

What to ask? What to tell!

How the 2020 Census affects GLBTQ communities

By Martricia O'Donnell McLaughlin, Esq.

The 2020 United States Census. It is easy to let the mind float over these words, making a mental note to be on the lookout for the forms when they arrive. Or, for those concerned with governmental collection of private data, the mind might feel a touch of distaste for the counting and classifying of the population.

Mandated by law

The decennial exercise of census taking is prescribed by the Constitution itself, yet it has tangible, practical and far-reaching consequences in modern-day America, dominated as it is by technology and “big data.”

Article I of the United States Constitution states: “Representatives and direct Taxes shall be apportioned among the several states ... according to their respective Numbers ... The actual Enumeration shall be made within three Years after the first meeting of the Congress of the United States, and within every subsequent Term of ten Years.”

Why the Census matters

The census matters in some very practical ways. Census data collected determines how billions of federal dollars will be spent. The allocation of congressional and electoral college seats



is affected by census data. Census data is used by state and local governments, businesses and non-profit organizations in decision making and priority setting. The census is also used to project an image of who Americans are, what our priorities are, what communities need, and who should have a voice. Laws can follow census data by enshrining the image created by the data collected.

Census Bureau burdens

The logistics of census taking are massive. Adequate funding of the Census Bureau is necessary in order that the census itself has integrity as a tool for social planning and development. Hiring and training employees who will be deployed throughout the country is one facet. Developing appropriate training is another aspect of mobilization for the census as technological

changes over the course of a decade have been monumental. Facilitating the transport of census workers is critical to ensure that all areas of the nation are counted.

Planning and testing

The decennial census is not just one major but fixed event. Rather, the decennial census is a complex exercise that requires substantial effort by social scientists, scholars, statisticians, politicians, lawyers, linguists, citizens and others to ensure that the census forms circulated to the population serve the intended purposes. Planning for the census of 2020 began years ago. Further, the Census Bureau actually “tests” questions. For example, as early as 2015, the bureau contacted 1.2 million U.S. households for a test census, testing how respondents self-identified when responding to questions that examined how differential language targeting race and national origin created different results. This type of testing highlights the importance of the actual wording of the census questions, as well as the significance of the quality, effectiveness and type of outreach to community groups to generate participation in census response. These “in-between years” testing efforts have his-

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Committee Chair Chatter

Jerry Shoemaker, Esq.

According to the National Coalition of Anti-Violence Programs, 2017 was the deadliest on record for the LGBTQ community.

There was an 86 percent increase in violent homicides related to hate crimes. In addition to hate that has turned physical, our community is also under attack in terms of legal protections. Bermuda became the first nation to repeal marriage equality, after passing it, for its citizens. On the flip side, marriage equality saw a big victory in Australia. How can it be that we are taking steps back in time, and what can you do about it?

There are few ways you can help. First, you can get involved, whether it is with our committee or an outside organization. Getting involved helps you stay informed. Information is knowledge, and knowledge is power. That

saying may be trite, but our community must be at the forefront of LGBTQ issues. Otherwise, someone else is driving the narrative.

Second, you can stay informed. A multitude of legislation and cases are pending relative to our community. While you do hear about some of it on our bimonthly conference calls, there is much more to soak up. Having this information may help you change someone's mind about a particular issue affecting the LGBTQ community or about the community itself. So, it's important to stay informed and to correct misinformation being spread.

While President Trump did pledge to take steps to protect the LGBTQ community during his convention speech, he has done little, if anything, to advance protections for the community. If anything, his positions have hurt. The fact that people now feel unrestrained in making derogatory statements regarding a person's race, gender and sexual identity tell me we are in for a few more tough years. Our community will remain resilient and we will remain involved. Please do your part!

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Historically been important to maximize inclusion of historically "hard to reach" populations such as the poor, homeless, immigrants and others who may resist "being counted." Revising the language and nature of questions is also necessary as society evolves in order that the census data reflects the reality of our society. For example, in 1940 the concept of "female heads of households" as a major constituent part of our society would have likely seemed outlandish. Such households with female heads are everywhere today, in reality and in our cultural depictions of ourselves through literature, art, film and song. In 2000, questions concerning "households with same-sex spouses" would have seemed inappropriate, given DOMA as federal law. Such data is important today, one

could argue, since in law and fact our communities present a diversity of households.

The importance of language

The appropriate function of a census is a matter of considerable debate among the various disciplines referred to above. The politics of supporting or resisting the completion of census forms is complex.

During the last decade, the LGBTQ community, hereinafter also referred to as SGM² (sexual and gender minorities), has in the United States, enjoyed greater cultural visibility and engaged in political activism. The recognition of same-sex marriage and family rights, greater public recognition of transgender populations and a growing discourse concerning "non-conforming" sexual expression, some argue, compels the collection of population data that

includes information designed to promote the well-being of these families and communities. Others suggest that despite advances in SGM civil rights, a strong backlash festers that would seek to reverse or curtail progress. As such, some argue that the collection of data about SGM communities by the government should be approached with caution.

