

January 16, 2025



S.B. 104 Higher Education Considerations

Disclaimers

We can't help ourselves. We're Lawyers.

- We are not giving you legal advice
- Consult with legal counsel regarding specific situation
- Compliance issues will be very fact-specific
- Slides will be provided by email to participants.

Agenda

Complying with S.B. 104 – Eff. Date: February 25, 2025

- Introductions
- Overview of higher education-specific S.B. 104 requirements.
- Overview of compliance steps with reviewing facilities, updating signage, and determining usage.
- Identifying potential compliance issues with Title VII
- Other compliance issues: athletics, accommodations, development of “multi-occupancy facilities [restrooms, showers, locker rooms]”

S.B.104 – The Basics (1 of 2)

Effective Date: February 25, 2025

- **S.B. 104 creates new** section 3345.90 of the Ohio Revised Code
- S.B. 104 text is available here:
https://search-prod.lis.state.oh.us/api/v2/general_assembly_135/legislation/sb104/06_EN/pdf/
- ***Applies to all*** university buildings

To Do:

- Review Statute and Definitions;
- What questions does your campus community have currently?

→ As you're participating in this webinar, identify what educational conversations will be needed on campus.

S.B. 104 – The Basics (2 of 2)

What types of institutions are subject to S.B. 104 – Schools and Institutions of higher education

“School” (K-12, other) (R.C. 3319.90(A))

- (a) A school district or school district building;
- (b) A community school established under Chapter 3314. of the Revised Code;
- (c) A science, technology, engineering, and mathematics school established under Chapter 3326. of the Revised Code;
- (d) A chartered nonpublic school;
- (e) An educational service center.

“Institution of Higher Education” (Uses the definition from R.C. 3345.19 (from anti-hazing law))

- (a) A state institution of higher education as defined in section [3345.011](#) of the Revised Code;
- (b) A nonprofit institution holding a certificate of authorization pursuant to Chapter 1713. of the Revised Code;
- (c) An institution holding a certificate of registration from the state board of career colleges and schools;
- (d) A private institution exempt from regulation under Chapter 3332. of the Revised Code as prescribed in section [3333.046](#) of the Revised Code.

S.B. 104 definitions

- “Biological Sex”
- “Family Facility”
- “Multi-Occupancy Facility”

Not specifically defined: restroom, locker room, changing room, and shower room.

“Faculty facilities” are also referred to in S.B. 104 – as being different from student restrooms, locker rooms, etc. (borrows the concept from the K-12 section).

““Biological sex” means the biological indication of male and female, including sex chromosomes, naturally occurring sex hormones, gonads, and nonambiguous internal and external genitalia present at birth, ***without regard to an individual's psychological, chosen, or subjective experience of gender.*** An individual may use the individual's official birth record, as defined in section 3705.01 of the Revised Code, to prove biological sex ***if the birth record was issued at or near the time of the individual's birth.***”

R.C. 3319.90(A)(1).

Family Facility

"Family facility" means *a family restroom or shower room* that does not have more than one toilet or shower.

R.C. 3319.90(A)(2).

Note: Does not include “locker room” or “changing room”

Multi-occupancy Facility

"Multi-occupancy facility" means a restroom, locker room, changing room, or shower room that is *accessible to multiple individuals* at the same time.

"Multi-occupancy facility" does not include a family facility.

R.C. 3319.90(A)(3)

