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2016 TRANSGENDER STUDENTS IN SCHOOLS

Frequently Asked Questions and Answers for Public School Boards and Staff

nsba
National School Boards Association

Table of Contents

2016 Transgender Students in Schools

I. Introduction 3

II. FAQs. 6

Definitions. 6

Addressing a Transgender Student 6

Discrimination/Harassment 7

Student Privacy. 9

Official Records 11

Curriculum 12

Sports, School Activities, and Physical Education. 13

Restroom and Locker Room Accessibility 14

Gender Segregation in Other Areas 16

School Trips 16

Dress Codes 16

School Staff 17

Community Engagement 18

Endnotes 20

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 nonconforming, are evolving rapidly. With the United States 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 students[3] 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 related to privacy and safety, requirements from state government and federal agencies, and guidance from special interest groups. While these sometimes-demanding voices continue to press schools from all sides, schools currently have no single definitive legal authority to inform their response in this area.

When we developed this guide in March of 2016, the legal framework specifically addressing transgender students was piecemeal. The U.S. Supreme Court had yet to hear a case addressing issues related to transgender students, so there was no definitive legal authority to which schools could turn when questions arose in this area. At the time that the first draft of this guide was developed, only a few federal district courts had ruled on issues related to transgender students and there was no definitive guidance from the United States Department of Education on how Title IX, the federal sex discrimination law, should be applied.

Since the first draft of this guide was published, however, many lawsuits have been filed by parties attempting to resolve issues regarding the accommodation of transgender students. It started with the case of *G.G. v. Gloucester*. In *G.G.* v. *Gloucester* a transgender high school student filed a lawsuit in a federal district court in Virginia alleging that a school district policy, which prohibited him from using the boys' bathroom at school, violated Title IX and his constitutional rights. He also filed a motion for a preliminary injunction asking the court to enjoin the school district from enforcing the policy during the pendency of his case. After the district court denied his motion for injunctive relief, he filed an appeal with the Fourth Circuit Court of Appeals. After reviewing the case, the Fourth Circuit held that the lower court erred in not granting the student's motion for injunctive relief because it (among other things) failed to give deference to the Department of Education's opinion that Title IX and its implementing regulation apply to transgender students (*Auer* deference). The Fourth Circuit remanded the case and instructed the lower court to issue a ruling consistent with its decision.[4]

The lower court subsequently issued a ruling, consistent with the Fourth Circuit's decision, granting the student's motion for injunctive relief and requiring the school district to allow the student to use the boys' bathroom pending the outcome of the case. The school district filed a petition with the Fourth Circuit for a re-hearing and for a stay of mandate. The Fourth Circuit denied both. The school district then asked the U. S. Supreme Court for a stay of the Fourth Circuit's ruling, pending a possible decision by the Supreme Court. The Supreme Court granted the stay and on October 28, 2016, it granted the school district's petition for certiorari. The Court agreed to hear the following issues: (1) whether Auer deference should extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought; and (2) whether, with or without deference to the agency, the Department's [United States Department of Education] specific interpretation of Title IX and 34 C.F.R. § 106.33 should be given effect.[5]

On May 13, 2016, which was not too long after the Fourth Circuit issued the decision in *G.G. v. Gloucester,* but before the United States Supreme Court agreed to hear the case, the United States Departments of Education and Justice issued guidance, in the form of a "Dear Colleague" letter, clearly stating that the provisions of Title IX applied to transgender students and instructing school districts to allow transgender students to use bathroom and locker room facilities that are consistent with their gender identity. However, in January 2017, President Donald Trump took office and on February 22, 2017, his administration issued a different "Dear Colleague" letter, which withdrew the May 13, 2016 guidance from the Obama administration. The February 2017 letter also withdrew a statement of policy that was reflected in a policy letter, dated January 7, 2015, from James A. Ferg-Cadima to Emily Prince that also interpreted Title IX as applying to transgender students and which was the basis for the Fourth Circuit's decision in the *G.G.* Case.[6]

The February 2017 "Dear Colleague" letter indicates that the guidance documents provided by the Obama administration "do not …contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process." The February guidance letter opined that the Obama administration's interpretation gave rise to "significant litigation regarding school restrooms and locker rooms" and that within the context of interpreting Title IX, as it relates to transgender students, "there must be due regard for the primary role of the States

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and local school districts in establishing educational policy." It is important to remember that even though the Trump administration has rescinded the Obama administration's guidance about the accommodation of transgender students, ***the new guidance still indicates that schools have an obligation to continue to implement policies that prevent the bullying and harassment of transgender students.***

On March 3, 2017, which was a few weeks after the February 22, 2017 "Dear Colleague" letter that rescinded the Departments of Education and Justice's earlier guidance indicating that Title IX applied to transgender students, the United States Supreme Court vacated the Fourth Circuit Court of Appeal's order in favor of the transgender student, in *Gloucester*, and remanded the case to the Fourth Circuit with the instruction that it was to give further consideration to the case "in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017."