Underlying this debate is a larger political and philosophical question concerning the extent to which data collection tools such as the census actually construct "identity" and whether the data gained serve public policy development and create social consequences that are helpful to SGM.

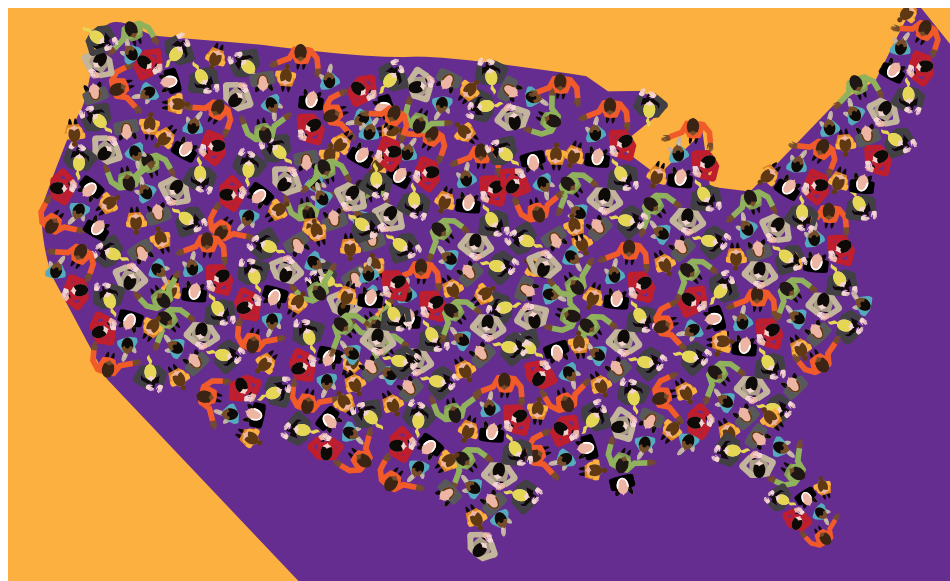
Those who support government data collection, or who recognize such

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activity as a necessary and inevitable function of the modern state, argue that in order to understand the diverse needs of SGM populations, more representative and better-quality data need to be collected. A review of the data available on a federal level has revealed a lack of important data points and inconsistencies and deficiencies across governmental departments in terms of the methodologies utilized. The federal government has taken several steps to coordinate data collection efforts across its many departments. The Office of Management and Budget (OMB) convened the Federal Interagency Working Group on Measuring Sexual Orientation and Gender Identity (SOGI) to begin addressing the dearth of data for these populations and the surrounding methodological issues in collecting such data. Several key concepts are central to discussions of SOGI, including sex, gender, transgender and sexual orientation. Terms related to these concepts, such as lesbian, gay, bisexual and transgender (LGBT), may have more than one meaning based on social context. The working group reached the determination that both the purpose of the survey and the specific dimension of SOGI to be measured are important when collecting data on SGM communities. The same working group arrived at a sophisticated understanding of the complexities of the language for describing SGM, noting, for example, that the identification of same-sex households is not a direct measure of SOGI for the individuals in those households; that, generally speaking, the term sex refers to the biological characteristics that are used to cat-



egorize individuals as male, female or intersex; that the term gender refers to “the socially constructed characteristics of women and men—such as norms, roles, and relationships of and between groups of women and men” (WHO, 2016).

This important discussion and critical analysis, conducted to enrich our understanding and representation of ourselves, our families, our communities and our government is, however, vulnerable to attacks of overbaked “political correctness” in a nation where fundamental debate still burns on such basic matters as to how, whether and with what language birth certificates should record the sex of an infant.

Why count?

Even before the beginning of the Trump Administration, which has been accused of attempting to exclude LGBTQ data from federal data collection, a need was identified to mandate LGBT data inclusion. HR5373, the LGBT Data Inclusion Act of 2016, was introduced by Rep. Raúl M. Grijalva and supported by the Congressional

LGBT Equality Caucus, as well as over 31 prominent civil rights organizations, including the Human Rights Campaign and the National Center for Transgender Equality. The bill was motivated by a finding that LGBT people are “generally invisible” in federal surveys and face “significant disparities in nearly all aspects of life, from employment and healthcare to homelessness.” The bill was reintroduced in July 2017 in both the House and the Senate (Sen T. Baldwin, D, WI) with many outside endorsements and the co-sponsorship of 94 legislators. Concern about the issue heightened after the Department of Health and Human Services Administration on Community Living proposed removing a question relating to sexual orientation on the 2017 National Survey of Older American participants, as well as attempting to eliminate a plan to collect data on gender identity and sexual orientation from the American Community Survey, which is conducted by the Census Bureau. LGQBT advocates

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identified these actions as an attempt to “erase” LGBTQ people from federal data and disrupt programs and services on which LGBTQ people rely.