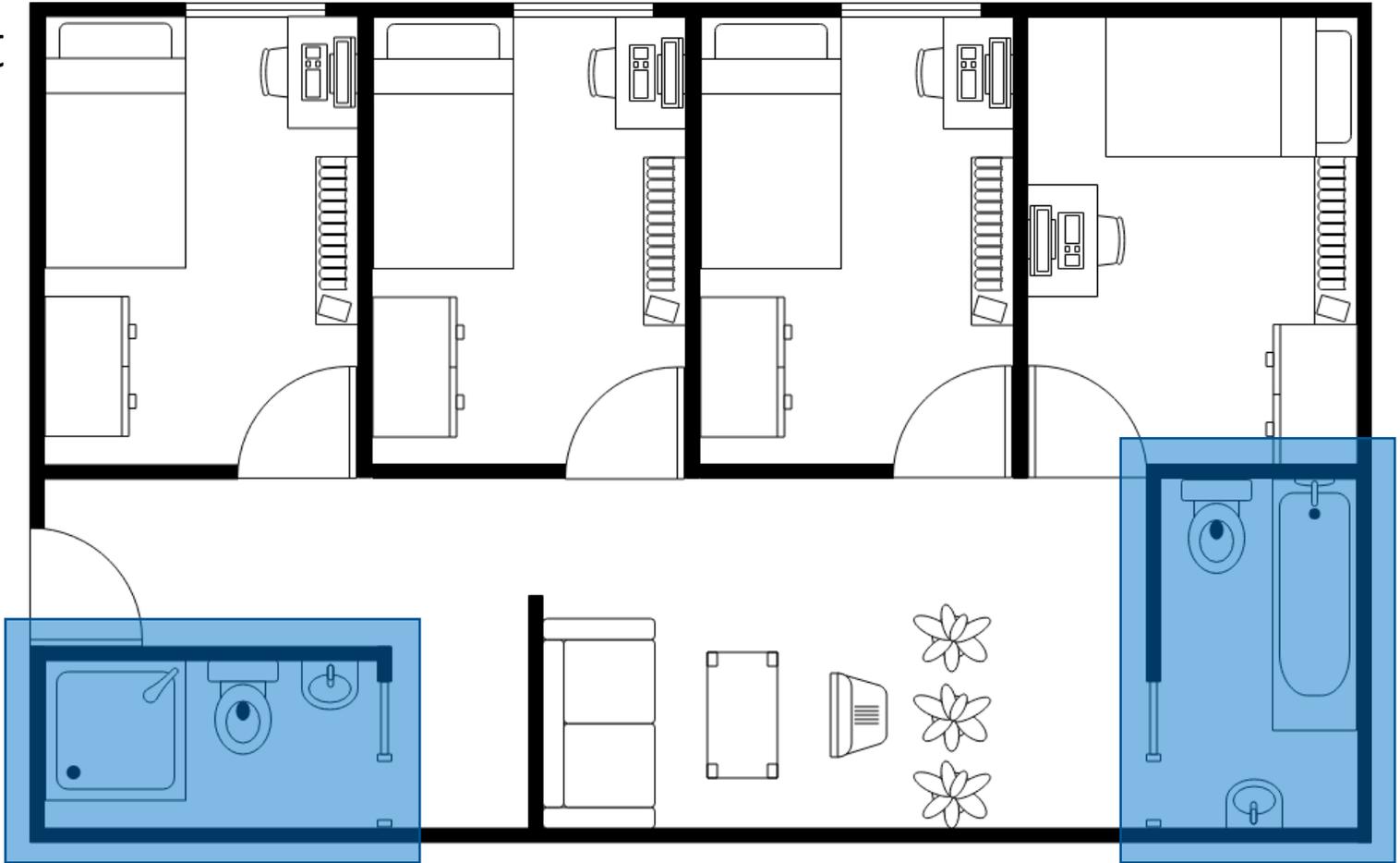
NOTE: Is not specific to student-only spaces.

