

Guidance for LGBTQ Youth

Excerpts from the Legal Opinion obtained from Cashe, Coudrain and Bass: October, 12, 2020

The Difference between Gender Identity and Sexual Orientation:

Gender Identity: Gender is the way someone identifies internally and how they choose to express themselves externally. People can use their appearance, clothing style, and behaviors to express the gender they identify with.

Sexual Orientation: Sexual orientation or sexuality is a term that refers to the gender or genders one feels sexual attraction to and how one feels sexual attraction. Typically, sexual orientation labels are derived using a prefix combined with the suffix "-sexual." Asexual, bisexual, heterosexual, and demisexual are all examples of sexual orientations.

Using Preferred Names:

"Similarly, the 2016 guidance from National School Boards Association, which is posted on the Louisiana Association of School Boards website, recommends allowing the informal name change as long as the name does not otherwise disrupt the educational environment. We agree that the best practices to ensure that no Title IX violation occurs would be **to allow the informal name change (with the parent's consent)** to the extent that other nick names are also allowed and it can be determined that the use of the name will not disrupt the class. However, all legal documents should reflect the child's legal name."

Privacy

"The U.S. Fifth Circuit has held that a minor does not have a right to privacy regarding his or her sexual orientation. We submit that this ruling extends equally to a child's right to privacy regarding his or her gender identity. The school may disclose such information to the child's parents **where there is a concern for the welfare of the child or it relates to the child's behavior at school.** Such disclosure should not be made where there are allegations of abuse and the mandatory reporting guidelines apply."

Exploring Disclosure to Parents/Guardians Carefully and with Counseling Support:

"If the student remains concerned about informing his or her parents, you should explore the basis for the student's concern, and determine whether the concern triggers any child abuse reporting obligations. Keep in mind that parental disagreement or lack of support regarding a student's gender expression alone does not equal reportable behavior. In fact, while schools may have a role in facilitating conversations between parents and students, including connecting them to local resources or support services, schools should be aware that families also may have sincerely held beliefs that impact the way they view issues of gender identity and sexuality. For this reason, you would be well-advised to focus your concerns on the student's well-being in the school setting."

What should I do if a student requests to be called by a different name and/or use different pronouns?

1. An administrator and a counselor should meet with the student to discuss the request.
2. You should inform the student that part of the process requires you to contact their parent/legal guardian to assure they are aware of and consent to the request.
3. You should gauge the student's reaction to this and determine if the student wishes to move forward with the request.
4. If the student agrees and you decide to move forward, you should make phone contact with the parent and inform them of the student's request. You should remind them that all official school records will remain in the name indicated on the birth certificate (roll, ID's, yearbooks,

etc.) and that non-familiar staff members (custodians, substitute teachers, cafeteria staff) may refer to the student by the "official" name or name on permanent record.

5. Send an email to the classroom teachers and other relevant staff (counselors, assistant principals, lead teachers, etc.) of the requested name change and cc the parent/guardian.
6. Determine if there are any other needs (restrooms, PE, etc.).

Q&A:

Should I honor requests to use a neutral restroom or changing area (PE/athletics)?

YES. Students who request using a neutral changing area should be allowed that opportunity. This can assist to reduce the potential for teasing, bullying and potential violence.

Do we also have to honor the request to use alternate pronouns?

Yes. If a transfemale student requests you to use the pronouns her/hers you must abide by that request.

Do we change the student's name in OnCourse/SIS, school yearbooks, ID tags, etc. to reflect the name that they request to be called?

No. All official school records shall remain in the student's given legal name.

What do we do if the parent says no to the requested name change?

You continue to use the student's legal name.

What if the student becomes a target of teasing and bullying by other classmates?

You handle that just as you would a student teasing/bullying about race, size, clothing, etc. A student's choice to express themselves and their preferred gender identity should not mean it is ok for others to harass them.

Some Common Terms:

Deadname: the name that a transgender person was given at birth and no longer uses upon transitioning.

Nonbinary: A term used by people who identify as neither entirely male nor entirely female. This can include people who are agender, bigender, genderfluid, gender nonconforming, and genderqueer, among others. Some nonbinary people identify as transgender, while others do not.

Pronouns: Terms used to substitute a person's name when they are being referred to in the third-person. Some common pronouns include he/him/his, she/her/hers, and they/them/their(s). A person's gender should not be assumed based on their pronouns.

Transgender: A broad term for people whose gender identity or expression is different from those typically associated with their sex assigned at birth. "Trans" is shorthand for "transgender." (Note: Transgender is correctly used as an adjective, for example: "transgender people," "people who are transgender," "a woman who is transgender," etc. However, "transgenders" or "transgendered" are incorrect and disrespectful.)

Cisgender: a gender description for when someone's sex assigned at birth and gender identity correspond in the expected way (e.g., someone who was assigned male at birth, and identifies as a man). A simple way to think about it is if a person is not transgender, they are cisgender. The word cisgender can also be shortened to "cis."

Outing: involuntary or unwanted disclosure of another person's sexual orientation, gender identity, or intersex status.

PGPs: preferred gender pronouns. Often used during introductions, becoming more common as a standard practice. Many suggest removing the "preferred," because it indicates flexibility and/or the power for the speaker to decide which pronouns to use for someone else.

Transition / transitioning: referring to the process of a transgender person changing aspects of themselves (e.g., their appearance, name, pronouns, or making physical changes to their body) to be

SESSION 2

**TRANSGENDER
ISSUES FACING
PUBLIC SCHOOLS**

WAYNE T. STEWART, J.D., PH.D.

SESSION 2

TRANSGENDER ISSUES FACING SCHOOLS

Wayne T. Stewart, J.D., Ph.D.

Introduction

For at least the past six years, there has been great variability in national public debate and attention (at least in the legal world) toward the interpretation of one's "sex" for purposes of employment protections and for purposes of student access to bathrooms and locker rooms. The debates and attention have been significantly augmented by high-profile sexual abuse and harassment cases in universities and others involving highly visible public figures. Adding to the mix was the May 2020 release of the U.S. Department of Education's amendments to the Title IX regulations which focus on "sexual harassment".¹ With two changes in administration in Washington since the initial rise in attention to sex/gender-related issues and a significant recent U.S. Supreme Court decision in the employment context, transgender issues in schools will likely be more significant and perhaps sooner than later.

Transgender & Employment: Title VII Hits the U.S. Supreme Court

The Law

Title VII prohibits employers from discriminating on the basis of protected categories. It provides, in pertinent part,

It shall be an unlawful employment practice for an employer--
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

¹ The most recent joint status report in a challenge to the Title IX sexual harassment regulations states that "the [U.S.] Department [of Education] is exploring administrative actions that are likely to alter significantly the course of this litigation—including the publication of a notice of proposed rulemaking" *Pennsylvania v. Cardona*, 1:20-cv-01468 (Rec. Doc. 156) (D.D.C. Oct. 27, 2021). This is merely the most recent signal that the ED is going to change the Title IX regulations regarding sexual harassment. The change will probably not occur prior to the 2022-2023 school year.

employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.²

The Case

In 2020, the U.S. Supreme Court heard three cases which it consolidated: one from Georgia, one from New York, and the other from Michigan.³ In the Georgia and New York cases, the employees claimed that they had been terminated from employment for being gay. The Michigan case involved an individual who claimed employment termination on the basis of transgender status. All alleged that their termination was based on sex and thereby discriminatory under Title VII.

In the end, the Court held that it is sex-based discrimination under Title VII to fire someone because the individual is gay or transgender. The Court stated, "In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."⁴

The U.S. Fifth Circuit Court of Appeals recently addressed *Bostock's* applicability to sexual harassment in the Title VII context. In one case, the plaintiff had urged the Court to extend *Bostock*, but the Court declined to do so. The Fifth Circuit stated, "The [Supreme] Court [in *Bostock*] interpreted Title VII to prohibit workplace discrimination against homosexual and transgender persons. It reasoned that an employer's taking adverse action against employees because of their sexual orientation or transgender status was inextricably tied to sex, even if sex was not the sole motivating factor for the action."⁵ The Fifth Circuit

² 42 U.S.C. § 2000e-2(a) (emphasis added).

³ *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020).

⁴ *Bostock*, 140 S. Ct. at 1754.

⁵ *Newbury v. City of Windcrest, Texas*, 991 F.3d 672, 676-77 (5th Cir. 2021) (internal citations omitted).

concluded, however, that *Bostock* did not extend to the Title VII *sexual harassment* context: “Although the Court expanded the groups of individuals protected by Title VII, it in no way altered the preexisting legal standard for sexual harassment.”⁶ In another recent case, the Fifth Circuit stated,

“Title VII protects every American, regardless of sexual orientation or transgender status. It simply requires proof of sex discrimination.” *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 340 (5th Cir. 2019) (Ho, J., concurring). That was true before *Bostock*, and it remains true after *Bostock*. Under *Bostock*, transgender discrimination is a form of sex discrimination under Title VII. But a plaintiff claiming transgender discrimination under *Bostock* must plead and prove just that—discrimination.⁷

Federal Response to *Bostock*

In the wake of *Bostock*, President Biden issued Executive Order 13988.⁸ In March 2021, the Civil Rights Division of the U.S. Department of Justice issued a letter to general counsel and heads of federal agencies’ civil rights divisions.⁹ In response, federal agencies – including the ED’s OCR, HHS’s OCR, and the EEOC – issued notices of how the respective agencies interpret and intend to apply *Bostock* within their enforcement activities.¹⁰

⁶ *Id.* at 677.

⁷ *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595, 603 (5th Cir. 2021). Plaintiff filed a petition for writ of certiorari on October 12, 2021.

⁸ Executive Order 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 Fed. Reg. 7023 (Jan. 25, 2021).

⁹ *Memorandum to Federal Agency Civil Rights Directors and General Counsel* (DOJ Mar. 26, 2021). Available at: <https://www.justice.gov/crt/page/file/1383026/download>

¹⁰ See Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination on the Basis of Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637 (OCR June 22, 2021); Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27984 (DHHS May 25, 2021); Sexual Orientation and Gender Identity (SOGI) Discrimination (EEOC 2021), available at: <https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination>

Transgender & Title IX

In the Workplace

We are not talking about “sex in the workplace” within the common vernacular (i.e., sexual behavior) but the legal protections afforded to individuals based on biological versus identified “sex” under federal law and afforded to individuals based on sexual orientation (e.g., homosexuality). While the U.S. Fifth Circuit Court of Appeals¹¹ has not opened the door to gender identity as a protected class or subsumed under “sex” within Title IX in the workplace, at least one of its sister circuits (e.g., Seventh) appears willing to recognize gender identity as protected under Title IX. With what appears to be an emerging “circuit split” on the issue, the U.S. Supreme Court may eventually be asked to address one of these cases.

Restroom and Lock Room Access

We saw an explosion of litigation in 2016 involving transgender student access to “intimate” facilities, such as restrooms and lock rooms. At the federal level, the Obama administration’s May 13, 2016 *Dear Colleague Letter* (DCL) was the spark. In essence, that DCL expressed the (then) position of the U.S. Department of Justice (DOJ) and U.S. Department of Education (ED) that the Title IX anti-discrimination provisions regarding sex included “gender identity” and directed public schools (among other entities) to allow access to restrooms and locker rooms according to a student’s gender identity, without more. The Trump administration withdrew the DCL¹² on February 22, 2017. The Biden administration has signaled that its position is in line with the Obama administration’s views of Title IX’s scope. To date, the current executive departments have not reissued a DCL on these issues; however, it is anticipated that the DOJ and ED will issue some form of guidance in the near future.

In the wake of the Trump administration’s withdrawal of the DCL in 2017, all eyes were on the U.S.

¹¹ U.S. Fifth Circuit Court of Appeals: Louisiana, Texas, Mississippi.

¹² The USDOJ and ED provided notice to the U.S. Supreme Court on February 22, 2017 that they were withdrawing the May 2016 DCL as well as OCR’s January 2015 *Letter to Prince*, a forerunner transgender guidance document.

Supreme Court and the *Gloucester County Sch. Bd. v. G.G.* case. Recall that Gavin Grimm (G.G.) is a transgender male¹³ who had filed suit to access the male restroom facilities at his Virginia high school. The Supreme Court vacated (i.e., wiped away) the lower court's decision and remanded (i.e., sent back) the case to the U.S. Fourth Circuit Court of Appeals to review in light of the government's withdrawal of the May 2016 DCL.¹⁴ On March 20, 2017, the Gloucester County School Board (GCSB) filed an unopposed motion to vacate the court's preliminary injunction. That injunction had allowed Gavin to use the boys' restroom. On April 7, 2017, the Fourth Circuit granted the GCSB's motion. As a result, Gavin could not use the boys' restroom the remainder of his senior year.

In Fall 2017, Gavin Grimm filed an amended complaint (through ACLU counsel) in the Virginia federal court in which the original litigation began. New allegations included sex discrimination based on Gavin's inability to use the men's restroom at school athletic facilities as a alum. The district court ruled in Grimm's favor, granting his motion for summary judgment that the bathroom policy violated Title IX.¹⁵ The school district appealed.

Grimm had obtained a state court order officially amending his birth certificate to indicate the gender of "male". In addition to denying access to the male restrooms, the school district refused to amend Grimm's official records. Finding the district's "on the basis of sex" bathroom policy violated Title IX, the Fourth Circuit affirmed the district court's ruling.¹⁶

The school district petitioned the U.S. Supreme Court to take the case. However, on June 28, 2021,

¹³ A "transgender male" is a biological female who expresses a male gender identity. Similarly, a "transgender female" is a biological male who expresses a female gender identity.

¹⁴ *Gloucester County Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017).

¹⁵ *Grimm v. Gloucester County Sch. Bd.*, 400 F. Supp. 3d 444 (E.D. Va. 2019).

¹⁶ *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020). The Court also affirmed the district court's ruling that the bathroom policy violated equal protection under the Constitution.

the Court declined to hear the case.¹⁷ A “denial of cert” is not the Supreme Court’s affirmation or approval of the ruling below. However, the effect of such denial is to make the Fourth Circuit’s ruling “final”. Therefore, the Fourth Circuit’s most recent *Grimm* ruling stands as a high-level decision¹⁸ in the transgender area for schools.¹⁹

Seventh Circuit’s May 2017 Ruling

Several months prior to Grimm filing his second federal complaint in 2017, the Seventh Circuit Court of Appeals²⁰ upheld a preliminary injunction against a Wisconsin school district which prohibited the school district from barring a transgender male from the men’s bathroom.²¹ Instead of a focus on direct expansion of the meaning of “sex” under Title IX, the plaintiff (“Ash” or “Ashton”) attacked the school’s ban on access using a “sex-stereotyping” theory.