The bill specifically makes responses to any relevant questions voluntary, renders it unlawful to penalize false responses and aims to protect individuals from being adversely affected by any data collected. The bill has not passed.

Activists in favor of the collection of data on SGM by the government argue that SGM can benefit by the surveys. As to inclusion of questions on the census, the argument is that questions help:

The Census Bureau understands how best to reach communities that are historically undercounted. The Census drives federal funding and the allocation of seats in Congress,” said Meghan Maury, policy director for the National LGBTQ Task Force. “Not counting LGBTQ people means less money for social programs and less democratic representation, and that’s just not fair.”

The hope is that greater visibility will create better funding for LGBT health initiatives, for example, anti-bullying campaigns, and shelters for queer homeless youth. These advocates also suggest that better census data would underscore the importance of equality and inclusion nationwide.

Why not count

Other activists do not support the inclusion of questions about “sexual orientation” or “gender identity.” Some have identified an increased level of mistrust of any census at all for anyone.

Some consider the relationship

between the census and funding for communities a fraught and imperfect marriage. Conservatives who do not support the census as a methodology determining the direction of funding argue against inclusion of LGBTQ data. Fiscal conservatives, who would curtail public spending on public health and welfare needs, argue that collecting data on the size of the LGBTQ population will impact spending decisions for such things as healthcare and antibullying programs, but that such decisions should not be made by demographics. The argument is that the census data showing that x percent of the population in an area is LGBTQ does not mean that that population has a demonstrated need for services.

Professor Roberto Suro (Annenberg School of Journalism, University of Southern California) has identified a concern that in this age of technology and routine data collection, the U.S. census is being financially inefficient, with a drop in the mail-back participation from approximately 80 percent in 1970 to 65 percent in 2000. Further, the current administration has committed to keep the budget for the 2020 census the same as that in 2010, not adjusting for inflation.

Others identify an emergent politicization of the census, as seen, for example, in opposition to counting non-legal residents and suggested boycotts in 2010 by some minorities, who claimed they were historically undercounted.

Professor Sunshine Hillygus (political science, Duke University) affirms a historical record claims of undercounting racial minorities. She points to the experience of the draft lists generated for World War II, which exposed gross

undercounting of Black Americans:

Black Americans were four times as likely not to be counted as white males. And this became obvious once we saw the draft numbers.

And over time, that undercount worsened, and it became embroiled in minority politics in the sense that because wealth and power are related to census numbers, you want to get an accurate count. But it also became clear from the two political parties that if you were to try and adjust numbers, that it might have disproportionate advantages for one side

With some people observing increased hostility to SGM in particular locations, there are objections to the 2020 census because of the use of the handheld computers and the use of GPS. The concern is one of privacy and a sense of vulnerability, with the federal government seen as gaining “a tag” on individual households. Professor Hillygus makes the distinction between a libertarian view, “how and where I live is not the government’s business,” and a more personal privacy concern, as when undocumented residents fear that they may face retaliation, or when racial, ethnic, religious, or sexual or gender minorities fear harm.

The census assumes a populace literate in the English language, which is another argument presented for not contributing to what is seen as a biased database.

The population resisting compliance with census law presents an insoluble dilemma: vulnerability drives the urge for anonymity. (The state was able to locate Japanese residents during World War II to confine them to desert camps, because it knew where

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these residents live.) And yet, by not being counted, LGBTQ individuals remain susceptible to harm.

Conclusion

Completing the census is a legal requirement, although penalties are rarely, if ever, enforced. Although the census barely enters our consciousness in the decade between the actual counting, it is a very important instrument in American life, dispensing political power and affecting economic viability and civil rights, such as voting. The failure to count SGM is a critical breakdown of civil rights. Adding appropriate questions about the LGBTQ population, how LGBTQ households function and what their needs and concerns are is as vital, from a civil rights standpoint, as the “coming out” of any individual to claim the dignity in life that is their due. In an age of divisive civil discourse, concerns about the safety and protection of LGBTQ and other groups need to be heard.

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Martricia O'Donnell McLaughlin has practiced law in Northampton and surrounding counties since 1979 in the general practice firm of McLaughlin and

Glazer. Currently, Martricia concentrates her legal practice in criminal law and appellate advocacy. She is also a certified mediator concentrating in family and elder issues.



Recognition, Respect, Recourse: Three Rs for Transgender Students

By Mária Zulick Nucci, Esq.

“**R**eadin’, ‘ritin’ an’ ‘rithmetic” is the old “three Rs” cliché for fundamental education. For transgender students, the three Rs might be better designated as recognition, respect and recourse, a course load, as it were, that is sometimes problematic in the current legal and political environment. Although the general news media frequently frames the issue as one of restroom access, for example, reporting on state and local “bathroom bills,” as one federal appellate judge has stated, more than that is involved. Recent legal developments provide both bad and good news for students and their families, nationwide and in Pennsylvania.