What is Required by S.B. 104 Signage

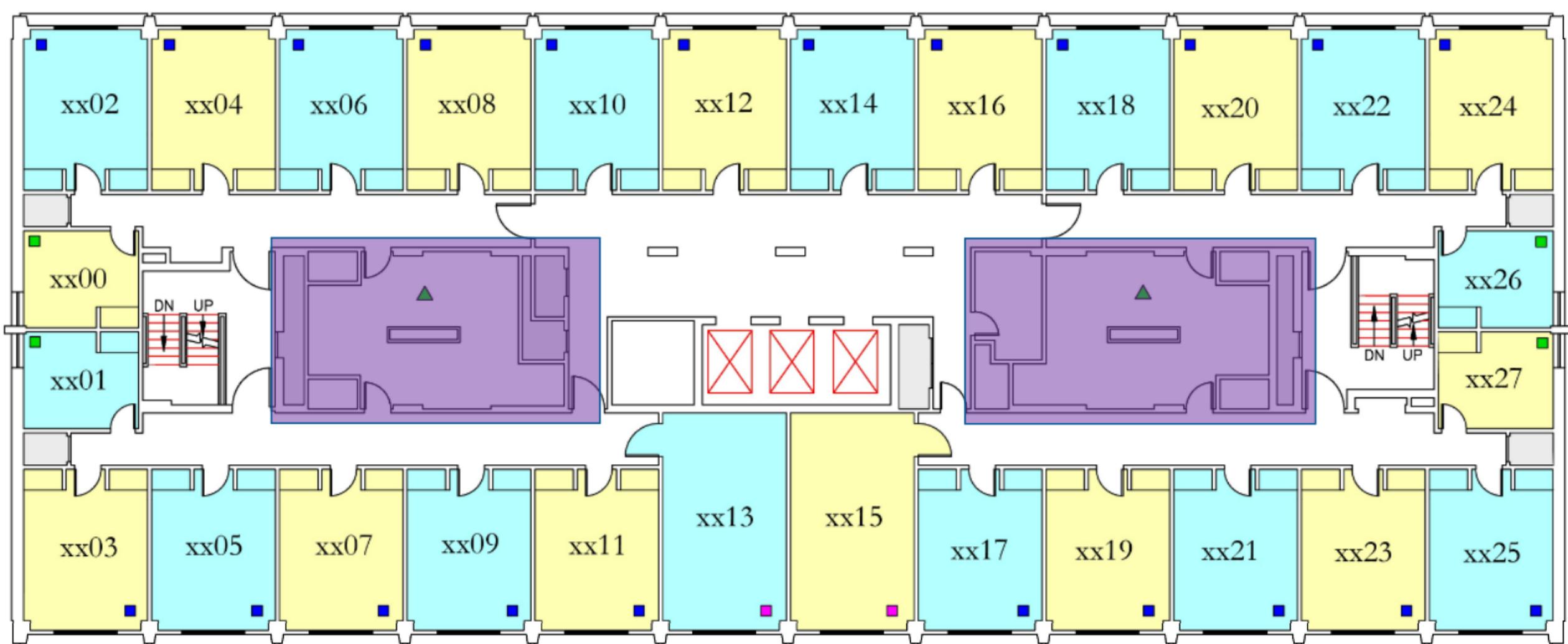
- “[D]esignate with clear signage each student restroom, locker room, changing room, or shower room accessible by multiple students at the same time for the exclusive use by students of the male [female] biological sex only or by students of the female [male] biological sex only.” R.C. 3345.90(B)(1).
- Focuses on student space for the “exclusive use” by students...

What is Required by S.B. 104? (Slide 1 of 2)

Are these bathrooms subject to S.B. 104 based on residence hall layout?



What is Required by S.B. 104? (Slide 2 of 2)



What is Required by S.B. 104? Cannot Knowingly Permit access...

- IHEs cannot “*knowingly permit* a member of the female [male] biological sex to use a student restroom, locker room, changing room, or shower room that has been designated by the school for the exclusive use of the male [female] biological sex.” R.C. 3345.90(B)(2).
- “Knowingly” is not defined in R.C. 3345.90.
 - “Knowingly” is defined in the Ohio Rev. Code “when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.” R.C. 2921.22(B).

What is Required by S.B. 104? Prohibits “all gender” designated multi-occupancy facilities

“No institution of higher education shall construct, establish, or maintain a multioccupancy facility that is designated as nongendered, multigendered, or open to all genders.” R.C. 3345.90(B)(3).

Nothing in [R.C. 3345.90(B)(3)] shall be construed to prohibit an institution of higher education from constructing, establishing, or maintaining a *family facility*.