Essentially, sex-stereotyping is discriminatory behavior founded on what is generally believed to be common or typical behavior (e.g., dress, mannerisms) of a male or female. In other words, for example, an

¹⁷ *Gloucester County Sch. Bd. v. Grimm*, 141 S. Ct. 2878 (2021). In order for the Court to “grant the petition for writ of certiorari”, four justices must vote in favor. Here, only two voted in favor (Justice Thomas and Justice Alito).

¹⁸ The decision is only binding in the Fourth Circuit (Virginia, North Carolina, South Carolina, Maryland, West Virginia). However, future plaintiffs will most certainly “use” the case in any challenge in other circuits to biological gender-based restrictions on bathroom/locker facilities.

¹⁹ In its first (now vacated opinion), similar to the Fourth Circuit in *Grimm*, the Eleventh Circuit held that the school district’s policy violated Title IX and equal protection. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns County, Florida*, 968 F.3d 1286 (11th Cir. 2020) (opinion vacated). The Fourth Circuit withdrew and vacated its prior opinion. In its new opinion, the Court did not “reach” (address) the Title IX issue but continued to hold that the bathroom policy violated equal protection. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns County, Florida*, 3 F.4th 1299 (11th Cir. 2021) (opinion vacated). The school board filed a petition for rehearing by the whole Eleventh Circuit (i.e., “en banc”); the Court granted the petition and vacated the panel’s decision. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns County, Florida*, 9 F.4th 1369 (11th Cir. 2021). The rehearing en banc is pending.

²⁰ Wisconsin, Indiana, Illinois.

²¹ *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (upholding preliminary injunction).

employer disciplining a biologically female employee for conduct which is inconsistent with the employer's belief of how a female should behave would be prohibited sex-stereotyping (e.g., behaving too masculine). This form of Title VII-based discrimination is prohibited under the U.S. Supreme Court's *Price Waterhouse* decision in 1989.²²

In short, the Seventh Circuit's decision concludes that a transgender individual's behavior (*per se*) is non-sex-stereotypical. The Court stated, "By definition, a transgender individual does not conform to the sex-based stereotypes of the sex he or she was assigned at birth." As support, the Court cited cases from two sister circuit courts of appeal (6th and 11th) to bolster its position.²³ The Court also cites to many federal district court decisions, including one from Texas,²⁴ in support of its conclusion.

However, the support is tangential at best, as the district judge in Texas stated,

Because Lopez has not argued that transgendered individuals are entitled to Title VII protection *per se*, the Court deems that argument waived. To the extent Lopez's claim relies on that theory, it is dismissed. The Court concludes, applying Title VII as written and interpreted by the United States Supreme Court, that Lopez has stated a legally viable claim of discrimination as a male who failed to conform with traditional male stereotypes.²⁵

Further, our circuit, the U.S. Fifth Circuit, has not ruled yet on whether a sex-stereotyping theory is viable for a transgender individual (on the basis of transgender status alone).

²² *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

²³ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App'x 883 (11th Cir. 2016) (unpub.). Sixth Circuit: Michigan, Ohio, Kentucky, Tennessee. Eleventh Circuit: Georgia, Florida, Alabama.

²⁴ *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008).

²⁵ *Id.* at 667-68.

What Should We Expect Now and in the Coming Months?

- (1) Since *Bostock* arrived, the tide for a national mandate regarding transgender-based access and activities in schools is apparently moving forward.
- (2) OCR has signaled its intent to investigate – if not encouraged filing of – transgender-based complaints.²⁶
- (3) It is more likely now in prior years that some parents and students may “test the waters” to see how school boards respond to parent/student requests for gender identity based bathroom access, locker room access, athletic team tryout/participation, and pronoun/name use. A school board’s denial of open access to or limitation of bathroom/locker room facilities according to gender identity could result in litigation. Well-organized groups (e.g., ACLU) have and will likely take up the banner for such parents and students.
- (4) Some number of community members, including parents, will protest any policy which allows access to facilities according to gender identity (if contrary to biological sex).
- (5) Challenges to bathroom/locker room facilities may prompt reactions from students and adults. As ever, be vigilant regarding bullying complaints on the basis of sex (or some alternate protected class, such as race or disability). Note that school district staff “retaliation” against a parent/student for engaging in a protected activity²⁷ under federal civil rights laws is another basis for a potentially viable discrimination complaint. Regional and national focus on this transgender issue coupled with possible district-level or school-level tension over the issue may create a fertile context for conflict – including emotionally based reactions (as opposed to reasonably considered responses) by school

²⁶ *Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families* (DOJ & ED 2021). Available at: <https://www.justice.gov/usao-sd/page/file/1423781/download>. See also *Supporting Intersex Students: A Resource for Students, Families & Educators* (OCR 2021). Available at: <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-intersex-202110.pdf>

²⁷ A “protected activity” includes merely filing a complaint under Title IX or another civil rights law (e.g., ADA/Section 504).

and administrative staff.

- (6) Issues regarding *student privacy* are not “stayed” pending resolution of the transgender litigation. School districts have taken affirmative steps to address privacy issues for **all** students—at least with regard to restroom and locker room facilities. Further, as reflected in many cases, school districts have provided the student private facility options.

What Else Should You Know regarding Title IX?

Consider the following obligations under federal regulations²⁸ for all public school districts:

(a) *Designation of coordinator.* Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.” The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

(b) *Dissemination of policy—(1) Notification of policy.* Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient’s Title IX Coordinator, to the Assistant Secretary, or both.

(2) *Publications.* (i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.

²⁸ 34 C.F.R. § 106.8 (eff. Aug. 2020).

Therefore, it is imperative that each school district establish *and publish* Title IX complaint/grievance procedures specific to Title IX (generally). Importantly, the 2020 Title IX regulations regarding “sexual harassment” have very detailed and specific procedural mandates, especially the sexual harassment grievance process. A component of these requirement is that school districts must by name identify their Title IX coordinator(s) and publish who that is by name and his/her contact information (i.e., at least office address and telephone number). For example, the required Title IX coordinator information can be included with the (also) mandated non-discrimination notice.

(Sample)

NOTICE OF NON-DISCRIMINATION

The _____ School Board does not discriminate on the basis of race, color, national origin, sex, disability, or age in the admission or access to, or treatment or employment in, its programs and activities and provides equal access to designated youth groups, such as the Boy Scouts.

The following persons have been designated to handle inquiries regarding the non-discrimination policies:

Section 504

Staff, Title
Address
City, LA 7xxxx
xxx-xxx-xxxx
xxxx.xxxx@xxxx.xxx

Americans with Disabilities Act (ADA)

Staff, Title
Address
City, LA 7xxxx
xxx-xxx-xxxx
xxxx.xxxx@xxxx.xxx


Title IX Coordinator

Staff, Title
Address
City, LA 7xxxx
xxx-xxx-xxxx
xxxx.xxxx@xxxx.xxx

**Transgender Issues
Facing Schools**


2021 Louisiana School Law Workshop

Wayne T. Stewart, J.D., Ph.D.



HAMMONDS MILLS ADDRESS
GUILD NOAH PERKINS
ATTORNEYS AT LAW


1



Context

- Variability in interpretation of one's "sex" for purposes of employment protections and for purposes of student access to bathrooms and locker rooms
- Changes in administration in Washington
- SCOTUS's *Bostock* decision

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Bostock

- 2020 SCOTUS ruling
- Resulted from 3 consolidated cases (Georgia, Michigan, New York)
- Main issue: Is termination for being homosexual or transgender "on the basis of sex" under Title VII?

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Bostock

Court held:

It is sex-based discrimination under Title VII to fire someone because the individual is gay or transgender.

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Bostock

The Court stated, "In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."

Bostock, 140 S. Ct. at 1754.

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Post-*Bostock*: U.S. 5th Circuit

"The [Supreme] Court [in *Bostock*] interpreted Title VII to prohibit workplace discrimination against homosexual and transgender persons. It reasoned that an employer's taking adverse action against employees because of their sexual orientation or transgender status was inextricably tied to sex, even if sex was not the sole motivating factor for the action."

Newbury v. City of Windcrest, Texas, 991 F.3d 672, 676-77 (5th Cir. 2021) (internal citations omitted).

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Post-Bostock: U.S. 5th Circuit

The Fifth Circuit concluded, however, that *Bostock* did not extend to the Title VII *sexual harassment* context: “Although the Court expanded the groups of individuals protected by Title VII, *it in no way altered the preexisting legal standard for sexual harassment.*”

Newbury v. City of Windcrest, 991 F.3d at 677 (emphasis added).

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Post-Bostock: U.S. 5th Circuit

In another recent case, the Fifth Circuit stated,

“Title VII protects every American, regardless of sexual orientation or transgender status. It simply requires proof of sex discrimination.” *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 340 (5th Cir. 2019) (Ho, J., concurring). That was true before *Bostock*, and it remains true after *Bostock*. Under *Bostock*, transgender discrimination is a form of sex discrimination under Title VII. But a plaintiff claiming transgender discrimination under *Bostock* must plead and prove just that—discrimination.

Olivarez v. T-Mobile USA, Inc., 997 F.3d 595, 603 (5th Cir. 2021).

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Federal Response to *Bostock*

- Executive Order 13988
- DOJ letter to civil rights divisions
- ED, HHS & EEOC guidance

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Transgender & Title IX

- 2016 – ED *DCL* on Gender Identity
- 2017 – *DCL* rescinded
- 2021 – Admin.: *DCL* to be revisited

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Transgender & Title IX

- *Grimm*: Round 1
- *Grimm*: Round 2
 - Fourth Circuit rules in favor *Grimm*
- Eleventh Circuit rehearing *en banc* on similar issues pending

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Transgender & Title IX

Sex Stereotyping & Title IX?

- Viable basis in 7th Circuit
- What would the 5th Circuit do?

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What's Next?

- (1) Since *Bostock* arrived, the tide for a national mandate regarding transgender-based access and activities in schools is apparently moving forward.
- (2) OCR has signaled its intent to investigate – if not encouraged filing of – transgender-based complaints.
- (3) Testing the waters?
- (4) Push back?
- (5) Privacy?

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Version 4.0 | Updated on 6.8.16



2016

TRANSGENDER STUDENTS IN SCHOOLS

Frequently Asked Questions and Answers for Public School Boards and Staff



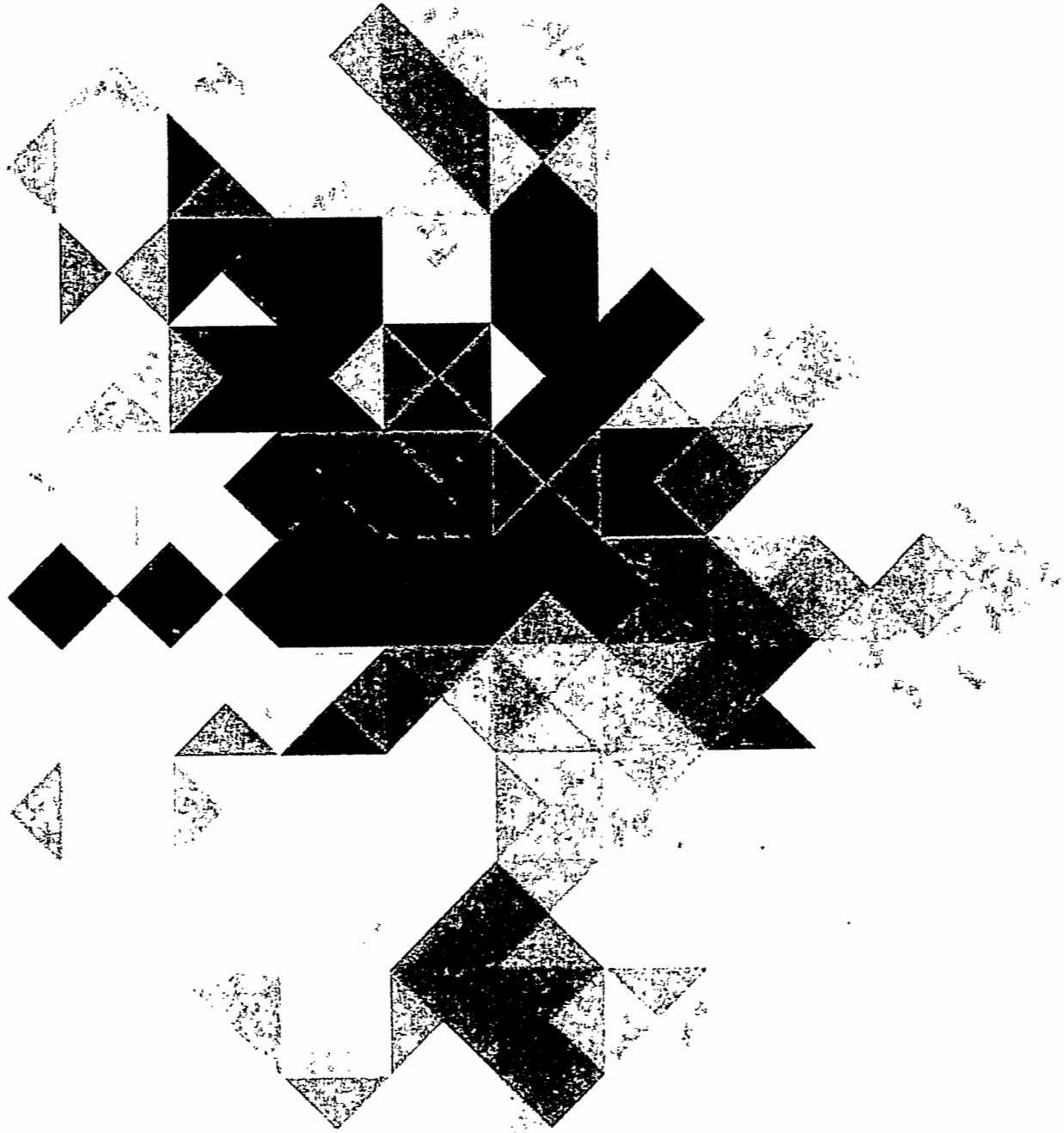


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I. INTRODUCTION

As K-12 public school leaders, you know that societal challenges, conflicts, and changes often play out dramatically in public schools. Students and staff bring to school each day their own unique family, religious, and personal experiences, their views, their opinions, and their struggles. As society continues to confront issues of sexual orientation and gender identity, schools have become a key arena where evolving views are explored and tested.