In response to the guidance issued by the Obama administration, several states filed lawsuits asking courts to enjoin the U.S. Departments of Education and Justice from enforcing their interpretation indicating that Title IX applies to transgender students. On August 21, 2016, a federal district court in the Northern District of Texas, which is handling one such lawsuit that was filed on behalf of the states of Texas, Alabama, Georgia, Louisiana, Oklahoma, Tennessee, Utah, West Virginia, Wisconsin, Kentucky, and Mississippi; the Governor of Maine; a school district in Texas; a school district in Arizona and the Arizona Department of Education, issued an order enjoining the federal government from enforcing the Obama administration's transgender guidance. The district court made it clear that the injunction prohibits the federal government from withholding federal funds from districts that do not comply with its guidance on transgender access to "intimate areas" inside of schools. However, the court's order did allow federal prosecutors to proceed with lawsuits that existed prior to the order granting injunctive relief.[7] The Texas court ruled that its injunction applied nationwide and although the Obama administration filed notice indicating that it would appeal the nationwide scope of this court order, the Trump administration has since advised the court that it will not pursue such an appeal. Please note that although the Texas court indicated that its injunctive order was applicable nationwide, a federal district court in Ohio ruled that it was not bound by the Texas court's decision because it was not a party to that lawsuit and it granted a student's motion for preliminary injunction, requiring the school district to accommodate the student by allowing him to use the bathroom that is consistent with his gender identity. [8]

In addition to the legal actions referenced in the previous paragraphs, several other lawsuits have been filed in various states asking courts to rule with regard to the accommodation of transgender students. For example, in Illinois the U.S. Department of Education issued a finding in a complaint that a transgender student filed against a school district alleging that the school district failed to accommodate the student. After the school district and the Department of Education reached a settlement agreement that required the school to accommodate the student, a group of parents and students sued the school district and the Department of Education alleging that in reaching the agreement the school district and the federal government had violated non-transgender students' fundamental right to privacy and their parents' constitutional right to instill moral values and standards in their children. The parent and student group also filed a motion asking the court to enjoin the school district from carrying out the terms of the agreement during the pendency of the underlying matter. On October 18, 2016, a federal magistrate in the case issued a written report recommending that the federal district court judge who is presiding over the case deny the motion for preliminary injunction. The district court judge has not yet issued a ruling on the request for injunctive relief.[9] In Michigan, a transgender student filed a lawsuit against a number of school districts he had attended within the state. He alleges that the schools discriminated against him because of his status as a transgender male in violation of Title IX and the U.S. Constitution's Equal Protection Clause.[10] In *Nebraska v. The United States*, No. 16-cv-03117 (Nebraska filed July 8, 2016), the states of Nebraska, Arkansas, Kansas, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota and Wyoming have also filed a lawsuit in a federal district court in Nebraska challenging the Departments of Justice and Education's guidance on accommodating transgender students.

Other transgender students are following the example of the student in *G.G. v. Gloucester* and have filed motions requesting that courts enjoin school districts from enforcing policies that require them to use bathrooms that are consistent with the gender assigned to them at birth. An Ohio court recently granted a preliminary injunction in favor of one such student and required a school district to accommodate the student during the pendency of a lawsuit filed by the school district against the U. S. Department of Education.[11]

Although there are many lawsuits pending in courts throughout the country regarding the accommodation of transgender students, North Carolina is the state that appears to have seen the most activity with regard to issues related to the accommodation of transgender persons. In March of 2016, North Carolina Governor Pat McCrory signed into law the Public Facilities Privacy & Security Act (PFPSA). The PFPSA put in place a statewide policy that bans individuals from using public bathrooms that do not correspond to their biological sex. The law, popularly referred to as HB2, was passed in response to a non-discrimination ordinance, that was enacted by the city of Charlotte, which would have made it possible for transgender individuals to use the public bathrooms of the sex with which they identify.

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Not too long after the PFPSA was passed, the Department of Justice warned the governor that the law was discriminatory. In response to the warning, the governor filed a lawsuit against the federal government accusing it of a "baseless and blatant overreach" stemming from a "radical reinterpretation" of the Civil Rights Act of 1964.[12] The North Carolina Senate Pro Tempore and the North Carolina Speaker of the House subsequently filed their own lawsuit against the federal government alleging that it was violating the Tenth Amendment by trying to impose "novel and unforeseen interpretations" of civil rights statutes.[13] Meanwhile, the federal government has filed its own lawsuit against the state of North Carolina alleging that the PFPSA violates federal civil rights laws.[14]

Two transgender male employees of the University of North Carolina System and a female lesbian professor also filed a lawsuit challenging the PFPSA on the grounds that it violates Title IX and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The court granted the plaintiffs a preliminary injunction pending the outcome of the lawsuit. The injunction enjoins the University from enforcing the PFPSA until the court makes a final determination in the underlying matter. [15]

Finally, a coalition of public school students, university students, and their parents have filed suit against the U.S. Departments of Education and Justice urging the district court to reject the Departments' interpretation of Title IX, as applying to gender identity, so that public schools in the state will not lose federal funding for following the PFPSA.[16] Readers should note that on March 30, 2017, the North Carolina General Assembly passed HB 142, which repealed the PFPSA in its entirety. However, many advocates claim that HB 142 is just as "odious" as the PFPSA since it forbids governmental entities, including school boards, from implementing policies that allow transgender persons to use bathrooms that are consistent with their gender identity unless the legislature gives the government entities permission to implement such policies. HB 142 also prohibits cities from "regulating private employment practices or regulating public accommodations" until December 1, 2020. There is nothing that stops the legislature from extending this moratorium as the its expiration date draws closer.