Navigating the compliance issues – Buildings and Bathrooms



Chris McCloskey – Public Sector Group Chair

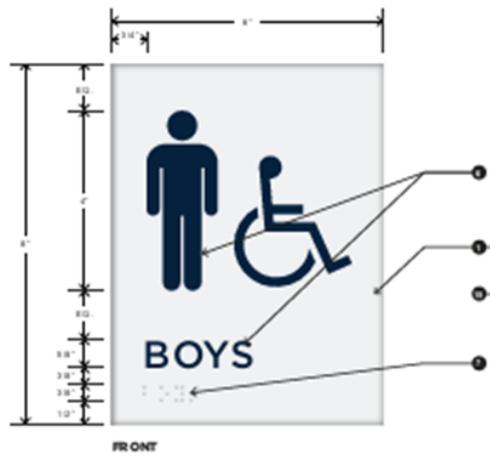


Facilities Discussion

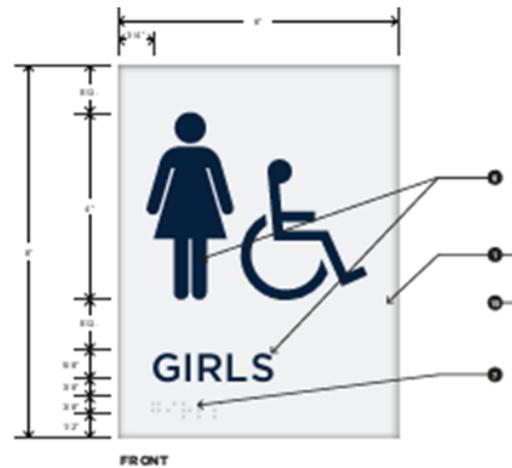
- Bathroom Bill Analysis
- Facilities Assessment
- Needed Facilities Change?
- Building Code Analysis
- Application with Authority Having Jurisdiction for Change of Use

Bathroom Bill Analysis (Quick Recap) (Slide 1 of 3)

“Each institution of higher education shall designate **with clear signage** each student restroom, locker room, changing room, or shower room accessible by multiple students at the same time for the exclusive use by students of the male biological sex only or by students of the female biological sex only.” (Emphasis added.) ORC 3345.90 (B)(1)



SIGN TYPE R2 - BOYS / MEN RESTROOM SIGN
SCALE: 1/2"=1"



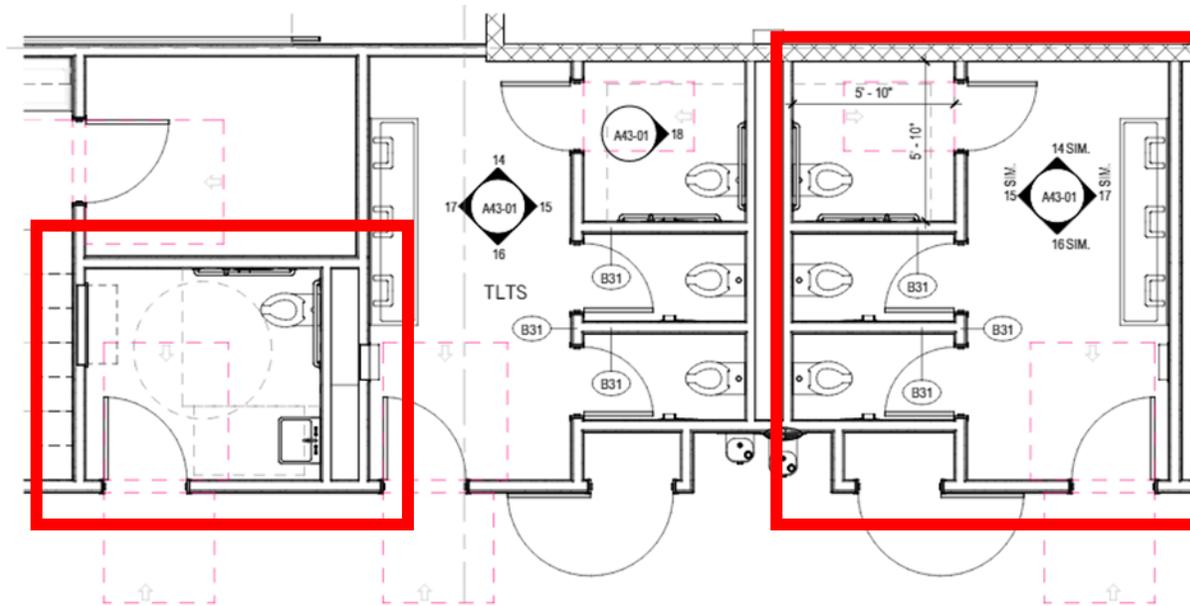
SIGN TYPE R3 - GIRLS / WOMEN RESTROOM SIGN
SCALE: 1/2"=1"



SIGN TYPE R5 - ALL GENDER SIGN
SCALE: 1/2"=1"

Bathroom Bill Analysis (Quick Recap) (Slide 2 of 3)

“No institution of higher education shall construct, establish, or maintain a **multi-occupancy facility** that is designated as nongendered, multigendered, or open to all genders.” (Emphasis added.) ORC 3345.90 (B)(3)