Today, societal attitudes with respect to LGBT people, particularly those who are transgender or gender non-conforming, are evolving rapidly. With the U.S. Supreme Court's recognition of same-sex marriage as a fundamental right,¹ and many states prohibiting discrimination based on sexual orientation or gender identity,² LGBT rights are front and center. Transgender or gender non-conforming students³ increasingly assert civil and educational rights at school, which means school staff and leadership must balance a growing number of competing voices: requests from students and parents for accommodation, concerns of students and parents relating to privacy and safety, requirements from state governments and federal agencies, and guidance from special interest groups.

While these sometimes-demanding voices continue to press schools from all sides, the legal framework specifically addressing transgender students remains piecemeal. Schools currently have no single, definitive legal authority to inform their response in this area, although one federal appellate court has ruled on Title IX's applicability to gender identity. The U.S. Supreme Court has yet to hear a case on transgender student issues, and conflicts remain between the few existing federal court rulings on the one hand, and the Departments of Justice and Education on the other regarding how Title IX, the federal sex anti-discrimination law, should be applied.

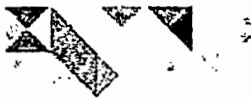
In this shifting legal landscape, your goal — and challenge — as public school leaders remains clear: to provide educational access and to maintain safe learning environments for all, including transgender students. School board members have an opportunity to lead through your policy-making function. You should engage your communities regarding the most effective policies and procedures that will ensure equal access to education, while reflecting community concerns and values. Public schools belong to all, and policy decisions about important issues should be made only after appropriate involvement of those affected by the decision and with due consideration for the rights of those holding dissenting views, seeking to reconcile sometimes deeply conflicting community views and legal imperatives on these issues.⁴ Admittedly, the conversation is not easy. Recent experience demonstrates that

even as school boards adopt and implement anti-discrimination policies to protect students, they are faced with more difficult conversations about how to implement those policies on a day-to-day basis. How do we allow equal access, but respect privacy for transgender and other students? How does a school district apply its dress code for transgender students? And how do schools regulate student use of single-sex restrooms and locker rooms? School boards and school staff will have to answer these questions through policy and daily on-the-ground decisions, all the while balancing sincerely held beliefs and community norms.

There are no quick and easy answers to these questions. While social change can be painful and challenging, it also can be a process of enrichment and growth, especially when school leaders engage and guide their communities in conversations that respect disparate beliefs and opinions. This guide is intended to assist your efforts to engage in these difficult conversations, and to make very difficult choices, while navigating a sometimes confusing legal landscape. Our primary aim is to offer a guide for spotting issues, understanding existing legal frameworks, and, where appropriate, offering recommendations to help schools ensure that all students, regardless of gender identity, are safe and learning at school. A key tenet undergirding this guide is the belief that all children have a right to learn, and they deserve public schools free from discrimination and harassment.

The guide is not intended to provide one size fits all legal advice for what are very sensitive and complex social and legal issues. Because these issues must be resolved in the context of local communities, school boards and school district leaders are encouraged to consult their school attorney member of the NSBA Council of School Attorneys regarding how the applicable laws and regulations in their state, along with federal requirements outlined here, may affect the policy decisions they are making for their schools.

We urge school boards and their communities to use this guide as a balanced, objective resource to illuminate your conversations on this topic, and to support the mission of public schools to educate our nation's children in safe learning environments.



II. FAQs

1. Definitions

“Transgender” is an umbrella term used to describe individuals whose gender identity, expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth. Gender identity is not sexual orientation.

Question: What is meant by transgender or gender non-conforming student?

The American Academy of Pediatrics (AAP) describes gender non-conforming people as “persons with behaviors, appearances, or identities that are incongruent to those culturally assigned to their birth sex.”⁵ Gender nonconforming individuals may refer to themselves as transgender, gender queer, gender fluid, gender creative, gender independent, or non-cisgender.” The AAP definition reflects the increasingly—though not universally⁶—accepted view that gender is “a continuum between maleness and femaleness” and that for a particular child, gender non-conformity may “change over the years or disappear altogether.”⁷

Gender identity is not sexual orientation, which refers to a person’s emotional, romantic, and/or sexual attractions to men, women, or both sexes.⁸ A transgender student may have any sexual orientation.⁹

2. Addressing a Transgender Student

Question: What names and pronouns should school staff use when speaking about or to a transgender student?

In speaking to or about a transgender student, you should treat him or her with the same dignity and respect as any other student. Whether educators should honor a request by a student or his or her parents that the student be addressed with a name and pronouns that conform to the student’s gender identity may depend on local school policy, applicable law, and concerns for order and behavior in the particular educational environment. Issues related to employees who do not want to address a transgender student with names/pronouns aligned with the student’s gender identity are discussed below in Section 12, School Staff.

Some local and state boards of education have adopted policies or issued guidance documents on this topic to help staff members who are unsure how to address gender-nonconforming students

in the absence of an affirmatively stated preference. The District of Columbia Public Schools tells staff, “students should be addressed by their preferred name and gender pronoun,” and advises that when school staff is unsure regarding a student’s preferred name or pronoun, staff should discuss the matter with the student privately and tactfully to determine the student’s preference.¹⁰ Similarly, the New York State Department of Education recommends that school officials discuss with the student and possibly the parents the question of name and pronoun use, and develop “a plan to reflect the individual needs of each student to initiate that name and pronoun use within the school.” The guidance suggests the “plan also could include when and how this is communicated to students and their parents.”¹¹

Several advocacy and interest organizations have issued guidance on addressing and serving transgender students in public schools, which you may find helpful for further insight as you form and re-form policies and practices on serving transgender students.^{11a}



3 Discrimination/Harassment

The State of the Law: Discrimination on the Basis of Gender Identity

All students in public schools are protected by federal civil rights statutes and constitutional concepts like equal protection, free speech, free exercise of religion and privacy. Generally, these legal standards require that schools treat students fairly and equally, without discriminating on the basis of characteristics including sex. Title IX of the Education Amendments of 1972 is particularly important in the discussion of legal protections for transgender students.

Title IX provides that “[n]o person ... 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.” On May 13, 2016, The United States Departments of Justice and Education issued a joint guidance letter, which states that Title IX and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance and that the prohibition includes discrimination based on a student’s gender identity. This guidance is accompanied by a separate document, titled *Examples of Policies and Emerging Practices for Supporting Transgender Student*, which contains examples of policies and documents taken from school districts, state education agencies and athletic associations around the country that are consistent with the Departments’ interpretation of the law. While Title IX and its regulations are silent on the issue, at least one federal appellate court has agreed with the Departments’ interpretation of Title IX.¹² The Fourth Circuit Court of Appeals ruled that a lower court should have given deference to the Department of Education’s interpretation of its regulations, which it outlined in a letter dated January 7, 2015, indicating that Title IX should be applied to transgender students and that “when a school elects to separate or treat students differently on the basis of sex ... the school must generally treat transgender students consistent with their gender identity.”

Beginning with the U. S. Supreme Court’s holding in *Price Waterhouse v. Hopkins*, courts have held that Title VII prohibits discrimination against persons who fail to conform to “socially-constructed gender stereotypes.” Those protections have been extended to transgender persons in an employment context. Even though the federal law on the issue of transgendered students is

unsettled, the Departments appear to be extending the protections that some courts have recognized in a Title VII context to students under Title IX. Many states protect transgender students more explicitly, through statutes, state regulations, or guidance. Currently, some states include a student’s sexual orientation, gender identity, gender expression, or transgender status as a protected class under state anti-discrimination and/or human rights laws. You should check with your school attorney, your state department of education, and your state school boards association for additional guidance on state-level legal standards regarding discrimination against transgender students.¹²

Question: Are transgender students protected more, or differently, from discrimination, harassment, and bullying?

Transgender students are protected from discrimination, harassment, and bullying, just like any other student. What is not clear at the moment, due to Title IX’s silence on the matter, is whether federal law protects transgender students *based on their transgender status, or simply protects them from discrimination based on sex*, and the extent of a school’s responsibilities in either case. At first blush, it would appear that there would be little, if any, difference in the protections provided to transgender students under federal law. However, the federal statute prohibiting discrimination on the basis of sex does not speak to the rights of transgender students specifically.¹³

In this near vacuum of more specific federal law, some states and the District of Columbia have passed laws protecting transgender students from discrimination.¹⁴ Recently, other states have sought to pass legislation protecting the safety and privacy of all students while excluding transgender students from certain activities and facilities and/or denying them protection against discrimination.¹⁵ Some local school boards have adopted policies providing transgender students with protections against discrimination, even when such protections are not provided under state law. You should familiarize yourself with your state’s requirements and your district’s policy on this topic.

Question: Should a school board’s policies prohibit discrimination, harassment, and bullying of transgender students?

Federal law neither requires nor prohibits a school district from developing and implementing a school board policy against discrimination, harassment, and bullying of transgender students. Such a policy may be required or encouraged by your state.



As school leaders, you do your best to provide a safe educational environment for all students, and to treat all students with dignity and respect, regardless of a student's sex, sexual orientation, gender identity/expression, transgender status, or other characteristics. You should consider your approach to prohibiting discrimination, harassment, and bullying of transgender students as you would for other students with characteristics protected by law or recognized by your school community. To foster a sense of inclusiveness in the school environment, a school board could amend an existing anti-discrimination policy to include transgender students as another protected class. Doing so could assist your efforts to maintain a safe school climate by creating opportunities to raise awareness, to train staff about expectations, and to notify stakeholders of procedures for resolving claims around transgender issues. On the other hand, boards should also weigh the risk that including transgender students in their existing non-discrimination, harassment and bullying policies could lead to potential claims by individuals who assert that specific applications of such policies violate their constitutional or statutory rights. In this regard, awareness of the expressed concerns and sincerely held beliefs of all members of the school community can be helpful in guiding *application* of an inclusive policy.

In considering policy on accommodating transgender students, you may note that some state school boards associations and state boards of education have issued guidance documents based on the goals of inclusiveness and equity, and, where applicable, based on state laws protecting transgender students. These guidance resources sometimes include model policy language that you may adopt in whole or in part, after consultation with your school attorney. Below are some examples of state-level guidance for educators:

- California School Boards Association, *Policy Brief—Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender-Nonconforming Students*, (Feb. 2014), https://www.csba.org/Governance/AndPolicyResources/DistrictPolicyServices/~/media/CSBA/Files/GovernanceResources/PolicyNews_Briefs/Transgender/201402_PBNondiscriminationGender.ashx
- Connecticut Safe School Coalition, *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws: Frequently Asked Questions*, http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf
- One Colorado, *Guidance for Educators Working with Transgender and Gender Nonconforming Students*, http://www.one-colorado.org/wp-content/uploads/2013/03/Transgender_Guidance.pdf
- Massachusetts Department of Elementary and Secondary

Education, *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment*, <http://www.doe.mass.edu/ssce/GenderIdentity.pdf>

- New York State Education Department, *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students*, <http://www.nysed.gov/press/transgender-and-gender-nonconforming-students-guidance-document>; and
- Texas Association of School Boards, *Legal Issues Related to Transgender Students*, https://www.tash.org/Services/Legal-Services/TASB-School-Law-eSource/Students/documents/transgender_students_july15.pdf.

A variety of non-governmental organizations (NGOs) also provide guidance and sample policies. School board members may wish to familiarize themselves with those policies and consider their applicability to their own school district. Because many NGOs represent specific interests, school boards are well served by conferring with their COSA lawyer before adopting a particular policy.

Question: How should a public school handle a complaint by a transgender student of discrimination, harassment, or bullying?

You should act on a complaint of discrimination, harassment, or bullying made by a transgender student with the same level of expediency, thoroughness, and corrective action as a complaint made by a non-transgender student. In fact, applying a separate procedure for processing complaints made by transgender students itself could be considered discrimination, particularly if the complaints are not investigated with the same vigor as those of non-transgender students.

With any complaint of discrimination, harassment, or bullying by a student — transgender or not — who is also identified as a special education student under either the Individuals with Disabilities Education Act (IDEA) or Section 504 of the Rehabilitation Act (Section 504), you should have procedures in place to ensure that school staff determine if the discriminatory, harassing, or bullying conduct may have resulted in a denial of the student's rights to a free appropriate public education (FAPE). The U.S. Department of Education, Office for Civil Rights (OCR) has said that bullying on any basis of a student with a disability who is receiving services under IDEA or Section 504 can result in a denial of FAPE that "must be remedied..."¹⁶ OCR expects schools to convene the student's IEP or Section 504 team(s) to determine whether there has been a denial of FAPE, and to formulate an appropriate response. Even though it is far from clear under applicable court decisions what constitutes a denial of FAPE in the bullying context, you should be aware that if you fail to investigate a complaint and/or to take corrective action, your school district may be subject to further investigation either by a federal or state governmental agency.



4. Student Privacy

State of the Law: Student Privacy

Every public student has a recognized right to privacy at school protected by the Family Educational Rights and Privacy Act (FERPA) and, in certain situations, by the U.S. Constitution. FERPA protects education records and personally identifiable information contained in them from release except under certain circumstances, and allows a student and/or the parents access to those records. A student's transgender status in an education record is "personally identifiable information," which would be protected from disclosure to others without the student's and/or parent's consent.

If a student's transgender status is included in his or her education records, parents of minor students have a right to see that information. FERPA does not preclude schools from otherwise sharing the transgender status of a minor student with the parents. But, generally, a student's transgender status is confidential information and should be protected as such by school officials.¹⁷

Question: Is a transgender student, or his/her parents, required to notify school staff of the student's transgender status?

No. Unless a family is seeking action by school officials such as changes to official records, changes in the way a student is addressed at school, or accommodations regarding restrooms or locker rooms, there is no legal requirement that parents notify the school of a child's transgender status.

