


School Attorney Cheat Sheet

Gender Identity



Background

2001	<i>Enriquez v. West Jersey Health Systems</i> , 342 N.J. Super. 501 (App. Div. 2001) recognizes that New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. (the “LAD”) protects against discrimination based on gender identity.
2006	LAD amended to make gender identity an expressly protected characteristic. L. 2006, c. 100 (effective 2007).
2007	<i>L.W. v. Toms River Regional Schools Bd. of Educ.</i> , 189 N.J. 381 (2007) establishes that the LAD applies to students.
2009	New Jersey State Interscholastic Athletic Association issues policy (“NJSIAA Policy”) to include transgender students in sports in a manner consistent with their gender identity (amended in 2017).
2017	 Governor Chris Christie signs into law L. 2017, c. 137 (codified at N.J.S.A. 18A:36-41), requiring the Department of Education to issue guidance regarding transgender students, “ensuring [among other things] that school personnel do not disclose information that may reveal a student’s transgender status except as allowed by law....”
2018	Department of Education issues Transgender Student Guidance for School Districts (“Guidance”).
2019	Policy 5756, which mirrors the Guidance, is widely adopted by districts.





<p>2023</p>	<p>School boards in four districts—Hanover Township School District, Middletown Township School District, Marlboro School District, and Manalapan-Englishtown Regional School District, vote to replace or amend Policy 5756 in a manner that would forcibly out students by revealing their transgender or nonbinary identity without their consent.</p> <p>Attorney General (“AG”) and Division of Civil Rights (“DCR”) bring administrative actions against all four districts asserting that the amended policies violate the LAD and seek preliminary injunctions in the Chancery Division in:</p> <ul style="list-style-type: none">• <i>Platkin v. Middletown Twp. Bd. of Educ.</i>, Superior Court Docket No. MON-C-80-23;• <i>Platkin v. Manalapan-Englishtown Regional Bd. of Educ.</i>, Superior Court docket no. MON-C-79-23;• <i>Platkin v. Marlboro Twp. Bd. of Educ.</i>, Superior Court Docket No. MON-C-78-23; and• <i>Platkin v. Hanover Twp. Bd. of Educ.</i>, Superior Court Docket No. MRS-C-42-23. <p>In all four suits, the Chancery Division finds that the policy changes likely violate the LAD and issues preliminary injunction.</p> <p>Districts appeal all four preliminary injunction rulings.</p> <p>A handful of school districts repeal Policy 5756.</p>
<p>2024</p>	<p>Administrative LAD actions continue against the four districts seeking to amend or replace Policy 5756.</p> <p>The preliminary injunction rulings remain pending in the Appellate Division.</p> <p>A handful of districts continue to consider repealing or replacing Policy 5756.</p>

Risk Assessment for School Districts

Fully implementing Policy 5756 or similar policy

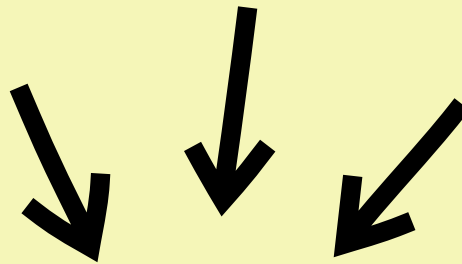
Low risk: AG/DCR refer to Policy 5756 as “the LAD-compliant policy.” Plaintiffs’ Br. at 1, *Platkin v. Hanover Twp. Bd. of Educ.*, Docket No. MRS-C-42-23 (Sept. 13, 2023).

Amending or replacing Policy 5756 to reveal students’ transgender/nonbinary identity

High risk: All four school districts that have amended or replaced Policy 5756 in a manner that would reveal students’ transgender/nonbinary identity have faced enforcement action. Chancery Division in each case found doing so likely violates the LAD (appeals pending).

Revoking Policy 5756


Medium risk: Creates ambiguity, increases risk that personnel may violate the LAD.



PRACTICE TIP: Ask, what is the board’s goal in revoking the policy? Is the goal likely to trigger LAD enforcement? If so, is the board informed regarding that risk?