Federal administrative action

On Feb. 12, 2018, the U.S. Department of Education (USDOE) acknowledged that it would no longer act on civil rights complaints by trans-

gender students regarding restroom access.^{1,2}

This comes approximately one year after USDOE and the U.S. Department of Justice (USDOJ) withdrew Obama Administration guidance relating to transgender students.

On March 3, 2016, the Obama Administration, USDOE and USDOJ published a Dear Colleague Letter on Transgender Students, which the agencies described as “*significant guidance*.” (Emphasis in original).³ The letter was directed to schools governed by Title IX of the Educational Amendments of 1972 and its implementing regulations, for schools receiving federal financial assistance. It set forth that the agencies treated a student’s gender identity as his or her “sex” under Title IX and the regulations, and set forth how to address harassment and hostile environ-

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ment claims, students' names, school facilities, athletics, single-sex classes or activities, housing and overnight accommodations, privacy and student records.

On Feb. 22, 2017, under the new Administration, USDOE and USDOJ issued a Dear Colleague Letter rescinding and withdrawing this 2016 significant guidance, disagreeing with their predecessors' interpretation of "sex" under Title IX and the regulations and asserting "due regard for the primary role of the States and local school districts in establishing educational policy." It also withdrew a related Jan. 15, 2015, opinion letter, which stated that USDOE's Office of Civil Rights (OCR) "generally" treats transgender students according to their gender identity.^{4, 5}

Thereafter, on June 6, 2017, OCR issued Instructions to the Field re Complaints Involving Transgender Students.⁶ These instructions cited the withdrawal of the 2016 Dear Colleague Letter and the U.S. Supreme Court's March 6, 2017 ruling in *Gloucester County School Board v. G.G.*, in light of the February 22 Dear Colleague Letter. They stated that the withdrawal did not leave transgender students without protection and that schools were to rely on Title IX and its regulations. OCR could assert subject-matter jurisdiction if certain conditions and five criteria were met. The instructions also included suggested text which "could be" used in a letter of dismissal of a case or complaint – but no text for use if a case



or complaint were accepted or resolved in a student's favor.

Ten days later, the U.S. Commission on Civil Rights published a letter expressing concern over the administration's record and actions regarding enforcement of civil rights laws.⁷

Exercising their "primary role" regarding school matters, Pennsylvania's Gov. Tom Wolf promptly responded to the administration's actions in a statement setting forth his position on a student's right to safety at school.⁸ Similarly, Montgomery County announced that will not comply with the new federal policy, but will retain its own policies to protect students.⁹

Grimm, Evancho and Doe

Recent judicial decisions also show the continuing debate over students' rights, both transgender and not, under federal and state constitutional, statutory and common law. Regardless of the 2017 letter and 2018 statement, courts have provided recourse to transgender students under the Equal Protection Clause of the Fourteenth Amendment.

In perhaps the best-known case, the aforesaid *G.G. v. Gloucester County*

School Board (caption changed to reflect the appellate status of the parties), Gavin Grimm was a transgender teenage boy who wished to use the boys' restroom at his high school. When he was denied access, he filed suit, making claims under the Equal Protection Clause and Title IX and requesting a preliminary injunction for restroom use while the suit was pending. The district court dismissed his Title IX claim and denied his injunction request. The Fourth Circuit found that the district court had not accorded appropriate deference to the USDOE regulations regarding Title IX and had used the wrong evidentiary standard preliminary injunctions. Under Title IX, 20 U.S.C. §1681(a), there is to be no discrimination "on the basis of sex" in educational programs or activities receiving federal funds. One of its implementing regulations, 34 C.F.R. §106.33, allows separate restrooms, locker rooms and showers, if they are "comparable."

The Fourth Circuit also noted the 2015 opinion letter, that OCR "generally" treats students according to their gender identity. It recognized the

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privacy interests of students of both biological genders and that a school may provide individual-user facilities, noting that Gavin only wanted restroom access. The case was thus distinguishable from *Johnston v. University of Pittsburgh*, 97 F.Supp.3d 657 (W.D.Pa. 2015), where a student wanted (and, in fact, had had) access to other facilities and activities, but the district court there dismissed his equal protection, Title IX, retaliation and state statutory and common-law claims. The Fourth Circuit noted that the *Johnston* Court had not considered the (Obama Administration) USDOE interpretation of §106.33. A court is to defer to a federal agency's interpretation of an ambiguous regulation, under *Auer v. Robbins*, 519 U.S. 452 (1997), giving it controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or governing statute.

Here, §106.33 was clear that "sex" means biological gender, but that did not resolve the issue of its application to transgender students. The Fourth Circuit found USDOE's interpretation of §106.33 entitled to *Auer* deference and stated that preliminary injunction requests were to be evaluated under less strict evidentiary rules, where the district court had excluded some of Gavin's proffered evidence on hearsay grounds. *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir., 2016).