That said, awareness of a student's gender identity is important so that you as school officials can engage in appropriate conversations with the student and family, maintain records accurately, make any needed accommodations for use of facilities, and ultimately ensure a safe learning environment for all. School boards should consider adopting policies around gender identity that prepare staff to address issues before they arise.

Some states permit school districts to designate sex/gender as a category of "directory information," which, with proper notice and opportunity for parents and eligible students to opt out, may be released without consent. The U.S. Departments of Education and Justice have taken the position that "[s]chool officials may not designate students' sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy."¹⁸

Question: Once a school staff member has actual notice of a student's transgender status, how should the school handle this information? Which members of the school staff should be informed? What information should be shared?

A member of the school staff, as provided in school district policy or practice, should speak to the student and family about how they prefer that the information be handled. Some families may wish a student's transgender status to remain private. Others families may prefer that the student's status is shared, and even discussed in class.¹⁹ Under FERPA and many state privacy laws, it is appropriate and allowable for an educational institution to share student information with other "school officials," including school staff, as long as they have a legitimate educational interest in that information. It may be necessary that an entire grade-level team or entire school staff be informed of a student's transgender status to enable the student to be safe at school. But generally, you should obtain parental (or eligible student) consent before sharing the student's transgender status with people who are not school officials.

Regardless of whether your school community currently has any transgender students, it is a good idea to provide training to staff and students on transgender issues to increase awareness of district policies and practices on specific issues such as names, pronouns, school records, and restroom/locker room use, and to ensure that the school community knows the appropriate steps to take in instances of bullying and harassment, and requests for accommodation.



A student's transgender or gender-nonconforming status is his/her private information. The district only will disclose the information to others with the student's prior consent, except when the disclosure is otherwise required by law or is necessary to preserve the student's physical or mental well-being.

— Policy language recommended by the California School Boards Association. See CSBA Sample Administrative Regulation – Students: Nondiscrimination/Harassment, Transgender, and Gender-Nonconforming Students, AR 5145.3(h)(1), at *8, http://www.nvasb.org/assets/californiasba_recd-08-14-15.pdf.

Question: What privacy interests should school officials consider when a school is communicating with a student's parents regarding the student's transgender status? Does the age or grade level of a student matter?

You should consider federal and state legal protections of student privacy when communicating with a transgender student's parents; and age does matter.

A very small number of courts have recognized a public school student's reasonable expectation of privacy in his or her sexual orientation, which suggests there would be a corresponding expectation for transgender status.²⁰ But a few courts have also recognized that this right of privacy is not absolute and may be outweighed in situations where schools have a legitimate or compelling reason to disclose information to parents that directly or implicitly reveals their child's sexual orientation.²¹ As school officials, you walk that delicate line balancing the privacy interests of the student versus his or her parents and your legal duties.²²

Given the unsettled state of the law, you may choose to direct school staff who are unsure whether the parents are aware of the student's transgender status to refrain from incautious disclosure of a student's transgender status. It may be wise to advise staff to limit discussions of a student's transgender status to situations where there is a legitimate or compelling need to do so, for example to address school records, use of facilities, health concerns, safety issues, including bullying or harassment, and where there is a legal duty to inform parents about their child's situation.

You also should consider the student's age and developmental stage. In the case of young students such as those in the elementary grades, or students with developmental disabilities, school officials should be able to communicate with parents regarding transgender status, unless there is a reason to fear

for the safety of the child if that status is revealed. For middle and high school students, while there is generally no legal requirement that schools obtain the consent of minors to speak with parents about the child's private matters, school officials may wish to talk with a tween or teen first to ascertain any concerns the student may have with such communications. The conversation could present opportunities for you to share community resources that may be of assistance to the students and their families, or could identify the danger of potential abuse against a child outside of school. Always remain aware of your duty to report reasonable suspicion of child abuse or neglect to the appropriate child protective service agencies as required by state law.

If the student remains concerned about informing his or her parents, you should explore the basis for the student's concern, and determine whether the concern triggers any child abuse reporting obligations. Keep in mind that parental disagreement or lack of support regarding a student's gender expression alone does not equal reportable behavior. In fact, while schools may have a role in facilitating conversations between parents and students, including connecting them to local resources or support services,²³ schools should be aware that families also may have sincerely held beliefs that impact the way they view issues of gender identity and sexuality. For this reason, you would be well-advised to focus your concerns on the student's well-being in the school setting.



Question: What should schools do if a transgender student expresses an interest in self-harm?

If any student expresses an interest in self-harm, you should follow existing policies and procedures and work closely with school counselors and other school staff who know the student to determine next steps.

Unless there is a concern that sharing a student's expression of an interest in self-harm will put the student at further risk, or there is a clear prohibition or protocol under state law, you should contact the parents of minor students and share the concern regarding self-harm. If the student is in middle or high school, you may want to first speak to the student about contacting his or her parents, and the parameters on what needs to be shared. You should explain to the student the school's responsibility in ensuring his or her safety at school.

5. Official Records

State of the Law: Official School Records

Although federal law does not directly address name and gender changes in student records, state law and policy is evolving on this topic. Before making a decision or adopting a policy on student name and/or gender changes in school records, consult with your state school boards association and your school attorney.

FERPA requires educational institutions to allow parents or eligible students to review education records, and to request that the school change "inaccurate" or "misleading" records or records in violation of the privacy rights of the student.²⁴ An educational institution must provide the parents the opportunity for a hearing to challenge the content of the student's education records.²⁵ The Department of Education's Family Policy Compliance Office (FPCO) issued a letter in 1991 saying FERPA does not apply to requests for (and, therefore, does not require) changes in records regarding transgender status, because records reflecting a student's gender or name as of a certain date contain no error. FPCO noted that, under FERPA, it is a "substantive decision of the school district" whether to amend the education records to reflect a name and gender other than that of the student during his or her attendance. The U.S. Departments of Education and Justice have taken the position that, under Title IX, schools must process requests to amend information in a student's record related to transgender status in the same way other student record amendment requests are processed.²⁶

Parents and students may still make such requests, and state law may require a change.

As a general rule, states require school districts to maintain a "permanent" record for a student that matches his or her legal name and gender, as indicated

on a legal document such as a birth certificate.²⁷ This permanent record is tied to the statewide longitudinal data system and the state education agency. Many states now recommend through policy guidance that schools maintain a transgender student's permanent record in a secure location, and that that record remain confidential, accessible only to key staff.²⁸ Meanwhile, the student's every-day records, including class rosters, student ID card, and test documents can reflect the student's preferred name and gender. Other states require simply a request from a student or his or her family to change student records. Connecticut and Massachusetts recommend that schools reflect in a student's record his or her chosen name, as affirmed by the parents or legal guardian, regardless of whether there has been a legal name change.²⁹ The student's birth name is considered private information, not to be disclosed.

Question: When a student requests to be addressed by a name and gender different from that assigned at birth, what documentation can/must/should the school require before complying with that request?

Unless state law requires legal or medical documentation, and considering the points raised in this guide, schools may consider accommodation of a student's requests to be addressed by his or her preferred name and gender identity. As with nicknames, your school staff usually are inclined to honor a student's preferences so that he or she feels safe and supported at school, without any need for documentation. Honoring a student's request to be referred to by the name and gender of his or her choice can contribute to creating a supportive climate for the student. As a practical matter, it also may put the school district in a better legal position. However, the school's interests in maintaining order and discipline and avoiding disruption in the educational environment could justify the refusal to honor a transgender student's request to be referred to by a certain name in the same way such interests would support a refusal to use certain nicknames preferred by non-transgender students. Schools should be careful to base such refusals on the same criteria no matter the gender identity of the student, or the school might face a claim of discrimination based on gender or gender stereotypes, and a potential enforcement action by OCR based on gender identity³⁰ under Title IX.³¹

Question: Is a school required to change the student's records to match the name and gender being asserted at school?

State law is the first place to check. In many states, a request from the parent or student alone is enough to change school records.³² In others, school officials must obtain a letter from the student's physician or counselor, a court order, or medical



evidence before changing a student's record. As stated above, FPCO has suggested that FERPA does not require schools to change records retroactively based on transgender status after a student leaves the school, but does allow parents to request a change to records that are "inaccurate" or "misleading."

Rather than requiring a family to initiate proceedings under FERPA to change a record by challenging its current accuracy, you can work with families to ensure that a student's records accurately reflect his or her preferred name and gender identification, in compliance with state law. In this way, the student feels respected, and you have opened channels of communication with the family. It also can help alleviate staff confusion about how to address a transgender student. Codify your approach in district policies, including requests by former students for amended records, transcripts, and diplomas. It is likely that FERPA's provisions that permit amendment to "inaccurate" or "misleading" records would apply in that case. For current students, some school districts change the student's main file according to his or her preferences, but keep a separate confidential file identifying the student's birth name and sex assigned at birth. In Illinois, for instance, school officials may reflect the student's preferred name on all official documents, including rosters, student ID cards, and test documents, but must retain a copy of the student's birth certificate under the Illinois Missing Children Records Act.³³

Question: If a student obtains a court order changing his or her name, or an amended birth certificate, must the school amend the student's educational records retroactively?

Yes, under most state laws. However, some state laws do not require a court order. For instance, Massachusetts says:

[T]ransgender students who transition after having completed high school may ask their previous schools to amend school records or a diploma or transcript that include the student's birth name and gender. When requested, and when satisfied with the gender identity information provided, schools should amend the student's record, including reissuing a high school diploma or transcript, to reflect the student's current name and gender.³⁴

Importantly, federal law does not answer this question. As previously discussed, under FERPA, parents may request that a school change educational records that contain incorrect or misleading information. If a student's education records contain his or her prior name or gender identity that was accurate at that time, a change may not be required retroactively under federal law. However, state law may address this specifically and allow for a change to school records if a court order has changed the birth certificate or name.

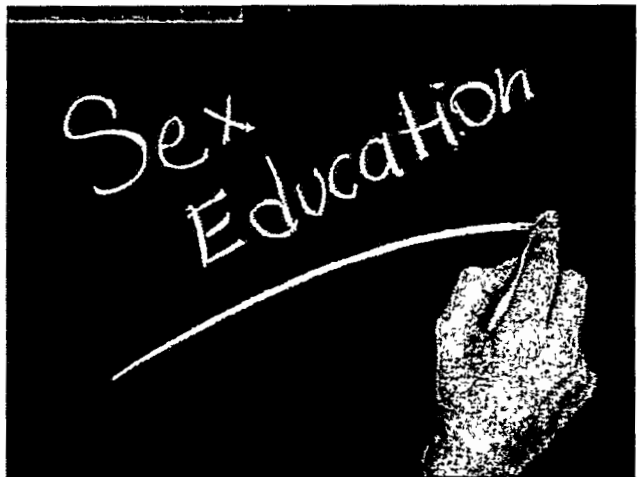
6 Curriculum

Question: Are schools required by law to expand their health or sex education curriculum to include content that addresses transgender students, gender identity, and/or sexual orientation?

In most states, there is no such requirement. Only 23 states and the District of Columbia require sex education. In other states, it is permissible, and many school districts in those states have sex education programs. Where sex education is provided, only 13 states require discussion of sexual orientation. Of these 13 states, nine require that discussion of sexual orientation be inclusive (CA, CO, DE, KY, NJ, NM, OR, RI, and WA). Most of the states that require inclusive discussion of sexual orientation have standards that include discussion of gender identity.

Question: Can parents "opt out" of having their student participate in those portions of the health or sex education curriculum?

This is a matter of state law. Thirty-seven states require that school districts that offer sex education to include parents in sex education, HIV education, or both. Three states (AZ, NV, and UT) require affirmative parental consent before students may participate in one or both types of instruction. Thirty-five states and the District of Columbia require school districts to give parents the option of removing their child(ren) from such programs. Of the nine states that require inclusive discussion of sexual orientation as part of sex education, two (DE and KY) do not mandate that districts give parents a choice about their child's participation in such instruction.³⁵



Question: Is there any requirement that school districts incorporate educational content about the contributions of transgender figures into the general education curriculum, such as history, literature, science, etc.? May schools include materials that feature or include transgender people or characters in a story?

California is the only state that requires the inclusion of the contributions of various groups of people, including gay, bisexual, and transgender, in state and U.S. history curricula. The state law requires “the study of their roles and contributions to the economic, political, and social development” of the state and nation “with particular emphasis on portraying the role of these groups in contemporary society.”³⁵

Except where specifically prohibited, school districts may take a more inclusive approach in presenting lessons across the whole curriculum, although some states prohibit including instruction that “promotes a homosexual lifestyle or portrays homosexuality as a positive alternative life-style.”³⁷ As defined by AAP and noted above, however, sexual orientation and homosexuality are not synonymous with gender identity.³⁸ Whether such prohibitions technically apply to a given school in a particular state is a question for school board legal counsel. As with many curricular choices, a school board is well advised to explore inclusion carefully and with a high degree of transparency and community involvement. Where the board adopts an inclusive approach, it may also wish to make clear that family input remains essential to the education of students and that avenues (formal or otherwise) exist for parents to raise and resolve concerns and objections about the lessons their children are receiving at school. School districts should also involve educators when making decisions on how best to achieve curricular goals. (For more discussion, see the section on Community Engagement below.)

Sports, School Activities, and Physical Education

Question: How may a transgender student participate in sports and school activities, including physical education and other extracurricular classes that are separated by sex?

For school activities like physical education and same-sex curricular activities (i.e., sex-segregated reading or mathematics classes), ideally a transgender student should have the same opportunities to participate as non-transgender students, although a school board’s determination whether a transgender student should be permitted to participate in the activities aligned with the student’s gender identity must carefully consider social, community and legal issues related to privacy, safety, and constitutional protections.

For sports activities, a transgender student’s ability to participate will vary by state. In those sports not governed by the state’s athletic association, a transgender student should, in general, be permitted to participate in those activities for the sex that is consistent with the student’s gender identity at school, particularly where state statutes or regulations or local policies prohibit discrimination on the basis of transgender status. However, before adopting such a policy, school boards should be aware that the participation of a transgender student on the team aligned with the student’s gender identity may raise concerns from parents, students, and opposing teams who cite safety issues or complaints of unfair advantage.