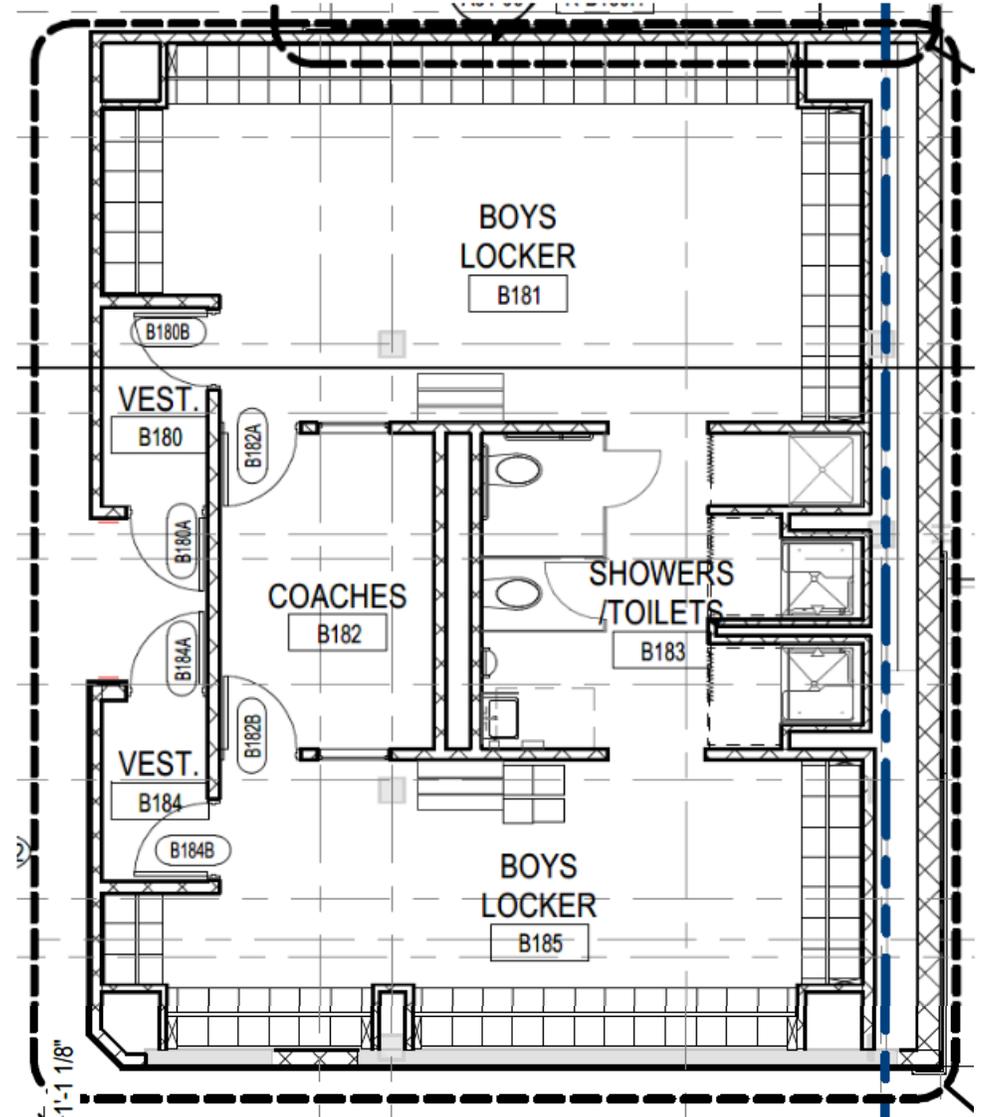


LEVEL 01 - PUBLIC TOILET ROOMS &
GYM TOILET ROOMS

13
1/4" = 1'-0"

Bathroom Bill Analysis (Quick Recap) (Slide 3 of 3)

“The prohibition described in division (B) of this section does not apply to any of the following: ... (3) An employee of the institution of higher education whose job duties require the employee to enter a restroom, **locker room**, changing room, or shower room that is designated for a biological sex that is different than the employee's biological sex.” (Emphasis added.) ORC 3345.90 (D)(3)



Facilities Assessment

- Analyze each of your facilities for conformance with the BB requirements.
- Do you need to change the “use” of a facility?
- What about the visitors’ locker room?
 - Consider a sign that toggles among: “men’s, women’s, meeting room”
 - Constitutes a change of use
- A change of use requires the approval of the authority having jurisdiction governed by the Ohio Building Code.