If board is purposefully seeking to trigger suit, is there a legal basis to defend the board’s actions? Is the question at issue already being litigated by other districts?



	<p>See also David Rubin, NJSBA, <i>Legally Speaking—Transgender Students and Parental Notification: What Path Forward?</i> (Winter 2024), https://www.njsba.org/news-publications/school-leader/winter-2024-vol-55-no-3/legally-speaking-transgender-students-and-parental-notification-what-path-forward/.</p>
<p>Never adopted a gender identity policy</p>	<p><u>Medium risk</u>: Ambiguity, increased risk that personnel may violate the LAD.</p>
<p>Student cannot access restrooms consistent with gender identity</p>	<p><u>High risk</u>: N.J.S.A. 10:5-12(f).</p>
<p>Student cannot access facilities consistent with gender identity</p>	<p><u>High risk</u>: N.J.S.A. 10:5-12(f).</p>
<p>Student cannot participate in activities in a manner consistent with gender identity</p>	<p><u>High risk</u>: N.J.S.A. 10:5-12(f). See also NJSIAA Policy.</p> 
<p>Staff disregarding student's name and/or pronouns</p>	<p><u>High risk</u>: In Title VII case, the EEOC found, "Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment when []judged from the perspective of a reasonable person in the employee's position."). See <i>Lusardi v. McHugh</i>, EEOC Appeal No. 0120133395 (Apr. 1, 2015). The LAD is generally more protective than Title VII.</p>

<p>Student's transgender/nonbinary identity revealed without their consent</p>	<p><u>High risk</u>: See Order and Statement of Reasons, <i>Platkin v. Hanover Twp. Bd. of Educ.</i>, Superior Court Docket No. MON-C-78-23 (Aug. 18, 2023) (attached).</p>
<p>Removing LGBTQ+-related books or “safe space” and pride flags/signs/stickers</p>	<p><u>Medium to high risk</u>: See New Jersey Dep't of Law and Public Safety and Dep't of Educ., <i>AG Platkin and Acting Commissioner Allen-McMillan Announce Joint Statement from Division on Civil Rights and Department of Education on School-Based Anti-Bias Initiatives and the Law Against Discrimination</i> (Jun. 26, 2023), https://www.nj.gov/oag/newsreleases23/2023-0623-School-Based-Anti-Bias-Initiatives-and-the-Law-Against-Discrimination.pdf (“the removal of books or symbols—such as posters, flags, and stickers—merely because they represent or reflect a specific historically excluded group could itself give rise to a discrimination or hostile educational environment claim”).</p>
<p>Requiring LGBTQ+-related curricula to be taught at home</p>	<p><u>Medium to high risk</u>: Hostile educational environment? Other potential violations? At least one administrative action was brought with respect to this already, but was not adjudicated. No known actions are pending.</p>
<p>Anti-transgender comments?</p>	<p><u>Uncertain</u>: Could anti-transgender comments by school personnel and/or board members give rise to a hostile environment claim? Potential ethics claims?</p>





LAD Compliance Checklist

To mitigate against LAD enforcement, determine:

- Are all students able to participate in school activities in a manner consistent with their gender identity?*
- Are all students able to use facilities (e.g., bathrooms and locker rooms) in a manner consistent with their gender identity?*
- Are students consistently addressed by school personnel using pronouns and names as directed by the student?*
- Are there practices in place to protect students from being outed through:*
 - Verbal communications?*
 - Physical documents and identification?*
 - Electronic systems and information?*
- Is there regular training for personnel regarding inclusive practices for transgender and nonbinary students? Training for:*
 - Administrators?*
 - Teachers?*
 - Support staff?*
 - Coaches?*
 - Others?*
- Is there regular training for personnel regarding how to handle communications (verbal, paper, electronic) to protect students from being outed? Training for:*
 - Administrators?*
 - Teachers?*
 - Support staff?*
 - Coaches?*
 - Others?*
- Are “safe space” and pride signs, flags, stickers, and LGBTQ+-related books permitted to the same extent as other signs, flags, stickers, and books?*