For sports governed by the state’s athletic association, participation rules are likely to be regulated by the association. Some state athletic associations have policies or regulations permitting transgender athlete participation on a team for the gender with which they identify, with some requiring a doctor’s verification. Other states permit their participation only on the team that coincides with their birth-assigned sex or the sex that appears on their birth certificate. Some states have no policy at all for the participation of transgender students.³⁹ Districts that comply with state association rules prohibiting transgender students from participating on teams of the gender with which they identify may be subject to OCR enforcement activity for an alleged violation of Title IX. Whether federal courts would adopt OCR’s position based on guidance or non-binding letters and, absent a change in the current law and/or regulations, is yet to be seen.

Question: If a state’s athletic association rules permit a transgender student to participate on a team of the gender with which the student identifies, should/may the transgender student’s school notify any opposing teams?

No. A student’s transgender status contained in an educational record is considered personally identifiable information and should be kept confidential under FERPA. A school district is prohibited by FERPA from disclosing such information without consent from the parent and/or the student (depending on the student’s age) to anyone who does not have a legitimate education need for that information. Although the answer is clear under FERPA, a school board should be aware that its compliance with these federal privacy requirements does not prevent the assertion of claims seeking damages for physical harm or other injuries based on the failure to disclose. The likely outcome of such claims is yet to be determined.



Question: Are transgender students eligible to be homecoming or prom king or queen in their gender of preference?

The criteria used to determine which students are deemed eligible to be homecoming king or queen vary by school district, many of which do not involve the gender status of the student. For some school districts, the eligibility criteria might be which student raises the most money in certain fundraising efforts. Other school districts may let each student club nominate a student for each king and queen role, and then let the student body as a whole vote for king and queen among the slate of candidates.

Practices or policies that are gender-based (irrespective of a student's gender identity), such as who is eligible to be homecoming king or queen, limitations on who can attend as "couples" (opposite-sex, but not same-sex), etc., can create the appearance of an environment that promotes exclusion and discrimination/harassment of students by students and staff, and may result in claims asserting denial of equal access to a school district's educational programs and activities. Consistent with each school board's mission of providing a safe educational environment for all students, school boards should review any such gender-based policies and practices to determine whether they serve a legitimate educational goal or otherwise non-discriminatory purpose. Absent such a purpose, the rule is subject to challenge, and at least two courts have found that a refusal to allow a student to bring a same-sex date to a prom is a violation of the First Amendment.⁴⁰

Restroom and Locker Room Accessibility

Question: How should schools handle restroom or locker room use?

This question is one that many schools are grappling with in the face of a dearth of federal law, widely differing state laws, and conflicting signals from federal courts and OCR. You should approach this question with caution and a careful understanding of the law in your state.

On the federal side, the Title IX regulations issued by the U.S. Department of Education allow schools to provide separate but comparable bathrooms, locker rooms, and shower facilities on the basis of sex.⁴¹ The Departments of Education and Justice have issued a joint guidance indicating that Title IX requires schools to provide transgender students with full access to locker rooms and bathrooms that align with their gender identity. In an opinion handed down on April 19, 2016, the Fourth Circuit agreed that OCR's interpretation of Title IX applicability to gender identity is entitled to deference. Under that decision, if schools decide to have separate, but comparable bathroom facilities, they must allow transgender students to use the bathrooms consistent with their gender identity.⁴²

States are handling restroom/locker room use in different ways. After Massachusetts added gender identity to the classes protected by its discrimination laws, the Massachusetts Board of Elementary and Secondary Education subsequently adopted revised regulations saying that transgender students may access restrooms, locker rooms, and changing facilities that correspond with their gender identity. In North Carolina, the governor recently signed into law a bill that restricts use of multiple occupancy restrooms and locker rooms to individuals of the same biological sex.⁴³ It does allow schools to provide single occupancy bathrooms and changing areas for use by transgender students. Several other state legislatures have proposed similar bills that would require transgender people to use the facilities corresponding to their assigned birth gender.⁴⁴ Still other jurisdictions have remained silent on the issue.

While there is no definitive national legal authority on the issue, federal courts in non-school cases have recognized a fundamental right to privacy or acknowledged the legitimacy of safety concerns in cases involving individuals undressing, using the restroom, or showering in an area to which a member of the opposite birth sex has access.⁴⁵ Moreover, a federal district court recently asked the question whether a university engages in unlawful discrimination in violation of Title IX or the Constitution when it prohibits a transgender male student from using restrooms and locker rooms designated for men

on campus. The court concluded: "The simple answer is no."⁴⁶

Your school attorney may be able to help you determine the impact, if any, of state criminal statutes prohibiting indecent exposure⁴⁷ on a policy allowing a student of one biological anatomy to enter and use restrooms, locker and shower facilities of the opposite biological sex. In states that have a statute prohibiting discrimination based on gender identity, the attorney may want to ascertain whether there is an exception for "restrooms, shower rooms, bath houses and similar facilities which are in their nature distinctively private."⁴⁸

For these reasons, you should proceed with care when developing policies to address this issue. You should gather input from all stakeholders, engage in conversations with experts and community members, and formulate workable policies that focus on promoting a positive and safe learning environment for all students, and comply with state and federal law.

Question: Can a school require a transgender student to use a single occupant restroom/private changing area instead of the group restroom or locker room?

Yes, unless there is a state statute or legal ruling, (like the recent Fourth Circuit ruling), state department of education regulation, or district policy that prohibits that. School districts should be aware that OCR takes the position that transgender students should have unfettered access to locker rooms and changing rooms consistent with their gender identity. Even though this view does not rise to the level of "law," it could become an issue in an OCR enforcement action should the district adopt a policy that restricts transgender students to facilities for their birth-assigned gender. Please see the discussion in the previous question.



Question: If a transgender student opts to use a single-occupant restroom or locker room, must a school construct new restroom facilities in locations that are convenient for the transgender student?

Schools are not legally required to construct new restroom facilities in convenient locations when a transgender student opts to use a single-occupant restroom. As you plan for new school facilities or renovations, you may want to keep in mind issues related to the accommodation of transgender students. You will need to consider plumbing codes and local building codes that often stipulate the number of separate bathrooms that must be made available for males and females. One building designer has noted that these code restrictions mean all-gender bathrooms must be in addition to the sex-segregated restrooms.⁴⁹

Question: How should schools handle objections by non-transgender students or families to sharing locker rooms or restrooms?

Ensure that your schools are places where all students are made to feel welcome, respected, and protected. While remaining sensitive to the rights of all students, a practical way of addressing these concerns is to make spaces available for any student who does not want to share locker rooms or restrooms with other students. Such options can include privacy curtains in locker rooms and separate restrooms. Keep in mind, however, that OCR takes a strong stance on this issue. In at least one recent case, OCR indicated the use of such separate facilities must be voluntary, and contrary policies could result in enforcement action.⁵⁰

9 Gender Segregation in Other Areas

Question: If a school separates students on the basis of sex for certain curricular content areas, such as sex education, can or should a school require a transgender student to participate in the class of the sex the student was assigned at birth?

In states that specifically protect transgender students from discrimination by law, the transgender student must be allowed to participate with the class of the sex with which that student identifies. Even in states that do not provide those protections, it could be considered a violation of Title IX to deny the student a right to participate in a class with the sex with which that student identifies, as Title IX has been found to protect against discrimination on the basis of non-conformity to gender stereotypes.⁵¹



10 School Trips

Question: If a school trip involves an overnight stay with sex-segregated sleeping rooms, may a school assign a transgender student to share a room occupied by student(s) of the sex with which he or she identifies?

There is no definitive federal legal authority on the question of room assignments for transgender students. As noted, OCR has taken the position that Title IX's prohibition on sex discrimination extends to transgender students and requires that schools provide them with access to restrooms and locker rooms that correspond with their gender identity. With respect to overnight school trips, the U.S. Departments of Education and Justice took a similar position in its recent guidance.⁵² State anti-discrimination laws and regulations also may mandate or provide guidance as to the specific response that schools should take in addressing this issue. Schools may also want to take into account the privacy rights and safety concerns recognized by courts in non-school situations involving individuals undressing, using the restroom, and showering when members of the opposite birth sex have access to these private areas.

Under these circumstances, it is important that school districts adopt policies and procedures that are focused on safety for all students and that seek to balance their respective privacy interests. You will have to make difficult decisions that should be informed by community input from a wide range of stakeholders and experts. Ensure that all students (and their families) who participate in extracurricular activities that may involve overnight trips are aware of the school's policy and the options available to them. Where the district has chosen to adopt an inclusive policy that would allow the assignment of transgender students to occupy rooms with students with the same gender identity, provide notice of the policy well in advance.



Question: Should a school notify the other students assigned to the same sleeping room, or their parents, that a transgender student will be assigned to their room?

No. As noted above, a student's gender identity is likely to be considered personal information in a student's education record that may not be disclosed to others absent parental consent under FERPA and that may be protected by the constitutional right to privacy. Where courts have recognized a constitutional right to privacy in a student's sexual orientation (which could be correlated to a student's transgender status), they have required an important or compelling reason to disclose that information to others. State privacy laws also may prohibit such disclosure to non-school staff. Again, the answer under FERPA is clear, but schools should be aware that non-disclosure could result in claims seeking damages for physical or other injuries.

Question: If a student's transgender status is known or suspected by other students, how should a school handle a request from a non-transgender student to be assigned a sleeping room with a student of the same birth gender?

Again there is no federal legal authority on this issue. To the extent that district policy allows schools to honor student requests to switch rooms after an assignment has been made or to specify a preference for a particular roommate in advance without regard to the reason, a request to be assigned to a room with a student of the same birth gender should be treated similarly.

11 Dress Codes

Question: May a school district have a gender-specific dress code that identifies what would be acceptable dress for each sex?

In general, courts grant school districts a great degree of latitude in adopting and enforcing dress codes that are based on promoting a safe and educationally focused environment at school. But a transgender student could challenge a dress code that contains gender specific provisions on several legal grounds: 1) violation of free expression rights under the First Amendment or violation of due process and equal protection rights under the Fourteenth Amendment; 2) violation of Title IX's prohibition on discrimination based on gender; and 3) violation of state civil rights laws and constitutional protections.

Gender-specific dress codes are likely to be deemed constitutional only where the school can show that the restricted expression substantially disrupts or interferes with the work of the school or the rights of other students.⁵³ To the extent a school board believes gender-specific provisions

are necessary, such provisions are more likely to be upheld if they can be shown to be substantially related to a sufficiently important educational interest. School districts also should ensure that such provisions are enforced uniformly with respect to non-transgender and transgender students.

Question: For school-related events, such as school dances, graduation ceremonies, or yearbook pictures, may a school district require that a transgender student dress according to the sex assigned at birth?

Gender-specific dress requirements for school-related events would be subject to the same kinds of legal challenges as those described above in reference to dress codes in general. Sex-specific distinctions in dress regulations have been allowed where they were justified by school concerns about safety, discipline, distraction from learning, and promoting community values. For example, a restriction on boys wearing dresses for school-related events might be appropriate where such attire would result in substantial disruption, but in places where such an occurrence would be more socially acceptable and result in minimal disruption, such a restriction would be less justifiable.⁵⁴ Schools also should take into account such factors as the setting and the age of the students. Many schools have adopted gender-neutral policies, such as requiring all graduating students to wear the same color cap and gown, rather than assigning different colors based on sex.

12. School Staff

Question: Is a school district required to conduct any training about transgender student concerns?

Currently, federal law does not require school districts to conduct any training for staff and students on transgender issues. You should consult your school attorney member of the NSBA's Council of School Attorneys on whether such training is required in your state or your states school boards association. In any case, schools are well advised to conduct training in this evolving area, particularly for school staff, and to include information in their student handbooks to heighten awareness of challenges faced by transgender students in the school setting. Include examples of bullying, harassing, and discriminatory behaviors by staff or students, and inform both students and staff about complaint procedures and avenues for resolution. Also, because the law is slowly changing, differs by state, and is attracting media attention, try to be proactive in addressing concerns before they arise. Such efforts would support a school district's goals of creating an inclusive educational environment where all students are respected and kept safe, regardless of transgender status, while reducing exposure to legal liability.

Question: If a school administrator has advised school staff that a transgender student wants to be addressed by that student's preferred name or pronoun, can a school staff member refuse to do so?

Under most circumstances, a school staff member should abide by the parent's/student's wishes as to how to address the transgender student. In accepting employment with a school district, administrators and school staff agree to abide by, uphold, and enforce all of their school board's policies and procedures, as well as federal and state laws, including a wide variety of non-discrimination, harassment, and bullying policies and procedures. Complying with the school administrator's directive and abiding by the school district's anti-discrimination policies and procedures likely will not interfere with an employee's personally held beliefs. Moreover, consistent with the school board's mission, an employee's religious or other sincerely held beliefs should not prevent that employee from treating all students with respect and dignity.

Question: Can an employee be disciplined for insubordination for failure to comply with an administrator's directives, or the student's or parent's expressed name and pronoun preferences?

A school district could pursue disciplinary action against the offending employee for insubordination for failing to comply with the administrator's directives and/or the student's/parent's wishes. In fact, the employee's failure to comply could create a discriminatory or hostile environment for the transgender student, and potentially open the door for school district liability or investigation. Where the employee has refused to comply based on her genuine belief that the directive is contrary to her religious convictions, she may claim that the district has violated her First Amendment rights by disciplining her. Whether that claim would be successful in federal court is unclear. While the Supreme Court in a non-school context has recognized a free exercise exemption to a government mandate directing an action the plaintiffs viewed as inimical to their sincerely held religious beliefs,⁵⁵ the Supreme Court has also accorded employers significant control over employee speech that constitutes part of official job duties.⁵⁶

If the employee not only refuses to comply with the directive, but also allows other students to disregard the student's name and pronoun preference, which creates a harassing or hostile environment for the transgender student, the school board also could pursue disciplinary action against the offending employee for allowing student-on-student harassment. The employee must strive to prevent such harassment as part of his or her duties.



13 Community Engagement

"How districts maintain relationships with the community can significantly influence the breadth and depth of academic, social, and civic experiences for children."

—Partnerships, Not Pushouts. A Guide for School Board Members: Community Partnerships for Student Success, April 2014, Version 1.0, National School Boards Association, et al.