Ohio Building Code (Slide 1 of 2)

- Where plumbing fixtures are required, separate facilities shall be provided for each sex. (OBC 2902.2)
- Exception - Separate facilities shall not be required to be designated by sex where single-user toilets rooms are provided in accordance with Section 2902.1.2.
- “Any owner or owner’s representative who intends to construct, enlarge, alter, repair, move, or change the occupancy of a building or structure, or portion thereof, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical, plumbing system, other building service equipment, or piping system the installation of which is regulated by this code, or to cause any such work to be done, **is to first make application to the building official and obtain the required approval.**” (Emphasis added.) (OBC 105.1)

Ohio Building Code (Slide 2 of 2)



TABLE 2902.1
MINIMUM NUMBER OF REQUIRED PLUMBING FIXTURES^a
 (See Sections 2902.1.1 and 2902.2)

No.	CLASSIFICATION	OCCUPANCY	DESCRIPTION	WATER CLOSETS (URINALS: See footnote g)		LAVATORIES		BATHTUBS/ SHOWERS	DRINKING FOUNTAINS (SEE SECTION 410 of the plumbing code for exceptions)	OTHER
				Male	Female	Male	Female			
		R-2	Dormitories, fraternities, sororities and boarding houses (not transient)	1 per 10		1 per 10		1 per 8	1 per 100	1 service sink

Protocol for Change

- Facilities Assessment
- Needed Change?
- Hire a Design Professional
- Application with Authority Having Jurisdiction for Change of Use

Navigating the compliance issues – Employment and Housing



Erin Butcher – Higher Education Employment

High-level Overview:

- Expect change in U.S. Equal Employment Opportunity Commission (EEOC) guidance regarding Facility/Bathroom Access re: Gender Identity (this includes 2017 technical assistance EEOC-NVTA-2017-1);
- *Bostock* = *employment* discrimination based on transgender status is sex discrimination in violation of Title VII.
- Sixth Circuit case law is not well developed and relies on current Executive Order and EEOC guidance, likely to change before February 25, 2025.

Other Federal Agency Guidance could also be rescinded with change in administration:

- *A Guide to Restroom Access for Transgender Workers*, issued by the U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA), <https://www.osha.gov/Publications/OSHA3795.pdf>, and
- *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, [https://op.bna.com/gr.nsf/id/llbe-9x5qcw/\\$File/OPM%20EEOC%20MSPB%20OSC%20Guide.pdf](https://op.bna.com/gr.nsf/id/llbe-9x5qcw/$File/OPM%20EEOC%20MSPB%20OSC%20Guide.pdf), issued by the U.S. Office of Personnel Management.

Title VII of the Civil Rights Act of 1964

- Protects employees against discrimination based on protected characteristics (including sex)
- Enforced by EEOC
- Is a remedial statute and applies regardless of whether or not a college receives Federal Funding



Bostock v. Clayton County, Georgia



- 2020 Supreme Court decision
- Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of ... sex," covers discrimination based on sexual orientation and gender identity.
- Court explicitly stated in *Bostock* that the decision was limited to employment scenarios.
- Does not expressly apply to bathrooms, locker rooms.
- Has been cited by Fourth Circuit as supporting transgender student rights to use bathroom that aligns with gender identity.

Exec. Order and EEOC, Dept. of Ed. and Housing and Urban Development Guidance Issued



- January 20, 2021, President Biden issued Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>) (requiring certain agencies to prohibit discrimination on the basis of gender identity and sexual orientation)
- Feb. 11, 2021 HUD memo: (HUD states that it will “investigate all complaints of sex discrimination, including discrimination because of gender identity or sexual orientation, that meet other jurisdictional requirements”) (No court has enjoined this memo).
- June 2021, EEOC Technical Assistance Document (October 2022, document was vacated in Texas v. EEOC et al., 2:21-CV-194-Z (N.D. Tex.) (EEOC’s issuance of guidance exceeded EEOC’s authority under Title VII)
- June 2021, Dept. of Ed Guidance issued and then enjoined in Ohio (and other states) (State of Tennessee v. Dep't of Educ., 104 F.4th 577, 615 (6th Cir. 2024)) [E.D. case specifically regarding Title VII – 615 F.Supp.3d 807 (including Ohio as Plaintiff).

What about student-employees? (Slide 1 of 2)

- SB 104 applies primarily to facilities for students. But colleges/universities also may have competing obligations under Title VII for employees of the institution.
- What about students who also perform work for the institution?
- For example: graduate assistants, resident assistants, housing directors, resident directors, area coordinators, etc.
- Can also be, e.g., a full-time student who works in the library restacking books for an hourly wage.