On remand, the district court granted the preliminary injunction, and the school board petitioned for certiorari



to the U.S. Supreme Court. That court vacated and remanded, *Gloucester County School Board v. G.G.*, 137 S.Ct. 1239 (Memorandum, March 6, 2017), for reconsideration in light of the 2017 Dear Colleague Letter. The Fourth Circuit then vacated the preliminary injunction, which action was unopposed, and remanded. 853 F.3d 729 (2017). Concurring, Senior Circuit Judge Davis observed:

G.G.'s case is about much more than bathrooms. It's about a boy asking his school to treat him just like any other boy. It's about protecting the rights of transgender people in public spaces and not forcing them to exist on the margins. It's about governmental validation of the existence and experiences of transgender people, as well as the simple recognition of their humanity. His case is part of a larger movement that is redefining and broadening the scope of civil and human rights so that they extend to a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected. *Id.* at 730.

The case came back to the Fourth Circuit, which again noted the 2017 Dear Colleague Letter and remanded again, for consideration whether the case was moot because Gavin had

graduated. *Grimm v. Gloucester County School Board*, 869 F.3d 286 (4th Cir., 2017). Given the length of litigation, particularly where there are appeals and remands, one might surmise that an argument against mootness, on the principle of "capable of repetition, but evading review," dating to *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911), could well be fashioned.

Federal courts sitting in Pennsylvania also recently addressed transgender students' rights. In *Evancho v. Pine-Richland School District*, 237 F.Supp.3d 267 (W.D.Pa. 2017), decided five days after the February 2017 Dear Colleague Letter, three transgender high school seniors sought a preliminary injunction allowing them to use restrooms based on their gender identity, which they were able to do before the district changed policy. They asked whether the district acted according to federal law when it limited restroom use to single-user facilities or to those matching a student's "assigned" (biological) sex, under the Equal Protection Clause and Title IX.

The parties agreed the restrooms were well-maintained and provided privacy. Until early 2016, there was no issue with the plaintiffs' attendance and participation in high school life. Apparently, however, one student's parent questioned the restroom use. The matter was discussed at several regular public school board meetings and special board committee meetings, including presentations by staff at Pittsburgh Children's Hospital. The board then approved Resolution 2, reversing policy and changing to a policy of use *via* single-user facilities or by biological sex, and not by gender identity, with further study and policy development,

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which was not yet done.

The court noted that there was no showing of actual threats to other students, interference with school operations, nor consideration of any risk of harm to the plaintiff students. To the contrary, the plaintiffs argued that, since the public discussions, they were marginalized (echoing Senior Circuit Judge Davis' observation in *Grimm*), stigmatized and subjected to "untoward or harassing conduct by some other students." *Id.* at 282. They were also now subject to discipline if they used restrooms based on their gender identity.

The court found that, based on the extensive record, the plaintiffs were reasonably likely to succeed on the merits of their Equal Protection claim, but not their Title IX claim. It issued the preliminary injunction to restore the pre-Resolution 2 policy and denied the defendants' motion to dismiss without prejudice.

On the Equal Protection claim, the court considered transgender identity as a "new" classification and set forth the elements for the intermediate standard of heightened scrutiny:

- 1) a class historically subject to discrimination;
- 2) a defining characteristic with no bearing on how the person can perform or contribute to society;
- 3) an obvious, immutable or distinguishing characteristic making them a discrete group; and
- 4) status as a minority or politically powerless group.

Applying these criteria, and reviewing the record, including the parties'

agreement that less than 1 percent of the American population is transgender, the court found that intermediate scrutiny applied. *Id.* at 288.

The district thus had the burden to show that Resolution 2 was substantially related to achieving an important governmental objective or interest, which was genuine, not hypothesis, not invented after litigation commenced and not reliant upon an overbroad generalization. The defendants had not shown this:

- 1) there was no showing of threats, disruption or privacy violation, which were already addressed by the restrooms' design;
- 2) the existing student code of conduct and Pennsylvania law were available to address any "Peeping Tom" incidents;
- 3) the plaintiffs showed "actual, immediate and irreparable harm" from Resolution 2;
- 4) their disparate treatment was a stigma; and
- 5) there was an inference of animosity from others.

Id. at 294, citing *Romer v. Evans*, 517 U.S. 620, 621, 116 S.Ct. 1620 (1996) and *Heckler v. Mathews*, 465 U.S. 728, 739, 104 S.Ct. 1387 (1984).