Your job as a school official crafting policy and practices on transgender student issues is not easy. You must consider how to accommodate transgender student needs while reflecting your community's concerns; you must balance privacy interests and safety needs; and you must navigate this journey without the benefit of clear law at the federal level. On top of that, each student and family situation is unique, so it may be tempting to take each on a case-by-case basis, rather than developing official policy.

While FERPA and other privacy laws do limit the ways in which school officials respond to the public and others about an individual student's gender identity concerns, school boards in particular have an opportunity to lead in this area. Schools reflect their communities, and in "many places, [they] operate as the town center,"⁵⁷ linking a wide variety of stakeholders. As representatives of their communities, school board members are in a unique position to lead and address the complex issues that arise in the context of transgender students. That connection to the community is an essential component to finding common ground in what could be a highly politicized conversation. Ultimately, the school district's goal should be the development and implementation of a policy that is informed by the law, protects all students, and makes sense for the community it serves. Leading the conversation with an eye towards informed policy development can help increase awareness and understanding, minimize resentment, and ultimately contribute to safe learning environments for all.

NSBA Belief & Policy, Article II, Section 3, ¶ 3.6, *Commitment to Diversity and Equity: School Board Leadership on the Issue of Race, Culture, and Diversity*

"School board members, as community leaders, should encourage and promote productive dialogue about diversity including, but not limited to socio-economic status, culture, gender, race, sexual orientation, gender identity, age, physical and mental abilities, religious beliefs, and political beliefs in their communities, model and encourage inclusive thinking and behavior, and provide credible and balanced information on issues of socio-economic status, culture, gender, race, sexual orientation, gender identity, age, physical and mental abilities, religious beliefs, and political beliefs, ultimately creating positive change."

Remember that when we speak of "requests" for accommodation, or "claims" of discrimination or harassment, we are speaking of real needs of children and their families. Whether the requests or claims come from the transgender students, their families, school staff, or concerned members of the community, they generally are not fronts for political agendas or movements. They are real-life problems, with an individual person at the center, and a community surrounding that person. The concerns of the community are real and often deeply rooted. It will be helpful for school boards considering policies involving gender identity to seek common ground among the various community voices. To find it, remember the central mission of public schools: to serve all students equitably, in a safe and supportive environment. Students and their families are members of the local community. School board policy will affect them directly. Far less crucial are the voices of special interest groups, particularly those that are so removed from the community that they don't represent its values and its residents, or appreciate local dynamics. Public forums, advisory committees, social media, and school meetings are all ways in which school districts can engage their stakeholders. Whatever the means, keeping the focus on student needs while encouraging respectful discourse can inform not only the board about its policy choices, but also help the community understand the ultimate choices made by the district.

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Endnotes

¹ *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015); see also National School Boards Association, *Same-Sex Marriage: What the Obergefell Decision Means for School Districts*, <http://www.nsba.org/same-sex-marriage-what-obergefell-decision-means-school-districts>.

² See discussion under FAQ Section 3: Discrimination/Harassment.

³ For simplicity, we refer to gender-nonconforming, transgender, gender-questioning, gender fluid, and similar descriptions together as “transgender.”

⁴ See FIRST AMENDMENT CENTER & BRIDGEBUILDERS, PUBLIC SCHOOLS AND SEXUAL ORIENTATION: A FIRST AMENDMENT FRAMEWORK FOR FINDING COMMON GROUND, <http://www.firstamendmentcenter.org/nadison/wp-content/uploads/2011/03/sexual-orientation-guidelines.pdf> (endorsed by, among others, the American Association of School Administrators, CEAI and GLSEN).

⁵ Am. Psychological Ass’n, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* (2011), available at <http://www.apa.org/topics/lgbt/transgender.aspx>.

⁶ See, e.g., Am. Coll. of Pediatricians, *Gender Ideology Harms Children* (Mar. 21, 2016; temporary statement), available at www.acpeds.org/the-college-speaks/position-statements/gender-ideology-harms-children.

⁷ Stanley R. Vance Jr., M.D., Diane Ehrensaft, Ph.D. & Stephen M. Rosenthal, M.D., *Psychological and Medical Care of Gender Nonconforming Youth*, PEDIATRICS (AM. ACAD. OF PEDIATRICS 2014), <http://pediatrics.aapublications.org/content/pediatrics/134/6/1184.full.pdf>.

⁸ Am. Psychological Ass’n, *Sexual Orientation & Homosexuality: Answers to Your Questions For a Better Understanding* (2008) (noting that sexual orientation refers to an enduring pattern of such attractions, and that research over several decades has demonstrated that sexual orientation ranges along a continuum, from exclusive attraction to the other sex to exclusive attraction to the same sex), available at <http://www.apa.org/topics/lgbt/orientation.aspx>.

⁹ Gender Equity Resource Center, *Definition of Terms*, http://gencr.berkeley.edu/lgbt_resources_definition_of_terms/transgender.

¹⁰ D.C. PUB. SCHS., TRANSGENDER AND GENDER-NONCONFORMING POLICY GUIDANCE (June 2015), available at <http://deps.dc.gov/sites/default/files/dc/sites/deps/publication/attachments/DCPS%20Transgender%20Gender%20Non%20Conforming%20Policy%20Guidance.pdf>.

¹¹ N.Y. STATE EDUC. DEP’T, GUIDANCE TO SCHOOL DISTRICTS FOR CREATING A SAFE AND SUPPORTIVE SCHOOL ENVIRONMENT FOR TRANSGENDER AND GENDER NONCONFORMING STUDENTS (July 2015), available at http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidance-FINAL.pdf.

^{11a} GLSEN ET AL., MODEL DISTRICT POLICY ON TRANSGENDER AND GENDER NONCONFORMING STUDENTS, available at http://www.glsen.org/sites/default/files/Trans_ModelPolicy_2013.pdf; ACLU ET AL., SCHOOLS IN TRANSITION - A GUIDE FOR SUPPORTING TRANSGENDER STUDENTS IN K-12 SCHOOLS, <http://www.nclrights.org/wp-content/uploads/2015/08/Schools-in-Transition-2015.pdf>.

¹² *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, slip op. (4th Cir. Apr. 19, 2016); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); Letter from Catherine E. Lhamon, U.S. Dep’t of Educ. Ass’t Sec’y for Civil Rights and Vanita Gupta, U.S. Dep’t of Justice Principal Deputy Ass’t Attorney General for Civil Rights to Colleagues, (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

¹³ Letter from Russlyn Ali, U.S. Dep’t of Educ. Ass’t Sec’y for Civil Rights, to Colleagues (Oct. 26, 2010), www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf; Letter from Catherine Lhamon, U.S. Dep’t of Educ. Ass’t Sec’y for Civil Rights, to Colleagues transmitting “Questions and Answers on Title IX and Sexual Violence” (Apr. 29, 2014) (supporting application of Title IX to discrimination on the basis of sexual orientation and transgender status), www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf. At least one federal court has disregarded this interpretation of Title IX. *G.G. v. Gloucester Cnty. Sch. Bd.*, ___ F.Supp. 3d ___, No. 15-54, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015).

¹⁴ See GLSEN, NONDISCRIMINATION LAWS PROTECTING STUDENTS BY STATE, http://www.glsen.org/sites/default/files/NonDiscrim_Laws_by-State.pdf.

¹⁵ In February 2016, HB 1008, which restricted access of transgender people to bathrooms corresponding to their birth assigned gender, was passed by the South Dakota Legislature but was vetoed by the governor. Mitch Smith, *South Dakota Governor Vetoes Restriction on Transgender Bathroom Access*, N.Y. TIMES, Mar. 2, 2016, at A12, available at www.nytimes.com/2016/03/02/us/governor-vetoes-transgender-bathroom-restrictions-south-dakota.html?_r=0.

¹⁶ Letter from Catherine E. Lhamon, U.S. Dep't of Educ. Ass't Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleagues (Oct. 21, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>.

¹⁷ The U. S. Departments of Education and Justice have indicated in guidance that FERPA violations in the transgender student context may have Title IX implications. Letter from Catherine E. Lhamon, U.S. Dep't of Educ. Ass't Sec'y for Civil Rights and Vanita Gupta, U.S. Dep't of Justice Principal Deputy Ass't Attorney General for Civil Rights to Colleagues, (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

¹⁸ Letter from Catherine E. Lhamon, U.S. Dep't of Educ. Ass't Sec'y for Civil Rights and Vanita Gupta, U.S. Dep't of Justice Principal Deputy Ass't Attorney General for Civil Rights to Colleagues, (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

¹⁹ For example, parents may request that staff introduce the student to other students by his or her preferred name, as a classroom management matter.

²⁰ *C.N. v. Wolf*, 410 F. Supp. 2d 894 (C.D. Cal. 2005); *Botello v. Morgan Hill Unified Sch. Dist.*, No. C09-02121 HRL, 2009 WL 3918930 (N.D. Cal. Nov. 18, 2009).

²¹ *Nguon v. Wolf*, 517 F. Supp. 2d 1177 (C.D. Cal. 2007) (no violation of right to privacy under First Amendment when principal disclosed a student's sexual orientation to mother in carrying out statutory duty to advise parents of circumstances leading to student's suspension); *Wyatt v. Fletcher*, 718 F.3d 496 (5th Cir. 2013) (no clearly established right to privacy under the Fourteenth Amendment barring public secondary school officials from discussing student's sexual activity with parents).

²² *In loco parentis*: Of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent. BLACK'S LAW DICTIONARY 787 (10th ed. 2014). The Supreme Court has recognized that during the school day, a teacher or administrator may act *in loco parentis*. See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654, 115 S. Ct. 2386, 2391 (1995).

²³ ACLU, SCHOOLS IN TRANSITION, *supra* note 12.

²⁴ 20 U.S.C. § 1232g(2); 34 C.F.R. §§ 99.20-.22.

²⁵ 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 99.21.

²⁶ Letter from Catherine E. Lhamon, U.S. Dep't of Educ. Ass't Sec'y for Civil Rights and Vanita Gupta, U.S. Dep't of Justice Principal Deputy Ass't Attorney General for Civil Rights to Colleagues, (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

²⁷ See, e.g., CAL. DEP'T OF EDUC., FREQUENTLY ASKED QUESTIONS: SCHOOL SUCCESS AND OPPORTUNITY ACT, available at <http://www.cde.ca.gov/re/di/co/faqs.asp>; TEX. ASS'N OF SCH. BDS., LEGAL ISSUES RELATED TO TRANSGENDER STUDENTS, available at https://www.tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Students/documents/transgender_students_july15.pdf.

²⁸ N.Y. COMP. CODES R. & REGS. Tit. 8, § 100.2 (2016); TEX. EDUC. CODE § 28.025(e); 19 TAC 74.5(b); TEX. EDUC. AGENCY, MINIMUM STANDARDS OF THE ACADEMIC ACHIEVEMENT RECORD, available at <http://tea.texas.gov/index2.aspx?id=5974>; CAL. CODE REGS. Tit. 5 § 432 (2016); CAL. DEP'T OF EDUC., FREQUENTLY ASKED QUESTIONS: SCHOOL SUCCESS AND OPPORTUNITY ACT, available at <http://www.cde.ca.gov/re/di/co/faqs.asp>.



²⁹ See MASS. DEP'T OF ELEM. AND SEC. EDUC., GUIDANCE FOR MASSACHUSETTS PUBLIC SCHOOLS: CREATING A SAFE AND SUPPORTIVE SCHOOL ENVIRONMENT, NONDISCRIMINATION ON THE BASIS OF GENDER IDENTITY, available at <http://www.doe.mass.edu/ssce/GenderIdentity.pdf>; CONN. SAFE SCH. COALITION, GUIDELINES FOR CONNECTICUT SCHOOLS TO COMPLY WITH GENDER IDENTITY AND EXPRESSION NON-DISCRIMINATION LAWS, FREQUENTLY ASKED QUESTIONS, available at http://www.ct.gov/ehro/lib/ehro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf.

³⁰ Letter from Catherine Lhamon, *supra* note 13 at 5-6.

³¹ 20 U.S.C. § 1681.

³² CALIF. SCH. BDS. ASS'N, *Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender-Nonconforming Students*, CSBA Policy Brief, at * 3 (Feb. 2014), <https://www.esba.org/~/media/E68E16A652D34EADA2BFDCD9668B1C8F.ashx> (advising that if a student provides documentation of a legal name or gender change, then the official student record must be changed to reflect this); Mass. Dep't of Elementary and Secondary Educ., GUIDANCE FOR MASSACHUSETTS PUBLIC SCHOOLS, *supra* note 26 (advising that as "Massachusetts' law recognizes common law name changes. An individual may adopt a name that is different from the name that appears on his or her birth certificate provided the change of name is done for an honest reason, with no fraudulent intent. . . , schools should accurately record the student's chosen name on all records, whether or not the student, parent, or guardian provides the school with a court order formalizing a name change." The department has a procedure in place to update name changes and gender markers in the Student Information Management System (SIMS) upon request.)

³³ 325 ILL. COMP. STAT. 50/5(b)(1) (2016).

³⁴ See MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC., GUIDANCE FOR MASSACHUSETTS PUBLIC SCHOOLS, *supra* note 26.

³⁵ GUTTMACHER INSTITUTE, *State Policies in Brief—Sex and HIV Education* (Mar 1, 2016), available at https://www.guttmacher.org/sites/default/files/pdfs/spibs/spib_SE.pdf.

³⁶ CAL. EDUC. CODE § 51204.5 (2016).

³⁷ ARIZ. REV. STAT. § 15-716 (2016); *see also* LA. REV. STAT. § 17:281; MISS. CODE § 37-13-171.

³⁸ See source cited *supra* note 7.

³⁹ For a list of athletic association policies regarding athletics participation of transgender students, see www.transathlete.com/#!/k-12c4w2.

⁴⁰ *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010) (school officials' refusal to allow student to attend prom with same-sex date violated First Amendment, but refused to issue injunction on the ground it would not serve the public interest); *Fricke v. Lynch*, 491 F. Supp. 387 (D.R.I. 1980).

⁴¹ 34 C.F.R. § 106.33.; Letter from Catherine E. Lhamon, U.S. Dep't of Educ. Ass't Sec'y for Civil Rights and Vanita Gupta, U.S. Dep't of Justice Principal Deputy Ass't Attorney General for Civil Rights to Colleagues, (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

⁴² *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, *slip op.* (4th Cir. Apr. 19, 2016).

