. Since schools are federally funded programs, they are required to follow national regulations and guidance from federal government agencies as reflected by Title IX and the IDEA.

What Can I Do?

Much like other historic social debates within the court systems, there is a back-and-forth process as cases are debated through appellate and higher courts or wait for congressional intervention. There is no clear legal answer regarding protections for transgender students or regulation of school officials. Ambiguity creates scenarios in which students are treated differently for their gender identity based on where they live within the United States. This can put schools and teachers in a difficult position when there is no clear guidance. What is clear is that educators have a proven ability to help their transgender students by being accepting and creating a safe space in the classroom for them. ■

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