On the Title IX claim, the court observed:

In light of the most recent, broader readings of the term "sex" both in the context of Title IX claims, *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 16-943, 2016 WL 5239829 (E. D. Wisc. Sept. 22, 2016); *Highland*; *Carcaño*; see also *Corral v. UNO Charter Sch. Network, Inc.*, 2013 WL 1855824, at *5 (N.D.Ill. May 1, 2013); *K.S. v. Nw. Indep. Sch. Dist.*, 2015

WL 9319982 (E.D. Tex. Dec. 23, 2015), and as noted above by courts considering that term in relation to the corollary anti-discrimination provisions of Title VII, the court concludes that the plaintiffs have demonstrated a reasonable likelihood of showing that Title IX's prohibition of sex discrimination includes discrimination as to transgender individuals based on their transgender status and gender identity.

237 F.Supp.3d at 297.

However, the court had to consider the 2017 Dear Colleague Letter, and the continuing activity in *Grimm v. Gloucester County School Board*:

Of note, the 2017 Guidance did not propound any 'new' or different interpretation of Title IX or the Regulation, nor did the 2017 Guidance affirmatively contradict the 2015 and 2016 Guidance documents. It instead appears to have generated an interpretive vacuum pending further consideration by those federal agencies of the legal issues involved in such matters. 237 F.Supp.3d at 298.

With the Title IX and federal regulatory issues unresolved, the court could not conclude that the plaintiffs were likely to succeed on the merits of that claim.

Evancho settled in August 2017. In announcing the settlement, the district stated that "any student across the district may access restrooms based upon his or her consistently and uniformly asserted gender identity" or may use a single-person restroom, essentially returning its schools to the pre-Resolution 2 policy.¹⁰

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More recently, in *Doe v. Boyertown Area School District*, Civil Action No. 17-1249 (E.D.Pa., filed August 25, 2017), non-transgender students sought a preliminary injunction prohibiting the district from maintaining its policy of restroom and locker room use based on gender identity. They described transgender students as “members of the opposite sex” and alleged the policy violated their Fourteenth Amendment right to privacy, their Title IX right of access to educational opportunities, by creating a hostile environment, and their Pennsylvania common-law right to privacy. The court made 417 findings of fact and concluded that the plaintiffs were not entitled to the injunction, where they had not shown likely success on the merits nor irreparable harm.

Student requests to use facilities based on their gender identity were granted after discussions and review. The court cited *Students and Parents for Privacy v. United States*, 2016 WL 6134121 (N.D.Ill. 2016), where a report and recommendation favored denial of a preliminary injunction to stop policies allowing gender identity in restroom and locker room use, but instead requiring segregation based on physical biology, as there was no constitutional right, invoking “privacy,” not to share facilities with transgender students. To the extent the district’s policy infringed on privacy, it was narrowly tailored to serve a compelling state interest: non-discrimination against transgender students. The court’s findings included:

- 1) the 2016 Dear Colleague Letter as “significant guidance”;
- 2) the 2017 letter withdrawing it but noting “the primary role of the States and local school districts”;
- 3) the district had acted pursuant to its own policy and believed it consistent with policies of the Pennsylvania School Boards Association, the National School Boards Association, the opinion of the district solicitor and district beliefs regarding fair and equitable treatment of students; and
- 4) despite the 2017 Dear Colleague Letter, cases involving transgender students were decided under the Equal Protection Clause and Title IX, such as *Whitaker* and *Evancho*, *supra*.

In *Doe*, district policy was narrowly tailored: students were not coerced to use multi-user facilities; there was a consultation and permission process; facilities contained privacy protections; and alternate single-user facilities were available.

On the Title IX hostile environment claim, the court again cited *Students and Parents for Privacy*, where the magistrate found no likelihood of success on the merits for a Title IX sexual harassment hostile environment claim. No student was “targeted” based on sex, and boys’ and girls’ facilities were treated equally. The plaintiffs’ argument was, in essence, that the presence of “members of the opposite sex” created a hostile environment. The court noted that there was no evidence that transgender students had committed any lewd acts in the facilities or harassed the plaintiffs or any other students; shower stalls had curtains; and restrooms had lockable doors.

Therefore, success on this claim was unlikely.

Lastly, on the tort claim of intrusion upon seclusion, the court noted that Pennsylvania follows the Restatement (Second) of Torts, §652B, defining the tort as an intentional intrusion which would be highly offensive to a reasonable person. Although the evidence before it was conflicting, the court noted that restrooms by nature are shared, and locker rooms are not noted for privacy, citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657, 115 S.Ct. 2386 (1995). As with the plaintiffs’ other claims, there was no showing of irreparable harm, which would not be presumed; again, there were sufficient privacy protections, and the defendants had shown their willingness to work with students and parents on the issue.

Legislative and executive action

Congress and the Pennsylvania Legislature have bills pending to address transgender concerns. At the federal level, H.R. 2282¹¹ and S. 1006,¹² known together as The Equality Act, were introduced, with bipartisan support, on May 2, 2017. They are also supported by, at present, 92 major corporations via the Business Coalition for The Equality Act. The Equality Act would amend the Civil Rights Act of 1964, to desegregate public education regarding “gender identity.”