⁴³ N.C. GEN. STAT. § 115C-521.2

⁴⁴ The governor of South Dakota recently vetoed a bill (H.B. 1008) that would have required transgender students to use bathrooms and locker rooms that correspond to their birth assigned sex. Greg Botelho and Wayne Drash, *South Dakota governor vetoes transgender bathroom bill*, CNN (Mar. 2, 2016), <http://www.cnn.com/2016/03/01/us/south-dakota-transgender-bathroom-bill/>. Similar bills are pending in several states. *E.g.*, Okla. S.B. 1014, Tenn. S.B. 2387 & H.B. 2414.

⁴⁵ See, e.g., *Cumbey v. Meachum*, 684 F.2d 712 (10th Cir. 1982) (finding prisoner asserted viable constitutional privacy claim based on female guard viewing him while he showered, used the toilet or undressed); *Kastl v. Maricopa Cty. Comm. Coll. Dist.*, 325 F. App'x 492 (9th Cir. 2009) (accepting employer's proffered safety concerns for banning transsexual plaintiff from using women's restroom as legitimate business reason under Title VII).

⁴⁶ *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015).

⁴⁷ *E.g.*, KAN. REV. STAT. § 510.148.

⁴⁸ *See, e.g.*, KAN. REV. STAT. § 344.145(2)(a); Louisville-Metro Ordinance 92.05

⁴⁹ Matt Nardella, *The Space Between Gender Neutral and Accessible Restrooms* (Jan. 20, 2015), www.moss-design.com/gender-neutral-restrooms.

⁵⁰ Letter from Adele Rapport, U.S. Dep't of Educ. Office for Civil Rights, to Dr. Daniel E. Cates, Superintendent Township High School District 211, OCR Case No. 05-14-1055 (Nov. 2, 2015), <https://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf>.

⁵¹ Letter from Catherine Lhamon, U.S. Dep't of Educ. Ass't Sec'y for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, at *25 (Dec. 1, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/fiqs-title-ix-single-sex-201412.pdf>. (Question 31. How do the Title IX requirements on single-sex classes apply to transgender students? Answer: All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.)

⁵² Letter from Catherine Lhamon, U.S. Dep't of Educ. Ass't Sec'y for Civil Rights and Vanita Gupta, U.S. Dep't of Justice Principal Deputy Ass't Attorney General for Civil Rights, to Colleagues (May 13, 2016): <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>. (What is not addressed in the agencies' recent guidance , however, is how a school should respond to requests from the non-transgender students, who may also be assigned to the overnight accommodations with the transgender student, to have their room assignment changed should they become aware of the student's transgender status. It would seem contrary to public policy to require the non-transgender student to share accommodations or to subject them to disciplinary action or sanctions for refusing to share accommodations.)

⁵³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Compare *Olesen v Bd. of Educ. of Sch. Dist. No. 228*, 676 F. Supp. 820 (N.D. Ill. 1987) (upholding ban on boys' wearing of earrings where district had a gang problem and some earrings were used as gang symbols); with *Hayden v. Greensburg Community Sch. Corp.* 743 F.3d 569 (7th Cir. 2014) (rule prohibiting long hair for boys basketball team members violates Title IX and Equal Protection Clause of Fourteenth Amendment).

⁵⁴ *See, e.g., Doe v. Brockton Sch. Comm.*, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) (finding school district could not prohibit transgender student from wearing dresses where there was no evidence that student's dress, rather than behavior, caused substantial disruption); *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010) (female student asked to wear tuxedo to prom).

⁵⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751 (2014) (finding Religious Freedom Restoration Act applies to corporations and that government's contraceptive mandate under the Affordable Care Act substantially burdens the plaintiffs free exercise of religion for RFRA purposes).

⁵⁶ *See Garcetti v. Ceballos*, 547 U.S. 410 (2006).

⁵⁷ *See supra* note 4.





Legal Issues Related to Transgender Students

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The legal rights of transgender students are topics of increased public awareness and interest, especially in light of recent federal guidance and related litigation. At the same time, transgender issues are relatively new in public discourse, understanding, and the law. This article addresses some of the more common questions that school districts face in this emerging area.

Q. Does a student have a right to be recognized as transgender at school?

A: Generally, yes. The extent of the student's right, and the district's duty, depends on the specific situation. In Texas, there is no state law that explicitly creates a right to be protected based on a transgender status. However, transgender students are entitled to be free from discrimination based on their gender identity and their free speech expression of that gender identity. As such, transgender students should be permitted to wear clothing that aligns with their gender identity. School districts should also use the preferred name and gender of the transgender student unless specifically prohibited by law.

Like all students, transgender students must be protected by schools from bullying and harassment by students or employees.¹ While all students need a safe place to learn, transgender and gender-nonconforming students face a heightened risk of bullying, violence, and discrimination.² Bullying of a student because of the student's nonconformity with gender stereotypes could be considered harassment because of sex in violation of federal nondiscrimination law.³ A district may need to group the student with other students of the same gender identity during sex-specific activities or in sex-segregated facilities in order to ensure student safety and minimize disruptions to the educational environment. While these issues have yet to be sufficiently resolved under Texas law, the positions and potential risks are clear. Consequently, districts should apply a common sense, case-by-case approach to reach the best resolution in each specific situation.

¹ U.S. Dep't of Educ., Office for Civil Rights, and U.S. Dep't of Justice, Civil Rights Division, *Dear Colleague Letter Withdrawing Previous Guidance on Transgender Students* (Feb. 22, 2017).

² See Gay, Lesbian, Straight Education Network, *The 2015 School Climate Survey* (2016) (finding 57.6 % of LGBTQ students feel unsafe at school and that school-related supports can improve student experiences).

³ See, e.g., *Carmichael v. Galbraith*, 574 F. App'x 286 (5th Cir. 2014) (holding that parents of middle school male student who committed suicide after allegedly being bullied by male students because of gender-based stereotypes sufficiently stated student-on-student sexual harassment claim under Title IX).

Q: What are common terms for understanding and discussing transgender issues?

A: The following terms have been used by the U. S. Department of Education Office for Civil Rights⁴ (OCR) or suggested by the National Center for Transgender Equality.⁵

Assigned sex or sex assigned at birth: the gender designation listed on one's original birth certificate.

Gender identity: One's internal sense of gender, which may be different from one's assigned sex, and which is consistently and uniformly asserted, or for which there is other evidence that the gender identity is sincerely held as part of the person's core identity.

Gender expression: How a person represents or expresses gender identity to others, often through behavior, clothing, hairstyles, voice, mannerisms, or physical characteristics.

Gender stereotypes: Stereotypical notions of masculinity and femininity, including expectations of how boys or girls represent or communicate their gender to others, such as through behavior, clothing, hairstyles, activities, voice, mannerisms, or physical characteristics.

Transgender: A term for people whose gender identity is different from their assigned sex at birth. Medical treatments or procedures are not a prerequisite for recognition as transgender.

Transgender female: Someone who identifies as a female but was assigned the sex of male at birth.

Transgender male: Someone who identifies as male but was assigned the sex of female at birth.

Gender transition: The process by which a transgender person begins to assert the sex that corresponds to the person's gender identity instead of the person's assigned sex at birth.

Q. Are school districts subject to OCR Title IX enforcement for claims of gender-based discrimination by transgender students?

A: Yes. Title IX of the Education Amendments of 1972 (Title IX)⁶ is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. OCR is the federal agency with the responsibility for enforcing Title IX.

⁴: See U.S. Dep't of Educ., Office for Civil Rights, and the U.S. Dep't of Justice, Civil Rights Division, Resolution Agreement between the Arcadia Unified School District and the U.S. Dep't of Educ., OCR Case No. 09-12-1020, at 1-2 (July 24, 2013).

⁵: National Center for Transgender Equality, Transgender Terminology (Jan. 2014).

⁶: 20 U.S.C. § 1681.

OCR's written policy guidance on preventing and responding to sexual harassment makes clear that Title IX protects students from gender-based harassment:

[G]ender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim's failure to conform to stereotyped notions of masculinity and femininity.⁷

In other words, Title IX protects all students, including transgender students, from harassment because of the student's deviation from stereotypical gender norms. It does not matter whether or not a harasser is the same or opposite sex in relation to the transgender student's assigned sex or gender identity. In addition, school districts may be liable under Title IX and other federal laws for employee or student harassment of transgender students when there is knowledge of harassment, followed by deliberate indifference and a failure to act in response.⁸ If a complaint is filed alleging discrimination against a transgender student, school officials should work closely with the district's attorney.

Q: What does TASB policy say about transgender students?

A: TASB offers a model policy that: (1) prohibits discrimination, harassment, dating violence, and retaliation against students; and (2) outlines remedial steps to report, investigate, and respond to concerns. Since 2005, a version of this policy has been at code FFH(LOCAL) in Texas school districts' policy manuals. The TASB policy prohibits various forms of discrimination, including discrimination on the basis of gender and sex. The policy does not speak directly or solely about the rights of transgendered students. Federal courts have found that discrimination on the basis of gender identity is a form of sex discrimination.⁹

⁷ U.S. Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* at v (Jan. 19, 2001).

⁸ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (Title IX actions for damages may be recovered for teacher-student sexual harassment if a school district official who has authority to institute corrective measures has actual notice of, and is deliberately indifferent to, the teacher's misconduct); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (Title IX action for damages may lie against a school board in cases of student-on-student harassment when there is actual knowledge and deliberate indifference as to severe, pervasive and objectively offensive harassment that deprives the victim of educational opportunities or benefits).

⁹ See *Wittmer v. Phillips 66 Co.*, Civil Action No. H-17-2188, 2018 WL 1626366 (S.D. Tex. 2018) (mem.) (finding Title VII protected transgender woman applicant for employment based on appellate court decisions recognizing Title VII protection from discrimination based on gender identity and sexual orientation, citing *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.* 884 F.3d 560 (6th Cir. 2018) and *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc)). See also *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, S42 F. Supp. 2d 653 (S.D. Tex. 2008) (finding transgender applicant for employment presented sufficient evidence of Title VII sex discrimination).

Some districts have contacted TASB Policy or Legal Services to ask about the addition of “sex”—in addition to “gender”—into model policy FFH(LOCAL) at Update 104. This change was not intended to expand the meaning or application of the model nondiscrimination statement. Rather, the addition was made at the suggestion of OCR, in the course of its investigation of a TASB member’s policies and practices, to better match the statutory wording and OCR guidance regarding notices of nondiscrimination. TASB Policy Service and Legal Services added the language to the model policy so that all of our members would have policies that meet OCR’s expectations.

Q. What additional guidance should we consider in addressing Title IX compliance?

A. There are many resources available online:

- The OCR’s [Resources for LGBTQ Students](#) Website includes policy guidance, court filings, and examples of resolution agreements regarding Title IX requirements related to transgender students;
- In addition, the National School Boards Association has developed and updated the [2016 Transgender Students in Schools: Frequently Asked Questions and Answers for Public School Boards and Staff](#), a best practices guide regarding common issues such as how to handle a transgender student’s records, accommodate student privacy, and more.

Districts should review the national guidance in light of state law and local policies. In addition, note that the law in this area is rapidly changing; online resource materials may not be updated to reflect the most recent developments. Due to this uncertainty and the high risk of litigation, districts that are considering policies or procedures regarding transgender students should work with an attorney familiar with both the federal interpretation of Title IX and state law.

Q. Do gender nonconforming students have a legal right to wear attire that does not match their assigned sex at birth?

A: Yes, a legal right exists to the extent that a court is likely to conclude that dressing in accordance with a student’s gender expression is a form of protected expression. Courts have found that wearing gender nonconforming clothing may be protected by the First Amendment as free speech, by the Fourteenth Amendment with regard to equal protection as to gender/sex, and by Title IX as gender non-discrimination.¹⁰ In light of this legal authority, a school district could permit a transgender male student to wear a tuxedo for his yearbook photo consistent with his expressed gender identity. Or, similarly, a district might allow a transgender female student to attend the prom in feminine attire.

¹⁰ See, e.g., *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699, at 704-5 (N.D. Miss. 2010) (finding that a female student demonstrated her likelihood of success on the merits of a First Amendment claim when school denied her permission to wear a tuxedo or other masculine attire to prom).

Gender nonconforming students are still subject to the established student dress code for the student's preferred gender attire. The dress code must be applied equally to all students. For example, if feminine attire at the prom requires dresses with a certain neckline and length, then all students who dress in feminine attire must abide by those requirements, including a transgender female. At the same time, a gender nonconforming student should not be asked to "tone it down" or be required to dress in a different manner than other students in the expressed gender.

Q. Should a district change school records to reflect a transgender student's preferred name and gender?

A: Texas Education Code section 25.0021 requires that a student be identified by his or her legal surname, or last name, as that name appears (1) on the student's birth certificate or other document suitable as proof for the student's identity, or (2) in a court order changing the student's name. However, Section 25.0021 does not address students' first names or genders.

In general, a student's legal name is used on permanent records, especially when required by state or federal laws and regulations. For example, Texas school districts are required to complete and maintain permanently the academic achievement record, or "AAR" of high school students (often referred to as a "transcript"), including full legal name and gender.¹¹ Following guidelines developed by the Texas Commissioner of Education, the AAR must have the complete name from the student's birth certificate or other legal document, without use of nicknames or abbreviations.¹² The student's legal name, the name submitted to Public Education Information Management System (PEIMS) at the Texas Education Agency (TEA), and the name recorded on the AAR must be identical.¹³ Any changes in the AAR must be dated, explained and kept as part of the student's permanent file.¹⁴ TEA has informally stated that it will accept the student gender that a district reports through PEIMS, including a report that changes the student's gender following a student and/or parent request to alter the record.

In contrast to permanent school records, however, teachers and other school district employees often informally address students by, and have non-permanent school records that reflect, preferred names or nicknames that are not a student's legal first name. A school district should apply this practice equally with transgender students. For example, the transgender student's preferred first name and gender should be used in speaking with the student and for class rosters, identification badges, awards, and any other similar purpose.

¹¹ Tex. Educ. Code § 28.025(e); 19 Tex. Admin. Code § 74.5(b); Tex. Educ. Agency, *Minimum Standards for the Academic Achievement Record* (2012).