What about student-employees? (Slide 2 of 2)

Students can be both students and employees.

- “A student’s academic and employment work can also overlap, and that does not remove them from the employment protections of Title VII.”
Huang v. Ohio State University, 116 F.4th 541 (6th Cir. 2024).
- Courts in the Sixth Circuit “holistically evaluate” the relationship between the student and the university.
- Look at “totality of the circumstances.”

How to determine if a student-employee is more student than employee?

In *Huang v. Ohio State University*, 116 F.4th 541 (6th Cir. 2024), the Sixth Circuit used the test usually reserved for employee vs. independent contractor, and listed thirteen factors to evaluate, including:

- Right to control the manner and means by which the work is performed;
- Skill required;
- Location of the work;
- Method of payment;
- Provision of employee benefits; and,
- Tax treatment.

In *Huang*, Sixth Circuit focused on:

- The type of work the graduate student performed;
- The extent the university controlled her research work; and,
- How the student-employee was paid, ultimately finding the student was protected as an employee under Title VII.

The *Huang* court held the “crux” of the analysis was ***whether the university controlled the manner and means of the work.***

Takeaway: Students performing work for a college/university may also be protected by Title VII.

- This causes the most problems (without clear answers) for student-employees working in residence facilities which would otherwise fall under S.B. 104.
- EEOC guidance indicates prohibiting employees from using facilities that align with the employee's gender identity can constitute harassment/discrimination under Title VII.
- Are reasonable accommodation requests enough?
- Can an institution assign all transgender student-employees to only buildings with single-occupancy facilities?
- Fair Housing Act will protect against housing discrimination based on gender identity and sexual orientation (FHA applies to residence halls)

Developing the Policy and Addressing Accommodations



Using the S.B. 104 Policy to address usage

- S.B. 104 may create conflicts with athletics operations (use of locker rooms by visiting teams; availability of space required by conference rules/contracts)
- ***Developing a Policy:*** IHEs allowed to develop a policy regarding “use of a multi-occupancy facility. Any policy adopted by an institution of higher education in accordance with this [R.C. 3345.90(C)] shall provide an option for alternative accommodations, including, but not limited to, the use of single-occupancy facilities or faculty facilities.

- Definition of disability excludes “transsexualism...[and] gender identity not resulting from physical impairments[.]” 42 U.S.C. § 12211(d) (Also true for Ohio Rev. Code definition of disability)
- *Williams v. Kincaid*, 45 F.4th 759, 779 (4th Cir. 2022) (case of first impression finding that gender dysphoria “i.e., a feeling of stress and discomfort with one's assigned sex” is not gender identity disorder)
- Are there circumstances where a reasonable accommodation will conflict with S.B. 104?
 - Do the aging residence halls on campus, with more congregate bathrooms, cause compliance concerns when a student requests a reasonable accommodation?

Upcoming Higher Ed Webinars



<https://www.brickergraydon.com/insights/resources/key/2024-2025-higher-ed-free-webinar-series>



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CREATING NEUROINCLUSIVE GRIEVANCE PROCEDURES

Date: February 19, 2025
Time: 12:00 - 1:00 PM EST
Cost: FREE

Statistics suggest that up to 20% of the population includes individuals who have a neurodiverse condition that impacts how they process, recall, and communicate information. This presentation will discuss the most common forms of neurodivergence, including ADHD and Autism, and explore how these conditions can impact participation in your campus grievance procedures.

Join Bricker Graydon Higher Education Attorneys, including Laura Anthony, an attorney with over 25 years of experience in the field of disability law, as they provide perspective on how to conduct investigations and hearings that are inclusive and accommodate individuals who have some form of neurodivergence. They will address common myths and biases regarding neurodiversity, offer insight on the growing body of research concerning credibility assessments, and provide practical suggestions for structuring procedures to obtain the most reliable evidence from parties and witnesses with neurodivergence.

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INCompliance The logo for INCompliance features the text "INCompliance" in a green, sans-serif font. To the right of the text is a graphic element consisting of a dark blue swoosh that curves upwards and to the right, with a lighter green swoosh following its path.

Bricker  **Graydon**
The logo for Bricker Graydon features the word "Bricker" in a dark blue, sans-serif font, followed by a graphic element consisting of a green square with a white arrow pointing up and to the right, and a dark blue square with a white arrow pointing down and to the right. Below this is the word "Graydon" in a larger, bold, blue, sans-serif font.

Thank You