In Pennsylvania, The Fairness Act, S.B. 613¹³ and H.B. 1410,¹⁴ both of which also have bipartisan support, would amend the Pennsylvania Human Relations Act to extend non-discrimination protections to gender expression and gender identity. S.B. 613 was referred to the State Government Committee on April 25, 2017. How-

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ever, on Dec. 12, 2017, a resolution was presented to discharge the committee from further consideration of H.B. 1410. In April 2016, Gov. Wolf signed executive orders proscribing gender-expression or gender-identity discrimination against Commonwealth employees and employees of Commonwealth contractors¹⁵ and more recently urged the legislature to pass the Fairness Act.¹⁶ Currently, 44 Pennsylvania municipalities ban sexual orientation or gender identity discrimination, or both.¹⁷ While these actions do not all specifically include transgender students, they could be argued as indicating the public policy of the Commonwealth and its subdivisions. In addition, Pennsylvania's House Rules Committee voted to remove language in the Children's Health Insurance Program (CHIP) reauthorization bill excluding coverage for gender reassignment surgery.

As indicated, other states vary in addressing transgender rights. While some states, their municipalities and school boards act against them, there are favorable actions. For example, Gov. Dennis Daugaard of South Dakota vetoed a bill that would have made the state the first in the country to require students to use restrooms and locker rooms consistent with their biological sex at birth. The governor based his veto chiefly on the preference for local school officials to address education-related issues, consistent with the 2017 Dear Colleague Letter, but noted – correctly, as shown above – that such a law could have created

costly liability concerns for the state and its schools.¹⁸

Conclusion

It must be kept in mind that these laws and cases involve public school and university systems. Private schools, particularly faith-based institutions, present a separate complex of issues, for example, the situation of Mason (Madelyn) Catrambone, who was denied admission to Camden (New Jersey) Catholic High School *after* having been accepted and awarded scholarships. This generated an online petition in support of Mason and his family and other expressions of community support and objection to the school's action.^{19 20}

As of this writing, USDOE still has a website page entitled “Resources for LGBTQ Students,” which provides, in part, that “[e]very school and every school leader has a responsibility to protect all students and ensure every child is respected and can learn in an accepting environment. Title IX protects all students, including LGBTQ students, from sex discrimination. Title IX encompasses discrimination based on a student's failure to conform to stereotyped notions of masculinity and femininity.”²¹ In addition, President Trump's proposed 2019 budget, according to Secretary of Education Betsy DeVos, “expands education freedom for America's families while protecting our nation's most vulnerable students.”²² How these statements will relate in practice to the 2017 Dear Colleague Letter and USDOE's recent announcement about not handling transgender students' restroom access complaints remains to be seen. (For example, how will USDOE and USDOJ

handle complaints, like those in *Doe, challenging allowance of access?*)

Transgender students face sentiments such as those of Jeff Mateer, first assistant attorney general of Texas, who characterized an action for restroom access for a transgender first-grade girl as “really show[ing] you how Satan's plan is working...” Mateer's federal judicial nomination by President Trump was withdrawn when this comment, among others, was publicized.²³ The referenced action was *Mathis v. Fountain-Fort Carson School District 8*, in which the Colorado Department of Regulatory Agencies, Division of Civil Rights, found, in a 14-page determination, in favor of Coy Mathis and her parents, Kathryn and Jeremy Mathis.²⁴

Laws and judicial decisions on transgender students' rights vary, as shown and as even a casual search will further demonstrate.²⁵ This suggests that the issue might go to the Supreme Court again. Regardless of the result, states and local agencies may continue to act favorably toward affected students, as matters of states' rights, the asserted federal preference, set forth in the 2017 Dear Colleague Letter, for local authority over school issues, and the principle that state constitutions may provide greater protections for individual rights than the U.S. Constitution.

The parties in *Evancho* agreed that transgender persons are approximately 1 percent of the American population. “The 1 percent” is a phrase used otherwise in current social and political discourse. For the transgender youth one percent, as Senior Circuit Judge Davis stated in *Grimm*, “much more than bathrooms” is involved. Time will show whether, with advocacy, more

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Three Rs for Transgender Students

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states and local agencies will provide the three Rs of recognition, respect and recourse for their young and vulnerable citizens.



Mária Zulick Nucci graduated from Temple University School of Law. She is a contract attorney with Allerton Bell PC in Wyomissing and is experienced in appellate litigation and aviation law, with an interest in animal law. Her private and public sector experience has covered a range of civil law areas. She wrote “The Course of True Identity: Pennsylvania Legislation for Transgender Youth”, in *Open Court*, vol. 4, no. 2, Fall 2014. She may be reached at MJNucci58@gmail.com. Her LinkedIn profile is at <http://www.linkedin.com/pub/mária-nucci/62/1b4/731/>.

FEATURED MEMBER

Getting to Know Larry Felzer, Esq.