¹² Tex. Educ. Agency, *Minimum Standards for the Academic Achievement Record*, Section 1.11.

¹³ Tex. Educ. Agency, *Minimum Standards for the Academic Achievement Record*, Section 1.11.

¹⁴ Tex. Educ. Agency, *Minimum Standards for the Academic Achievement Record*, Section 1.9.

Parents or students may request that a district change the student's name and gender in educational records based upon a claim that such records are incorrect, misleading, or a violation of privacy under the Family Educational Rights and Privacy Act (FERPA).¹⁵ In a 1991 letter regarding a former male student who had graduated from a school district and thereafter transitioned to female, the U.S. Department of Education's Family Policy Compliance Office (FPCO), which implements FERPA, advised that "whether to amend the students' education records to reflect a name and gender other than that of the students' [name and gender] during their attendance would be considered a substantive decision of the District" and not a matter of required amendment under FERPA.¹⁶ In assessing a request to change or correct records, a school district should seek specific guidance from FPCO and the district's legal counsel.¹⁷ The district should also communicate and coordinate with any other agency that has authority related to the record at issue, such as TEA.

Note of Caution on Student Privacy

School districts and their employees should exercise caution in the release of information about a transgender student and seek the guidance of the FPCO or the district's attorney when in doubt. Depending on the circumstances, FERPA may protect from disclosure information about a transgender student that would be considered non-confidential directory information for another student. For example, a student may transition genders when moving from one school to another. In the process, the transgender student may request to be addressed by a new preferred first name and gender. The student may also want to keep private the previous name and gender that would be part of the student's educational records. For most students, name and gender are categorized under FERPA regulations and local policy as *directory information* that may be released without parental consent. For the transgender student, however, the former name and gender noted in the previous district's records would not meet the definition of directory information because its release could be considered harmful or an invasion of privacy. In addition, note that all parents, and students aged 18 and older, have the right to opt out of disclosure of directory information and the district must provide annual notice of this right.¹⁸

¹⁵ 20 U.S.C. § 1232g; 34 C.F.R. § 99.7(a)(2)(ii).

¹⁶ U.S. Dep't of Educ., Family Policy Compliance Office, *Letter from FPCO Director Leroy S. Roaker to Karol Johnson, Superintendent, Great Falls Public Schools* (Nov. 13, 1991).

¹⁷ U.S. Dep't of Educ., Office for Civil Rights, and the U.S. Dep't of Justice, Civil Rights Division, *Resolution Agreement between the Arcadia Unified School District and the U.S. Dep't. of Educ.*, OCR Case No. 09-12-1020, (July 24, 2013); U.S. Dep't of Educ., Office for Civil Rights, and the U.S. Dep't of Justice, Civil Rights Division, *Resolution Agreement Downey Unified School District*, OCR Case No. 09-12-1095, (Oct. 8, 2014).

¹⁸ 34 C.F.R. §§ 99.3, .37. See TASB Policies FL(LEGAL) and (LOCAL).

Q. What should a school district do if a transgender student requests to use sex-specific restrooms or locker rooms based on the student's gender identity?

A: Texas law does not specifically address this question. Title IX regulations have long permitted school districts to segregate male and female students in separate but comparable toilet, shower, and locker room facilities.¹⁹ The legal issue presented by transgender students is how to define "male" or "female" when a student's expressed gender identity does not match the student's assigned sex at birth. The Title IX statute and regulations were not designed to answer this question when they were adopted in the 1970s. Due to this uncertainty, the issue of a transgender student's legal right to access sex-specific facilities based on gender identity is currently being litigated in many states.

Federal Court Decisions Regarding Access to Single-Sex Facilities

In 2017, the Seventh Circuit Court of Appeals upheld an injunction allowing a transgender male student in Wisconsin to use the boys' bathroom.²⁰ The court held that the student was likely to succeed on the merits of his Title IX claim because the Wisconsin school district's unwritten policy requiring "an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." The court also found that the student's Equal Protection claim was likely to succeed, because the district had not provided a "genuine and exceedingly persuasive justification" for its sex-based classification.

Similarly, the Third Circuit Court of Appeals recently denied an injunction sought by non-transgender students to block their Pennsylvania school district's policy of accommodating transgender student requests to use bathrooms and locker rooms based on gender identity.²¹ The Seventh Circuit and Third Circuit opinions are not binding on Texas courts, but they would be persuasive authority if a federal court in the Fifth Circuit were to consider these issues.

OCR Guidance Regarding Access to Sex-Specific Facilities

In May 2016, a *Dear Colleague Letter* issued by OCR and the U.S. Department of Justice (DOJ) stated: "A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity."²² The *Dear Colleague Letter* was immediately challenged in a lawsuit brought by the state of Texas

¹⁹ 34 C.F.R. § 106.33.

²⁰ *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017), cert. filed Aug. 25, 2017.

²¹ See *Doe v. Boyertown Area Sch. Dist.*, 890 F.3d 1124 (890 F.3d 1124) (upholding denial of injunction to students claiming that district's policy allowing transgender students to use bathroom in accordance with gender identity violated non-transgender students' constitutional right to privacy).

²² U.S. Dep't of Educ., Office for Civil Rights, and U.S. Dep't of Justice, Civil Rights Division, *Dear Colleague Letter on Transgender Students* (May 13, 2016) (citing 34 C.F.R. § 106.33, the Title IX regulation permitting recipients of federal funds to provide separate but comparable facilities based on sex).

and other entities. In February 2017, however, OCR and DOJ issued a new joint *Dear Colleague Letter* rescinding the 2016 *Dear Colleague Letter*.²³ Due to this change in policy the plaintiffs in the Texas case voluntarily dismissed their lawsuit. The rescission of the 2016 *Dear Colleague Letter* also raised questions in ongoing litigation regarding transgender student rights.²⁴

Since OCR's February 2017 *Dear Colleague Letter*, however, the Third Circuit, Seventh Circuit, and other federal courts have held in favor of transgender students.²⁵ Many of these cases are ongoing; the issue may eventually be decided by the U.S. Supreme Court.

A Case-By-Case Approach to Transgender Students' Use of Sex-Specific Facilities

No court with jurisdiction in Texas has issued a final decision that clarifies exactly how a district must respond when a transgender student asks to use communal, sex-specific facilities that correspond to the student's gender identity. In the meantime, it remains clear that the transgender student has a right to be free from discrimination based on gender identity, while other students may claim a right to privacy or raise a safety concern about sharing a sex-specific facility with a transgender student. Districts are tasked with finding a reasonable resolution that addresses each situation as best as possible, in light of nondiscrimination principles and practical options.

As an initial step, the school district should communicate with the transgender student and the student's parents to determine the student's preference as to gender-specific facilities. Some school officials who have worked with parents and transgender students have found that the student voluntarily agrees to or prefers a separate unisex restroom, shower and changing area. If available, the district may make individual-user facilities an option for any student seeking greater privacy. Such facilities should be selected with safety, accessibility, and lack of educational disruption in mind.

While separate unisex facilities may work for some transgender students, others may feel that such an arrangement negatively singles them out and isolates them from their peers. Consequently, the transgender student may request to use communal sex-specific facilities that match his or her gender identity. While OCR has rescinded the guidance that formerly

²³ U.S. Dep't of Educ., Office for Civil Rights, and U.S. Dep't of Justice, Civil Rights Division, *Dear Colleague Letter Withdrawing Previous Guidance on Transgender Students* (Feb. 22, 2017).

²⁴ *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017) (mem.).

²⁵ See *Evancho v. Pine-Richland Sch. Dist.*, 237 F.Supp.3d 267 (W.D. Pa. 2017) (granting transgender students' preliminary injunction against enforcement of school district resolution restricting bathroom use to single user facility or the bathroom of the students' assigned sex); *A.H. v. Minersville Area Sch. Dist.*, 3:17-CV-391, 2017 WL 5632662 (M.D. Pa. Nov. 22, 2017) (mem.) (denying district's motion to dismiss transgender female student's Title IX and Equal Protection claims). See also *Doe v. Boyertown Area Sch. Dist.*, 276 F.Supp.3d 324 (E.D. Pa. Aug. 25, 2017) (denying injunction to students claiming that district's policy allowing transgender students to use bathroom in accordance with gender identity violated non-transgender students' constitutional right to privacy).

required a district to allow a transgender student to use the facilities of the student's gender identity, there is no law that *prohibits* a district from granting the transgender student's request to use these facilities. In addition, changes to OCR's policy guidance do not alter the district's underlying obligation to comply with Title IX. If other students or their parents object to the use of a sex-specific facility by a transgender student, a school district may be able to amicably address the competing interests by making individual-user facilities and private areas available for all students.

Should a district's response to this difficult issue be challenged by a party through a legal action, the result is difficult to predict until the law more fully develops. Due to legal uncertainty and potential risk of litigation, a district should promptly consult with legal counsel in order to determine a defensible plan of action, including documentation of the district's efforts to address legitimate safety and privacy concerns while upholding the principles of nondiscrimination. If the transgender student's requests are not granted, then a school district will need to be prepared to demonstrate all the options considered and attempted, and to articulate a reasonable, non-discriminatory rationale for denying any requests.

Q. What do we do if a transgender student requests to participate in a sport based on gender identity instead of assigned sex on a birth certificate?

A: Texas statutes and case law do not address how to respond to such a request. It may be appropriate to deny a transgender student's request to compete on the team of the student's gender identity, but only if the denial of the request is based on objective, research-based medical information about the activity and the student in question, rather than general assumptions about gender differences or the potential discomfort of others.

If the student's request pertains to a sport under the jurisdiction of the University Interscholastic League (UIL), the district should consider UIL's position as to the student's eligibility.²⁶ Effective August 1, 2016, a UIL policy regarding gender specific sports requires Texas public schools to use a student's birth certificate to determine eligibility.²⁷

While the Texas UIL rule settles that UIL's position on eligibility is based on assigned sex and not on gender identity, a district's decision to enforce such a position is still subject to legal challenge and review by the OCR and the courts. Therefore, school districts should assess each request individually and determine the best course of action based on a thorough evaluation of all of the issues and potential risks. In its review, a school district should consider the issues of eligibility, gender-based discrimination, safety, and fairness. The district should document the steps it takes, including the following: (1) gathering full information as to the basis for and options related to the request, including seeking the UIL position on eligibility; (2) consulting with educational, sports, and health experts about the potential

²⁶ Tex. Educ. Code § 33.081.

²⁷ The University Interscholastic League, Proposed Recommendation by UIL Review Advisory Committee to Standing Committee on Policy.

impact of the transgender student's participation; (3) consulting with the district's attorney regarding how to proceed, including documentation of the district's non-discriminatory rationale for the chosen course of action; and (3) confidentially informing all of the affected parties as to the process, analysis, and ultimate determination.

Q. How should a district handle field trips for transgender students?

A: Districts must not deny a transgender student an equal opportunity to participate in field trips, or any other curricular or extracurricular activity, in which students are segregated by sex. School officials can reduce the risk of complaints by addressing accommodations for individual transgender students in advance with the goals of maximizing the student's opportunity to learn and socialize with peers while ensuring safety and privacy interests for all students.²⁸ When the district agrees on an arrangement for the student's use of private, unisex, or sex-specific facilities at school, school officials must be prepared to ensure that the student has a safe place to use the restroom when away from campus. For example, when planning an event that will occur off-campus, a district employee may be assigned to call the location in advance to get information about private or alternative bathrooms or locker rooms.

For field trips involving overnight stays, an administrator or counselor may ask the student to identify other students with whom the student feels comfortable sharing a room. In this case, the administrator should seek written consent from the parent of a minor transgender student (or the student, if 18 years old) allowing the district to share information with the other students and their parents.²⁹

Q. What if a parent does not support a student's gender transition?

A: The law does not provide a clear path for educators in this difficult situation, but some principles are clear. Under FERPA, parents have a right of access to their minor students' education records; this right transfers when the student turns 18.³⁰ The Texas Education Code also gives parents the right to "full information" about their child's school activities, except for in child abuse investigations, and employees who encourage or coerce a child to withhold information from the child's parent may be subject to discipline, including termination.³¹ In 2016, the Texas attorney general opined that a district's guidelines for transgender student accommodations violated the Texas Education Code to the extent that the guidelines could have limited parental access to full information.³²

²⁸ See U.S. Dep't of Educ., Office for Civil Rights, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (2016) (citing policies and regulations for accommodating transgender students on overnight field trips).

²⁹ 34 C.F.R. §§ 99.31, .5.

³⁰ 34 C.F.R. § 99.5.

³¹ Tex. Educ. Code § 26.008.

³² Tex. Att'y Gen. Op. No. KP-100 (2016).

In light of these parameters, Texas educators typically work with parents to decide on appropriate accommodations for transgender students. Nonetheless, it is important to keep in mind that transgender students are at particular risk of harm, including self-harm, when a parent disagrees with the student's gender identity. The National Association of School Psychologists has advised that transgender youth who experience low family acceptance of their gender identity are more likely than peers to experience depression, substance abuse, and suicidal thoughts.³³ As such, a student may request that a district employee not tell his or her parent about the student's gender identity. School officials should proceed with caution in this case, in accordance with district policy regarding student counseling, crisis intervention, and child abuse.³⁴ It may be possible to reach an agreement with the student and parent that satisfies everyone: for example, schools have instructed staff to call a transgender student by the student's preferred name at school but to refer to the student by the name on the birth certificate in all communications with parents. Ultimately, the best advice is to assess each situation as it comes, working closely with the student, parents and district counsel to reach a resolution that protects the learning environment for all.

This document is continually updated, and references to online resources are hyperlinked, at [tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Students/documents/legal issues related to transgender students.pdf](https://tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Students/documents/legal%20issues%20related%20to%20transgender%20students.pdf). For more information on this and other school law topics, visit TASB School Law eSource at schoolawesource.tasb.org.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.

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³³ See National Assoc. of School Psychologists (NASP), *Position Statement: Safe Schools for Transgender and Gender Diverse Students* (May, 2014) (citing NASP Standard 1.2.6, "School psychologists . . . do not share information about the sexual orientation, gender identity, or transgender status of a student . . . without that individual's permission").

³⁴ See TASB Policies FFB (Crisis Intervention), FFE (Assistance Programs/Counseling), and FFG (Child Abuse and Neglect).