

# KNOW YOUR RIGHTS

## THE RIGHTS OF TRANSGENDER STUDENTS

Many transgender children take the courageous step to begin their transition before they graduate from high school. Unfortunately, many teachers and school officials know very little about the laws impacting transgender students. This document is intended to provide information on what actions school districts may or, in some cases, must take to create an inclusive and affirming educational environment transgender students.

### Access to Restrooms or Locker Rooms Corresponding with Gender Identity

There are no U.S. or Kansas statutes obligating schools to require students to use restrooms or locker rooms that correspond with their sex assigned at birth. In other words, there are no U.S. or Kansas statutes that deny students the right to use restrooms or locker rooms that correspond with their gender identity.

In fact, the act of denying students the right to use a restroom or locker room corresponding with their gender identity and instead compelling them to use facilities that correspond with their sex assigned at birth is prohibited by Title IX of the Educational Amendments of 1972. In the public school context, denying students these rights may also violate the U.S. Constitution.<sup>1</sup>

In contrast, we are not aware of any court cases in Kansas finding a public or private school (or the school's board members, administrators, teachers or other employees) liable for damages for honoring the rights of transgender students to use a bathroom or locker room corresponding with their gender identity as opposed to their biological gender. Courts in other jurisdictions have rejected claims under the U.S. Constitution, Title IX, and other applicable law brought by cisgender students and their parents alleging that their rights were violated by schools that honored the rights of transgender students to use restrooms corresponding with their gender identity.<sup>2</sup>

### Name and Pronoun Usage in Schools

Under K.S.A. § 72-9934(b), whenever a child enrolls or is enrolled in a school for the first time, the school board of the school in which the child enrolls shall require, in accordance with a policy adopted by the school board, presentation of proof of identity of the child. "Proof of identity" is defined by K.S.A. § 72-9934(a)(3) to mean:

(A) In the case of a child enrolling in kindergarten or first grade, a certified copy of the birth certificate of the child or, as an alternative, for a child who is in the custody of the secretary for children and families, a certified copy of the court order placing the

<sup>1</sup> Grimm v. Gloucester County School Board, 972 F. 3d 586 (4th Cir. 2020) (holding school board's policy requiring students to use bathrooms corresponding with their biological gender violated the Equal Protection Clause of the 14th Amendment to the U. S. Constitution and unlawfully discriminated against a transgender male student in violation of Title IX of Education Amendments of 1972); Adams v. School Board of St. John's County, Florida, 968 F. 3d 1286 (11th Cir. 2020) (same); Whitaker v. Kenosha U.S.D. No. 1 Board of Educ., 858 F.3d 1034 (7th Cir. 2017) (holding transgender student's Title IX claim against school board based on policy that denied him the right to use bathroom corresponding with his gender identity stated a claim that was likely to succeed under Title IX and policy violated the Equal Protection Clause). Cf. Bostock v. Clayton County, Georgia, \_\_\_ U.S. \_\_\_, 140 S. Ct. 1731 (2020) (holding that employers are prohibited from firing employees on the basis of homosexuality or transgender status under Title VII of the Civil Rights Act of 1964).

<sup>2</sup> See, e.g., Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018) (holding board policy honoring rights of transgender students to use restrooms corresponding with their gender identity did not violate Title IX); Parents for Privacy v. Dallas Sch. Dist. No. 2, 326 F. Supp. 3d 1075 (D. Or. 2018) (holding board policy honoring rights of transgender students to use restrooms corresponding with their gender identity did not violate Title IX, Due Process Clause of 14th Amendment to U.S. Constitution, or Oregon law).

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child in the custody of the secretary and, in the case of a child enrolling in any of the grades two through 12, a certified transcript or other similar pupil records or data; or (B) any documentary evidence which a school board deems to be satisfactory proof of identity.

While documentary proof of identity must be presented whenever a child is enrolled in a school for the first time, there is no Kansas or federal law obligating a school (including the school board, school, school administrators, teachers or other employees) to refer to, or call, a pupil by the name specified in the pupil's documentary proof of identity.<sup>3</sup> Likewise, there is no Kansas or federal law obligating a school board, school, school administrators, or teachers, to refer to a pupil by pronouns consistent with the sex of the pupil specified in a birth certificate or other documentary proof of identity. Thus it is legally appropriate for a school, including administrators, teachers, and other employees, to use a student's preferred name and pronouns corresponding with the student's gender identity, in the ordinary course of daily usage.

In fact, denying pupils the right to use a name or pronouns that they have chosen based on their gender identity, including by referring to them or calling on them by another name specified in their documentary proof of identity or pronouns corresponding to their sex assigned at birth, may constitute a violation of Title IX of the Educational Amendments of 1972. In the public school context, a policy requiring the use of a name and/or pronouns inconsistent with gender identity may violate the Equal Protection Clause of the U.S. Constitution.<sup>4</sup>

Some Kansas school boards have adopted policies effectuating the right of all students to be addressed and referred to by a name, pronouns, and other terms that correspond to their gender identity, regardless of whether that gender identity corresponds with the name or sex shown on a birth certificate or other documentary proof of identity.<sup>5</sup>