Interviewed by Martricia O'Donnell McLaughlin, Esq.

Just for the record, as they say, what is your full name?

Lawrence Scott Felzer

Can you tell our readers about your background, education and employment as an attorney?

I graduated Temple Law School Evening Division in 1994. Technically I don't practice. I am a licensed attorney and active in bar association activities, but I am responsible for finances and operations at SeniorLAW Center. I don't usually do client work.



Larry Felzer is an attorney at SeniorLAW Center.

So, it sounds as though you have strong ties to the City of Philadelphia?

I am a Philadelphia native, have always loved the city.

What's your favorite thing about Philadelphia?

How walkable the city is, especially Center City.

What's your favorite vacation spot? Why?

Either New York City – I am a city kind of guy – because I enjoy the energy level in the city and theater or a cruise vacation. I have grown to enjoy cruises because it is forced relaxation, off the grid for a week and just sit back and relax. Other vacations, I am feeling I am trying to cram as much as I can into the time I am there. On a cruise, I feel like I can do nothing.

Do you have a favorite book and why do you love it?

This changes but in the past few years it has been *The Warmth of the Other Suns* by Isabel Wilkerson. A good friend recommended it, it opened my eyes and taught me a lot about the Great Migration and the African American struggle in the south post-Civil War. A key part of this country's history I never learned in school.

Do you have a favorite TV show?

Difficult to say one, but it would probably be a sitcom I loved growing up – “The Mary Tyler Moore Show.” Love the chemistry between the cast, the characters, the opening theme and MTM.

What about a favorite movie?

Not sure about a favorite movie, but a favorite movie experience is seeing classic movies, including black and white films, on a big screen.

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Larry Felser

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What's one thing that we don't know about you?

I am not a morning person. At all.

Do you have a favorite band or type of music?

Not sure if I would use word "band," but growing up I fell in love with the voice of Karen Carpenter. I love a lot of other recording artists, but The Carpenters will always be number one with a bullet in my book.

We all have them, some keep them more well hidden than others, but do you have any "pet peeves?"

People that are late and people that are overly material and seem to value material possessions over people.

Many thanks, Larry! I know that you are very busy at the SeniorLAW Center in Philadelphia, which does such wonderful work for the citizens of the city. Thanks for taking the time to let us get to know one of our committee members better. It's great to see that our members have such diverse interests, work experiences and backgrounds. We appreciate your time.

2020 Census Endnotes

- 1 See, for example: by Catherine Rampell, Jan. 4, 2018, Washington Post The GOP is sabotaging this Sacred Mandate. And, D'Vera Cohn, FACTTANK News in the Numbers, April 20, 2017 Seeking better data on Hispanics, Census Bureau may change how it asks about race.
- 2 Some of the research conducted and referred to in this article utilizes "Sexual and Gender Minorities" terminology. It appears that some researchers and demographers consider SGM a more inclusive term when measuring aspects of civil rights and group identity. The suggestion is that how one's sexuality is expressed is less important in this context than how sexual and gender minorities are treated as a group.
- 3 For a full consideration of the question of whether census tools reflect social reality or actually construct it, see *Census and Identity: The Politics of Race, Ethnicity and Language in National Censuses*, David I. Kertzer and Dominique Arel (Ed.) Cambridge University Press (2002).
- 4 Federal Interagency Working Group on Improving SOGI in Federal Surveys. *Toward a Research Agenda for Measuring Sexual Orientation and Gender Identity in Federal Surveys: Findings, Recommendations, and Next Steps*, October 2016.
- 5 <http://reason.com/blog/2017/03/31/no-lgbt-rights-are-not-and-should-not-be> March, 2017

GLBT Rights Committee

Chair:

Gerald L. Shoemaker Jr.

Hangley Aronchick Segal Pudlin & Schiller
401 Dekalb St., Fl. 4
Norristown, PA 19401
GLS@hangley.com
610-313-1670

Newsletter Editors:

Martricia O'Donnell McLaughlin

Attorney at Law
26 N. Third Street
Easton, PA 18042
610-258-5609

mclandg@hushmail.com

Robert Daniel Oliver

Court of Common Pleas of Montgomery County
roliver@montcopa.org

PBA Newsletter Liaison:

Diane Banks

diane.banks@pabar.org
800-932-0311, ext. 2217

PBA Staff Liaison:

Ursula Marks

ursula.marks@pabar.org
800-932-0311, ext. 2206

Committee History:

The committee was formed in 2005. The committee's mission is to study matters pertaining to the recognition and protection of the legal rights of the gay, lesbian, bisexual and transgender (GLBT) community. The committee monitors and makes recommendations on issues and developments in the law impacting GLBT people in the public and the legal profession.

Committee Membership:

The committee is open to GLBT lawyers and allies. The committee welcomes all members who are interested in promoting equal rights for the GLBT lawyers and the GLBT community at large.