Students' interests in privacy and safety are closely related to their rights to be referred to by chosen names and pronouns consistent with gender identity. School administrators, teachers, and other employees who insist on using a pupil's "official" name or pronouns that do not correspond with a pupil's gender identity risk disclosure of matters of a highly sensitive and personal nature and potentially increase the risk that the pupil will suffer discrimination, harassment and violence.<sup>6</sup>

## Participation in School Athletics

There is no federal or state law that prohibits transgender students from participating in intermural or interscholastic athletics.<sup>7</sup> In Kansas, schools are responsible for determining the appropriate gender

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3 For interested Kansas parents and students, the Kansas Department of Health and Environment describes "How to Amend the Sex Designation on a Birth Certificate for Minors" here: [https://www.kdheks.gov/vital/amend\\_sex\\_desination\\_minors.htm](https://www.kdheks.gov/vital/amend_sex_desination_minors.htm)

4 See *Grimm v. Gloucester County School Board*, 972 F. 3d 586 (4th Cir. 2020) (holding school board's refusal to amend transgender student's records to reflect his male gender, consistent with his amended birth certificate, violated Equal Protection Clause and unlawfully discriminated against transgender male student in violation of Title IX).

5 Examples of these types of policies are readily available. See, e.g., [https://themercury.com/news/local/full-text-of-usd-383s-guidelines-for-transgender-students/article\\_bbe29c7c-0ca7-5f4b-8588-93720cdf2a15.html](https://themercury.com/news/local/full-text-of-usd-383s-guidelines-for-transgender-students/article_bbe29c7c-0ca7-5f4b-8588-93720cdf2a15.html) (U.S.D. 383 Manhattan-Ogden policy); <https://www.glsen.org/activity/model-local-education-agency-policy-on-transgender-nonbinary-students#d> (GLSEN model policy).

6 See *Foster v. Anderson*, No. 18-2552, 2019 WL 329548, at \*2 (D. Kan., Jan. 25, 2019), and cases cited therein.

7 It is worthwhile to note that the Trump administration's Department of Education Office of Civil Rights (OCR) took the position that Connecticut Interscholastic Athletic Conference violated Title IX of the Civil Rights Act by permitting male to female transgender student athletes who have not undergone hormone treatment to participate in girls' sports. See U.S. Department of Education Office of Civil Rights, Letter of Impending Enforcement Action against Connecticut Interscholastic Athletic Conference et. al., <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf> (Aug. 31, 2020)(finding Connecticut's Revised Transgender Participation Policy which permitted transgender girls to participate in competitions against cisgender girls violated Title IX). However, no case has been filed and there is no indication the new administration's OCR will adopt its predecessor's position.

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team for a transgender student.<sup>8</sup> The Kansas High School Athletic Association (KHSAA) has issued recommendations to schools on transgender student athlete participation in sports<sup>9</sup> and maintains criteria under which to review appeals of a school district's determination. Specifically, KHSAA advises school districts to review the following forms of documentation when evaluating the appropriate gender team for a transgender student:

- Gender identity used for school registration record;
- Medical documentation (length and duration of hormonal treatments, sexual re-assignment surgery; psychological counseling, medical records, etc.);
- Gender Identity related advantages to the student if participation would be approved.

To date, there have been no successful legal challenges to a school district or athletics association's decision to permit transgender students to participate in a sport that corresponds with their affirmed gender. On the other hand, a federal court has enjoined Idaho from banning transgender student athletes from participating on sports teams aligning with their gender.<sup>10</sup> The court found that Idaho's statute prohibiting transgender student-athletes from participating in intermural competitions likely violates the Fourteenth Amendment.<sup>11</sup> Notably, there is legislation currently pending in the Kansas legislature (for the 2021 session) that would attempt to put restrictions in place similar to those challenged in Idaho.<sup>12</sup> It is unclear whether or not this measure will pass.

## Privacy Protections for Students Who Are Transitioning

Teachers and administrators do not have an affirmative obligation under state or federal law to inform a parent that a student is transgender. While parents may be able to access certain information that would reveal a student is transgender to the extent it appears in their educational records—for example, if the student's chosen name appears on Skyward<sup>13</sup>—they are not otherwise entitled to know information about a student's sexuality or gender identity that becomes known to educators. Indeed, revealing this information to a parent is inconsistent with a student's constitutional right to privacy and the Family Educational Rights and Privacy Act (FERPA).

*This information is being made available for educational purposes only as well as to give you general information and a general understanding of the law, not to provide specific legal advice. This information should not be used as a substitute for competent legal advice from a licensed professional attorney in your state.*

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<sup>8</sup> “KHSAA Policy for Transgender Student Participation.” Kansas Student High School Athletics Association, <https://www.kshsaa.org/Public/PDF/TransgenderPolicyRecommendations.pdf>

<sup>9</sup> Id.

<sup>10</sup> Hecox v. Little, 1:20-cv-00184 (D. Idaho, Aug. 17, 2020)(law that categorically excludes transgender women and girls from participating in sports competitions against cisgender women and girls likely violates the Equal Protection clause of the Fourteenth Amendment)

<sup>11</sup> Id.

<sup>12</sup> See Senate Bill 208 (2021), [http://www.kslegislature.org/li/b2021\\_22/asures/documents/sb208\\_00\\_0000.pdf](http://www.kslegislature.org/li/b2021_22/asures/documents/sb208_00_0000.pdf).

<sup>13</sup> Kan. Stat. Ann. §72-5386(c)