Over the past several months, under different administrations, the United States Departments of Education and Justice have rendered two conflicting "Dear Colleague" letters on the issue of Title IX and its applicability to transgender students. There have also been numerous lawsuits filed—many in response to the Obama administration's letter—as states, school districts, parents and students seek to determine what their rights and obligations are about transgender students. Now that the United States Supreme Court has vacated the Fourth Circuit Court of Appeals decision, in *Gloucester*, and remanded the case to the lower court for "further consideration in light of the guidance document issued by the Department of Education and the Department of Justice on February 22, 2017," it appears that school districts will not receive any definitive guidance from the United States Supreme Court on this issue any time soon. Even though it is hard to know what impact the existing lawsuits and the federal government's guidance will have on school districts in the long-run, schools must continue to ensure that all students learn in a safe environment. Schools must implement policies that prevent transgender students from being bullied and harassed and they must address accusations of such bullying and harassment promptly. One immediate impact of the federal change of course is that the loss of federal funding for failing to accommodate transgender students in the manner outlined in the Obama administration's guidance is removed; however, schools must make certain that they are following the laws of their states and the regulations of their state departments of education with regard to the accommodation of transgender students.

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 the 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.[17] 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? 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 those 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 schools. A key tenet undergirding this guide is the belief that all children have a right to learn, and they

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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.

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.[18] 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 universally[19]—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."[20]

Gender identity is not sexual orientation, which refers to a person's emotional, romantic, and/or sexual attractions to men, women, or both sexes.[21] A transgender student may have any sexual orientation.[22]

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.[23] 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."[24]

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.[25]



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3. Discrimination/Harassment

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

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." While Title IX and its regulations are silent as to whether or not the protections of Title IX extend to transgender students, 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 gender identity. Many school districts and states disagree with the Departments' interpretation of Title IX, as including transgender students, and have filed lawsuits challenging the interpretation. However, the Fourth Circuit Court of Appeals is one Court that has held that the Departments' interpretation of Title IX, and its regulations, is entitled to deference and in G.G. v. Gloucester it remanded a case back to a lower court that had determined that a school district did not have to accommodate the request of a transgender student to use the bathroom consistent with his gender identity. The lower court, in ruling consistent with the Fourth Circuit decision, subsequently granted injunctive relief to the student and required the school district to accommodate his request to use the boys' bathroom. After unsuccessfully appealing to the Fourth Circuit Court of Appeals for a re-hearing, the school district filed a request to the U.S. Supreme Court for certiorari.

On February 22, 2017, after the United States Supreme Court granted the school district's petition for certiorari and scheduled oral arguments in *Gloucester v. G.G.*, the Trump administration rescinded the Obama administration's May 13, 2016 guidance, which indicated that Title IX applies to transgender students, and advised school districts that it will no longer enforce the guidance as interpreted by the Obama administration. Since the central issue before the Supreme Court was whether the Fourth Circuit should have given deference to the Obama administration's interpretation of Title IX as including transgendered students, on March 3, 2017, the Supreme Court vacated the judgement rendered by the Fourth Circuit Court of Appeals and remanded the case so that the Court could look at it "in light of" the February 22, 2017 guidance.

Although federal law with regard to transgender students is unclear, there are many states that protect transgender students explicitly, through statutes, state department of education regulations or state guidance. Currently, some states include a student's sexual orientation, gender identity, gender expression, or transgender status as protected classes under state anti-discrimination and 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.[26]

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.[27]

In this near vacuum of more specific federal law, some states and the District of Columbia have passed laws protecting transgender students from discrimination.[28] 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.[29] 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.

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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 GovernanceAndPolicyResources/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.tasb.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

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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…."[30] 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.[31]

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.[32]

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.[33] 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.

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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.[34] 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.[35] As school officials, you walk that delicate line balancing the privacy interests of the student versus his or her parents and your legal duties.[36]

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,[37] 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

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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.[38] An educational institution must provide the parents the opportunity for a hearing to challenge the content of the student's education records.[39] 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.[40]

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.[41] 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.[42] 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.[43] 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 identity [44] under Title IX.[45]

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

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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.[46] 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.[47]

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.[48]

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.[49]



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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."[50]

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 lifestyle."[51] As defined by AAP and noted above, however, sexual orientation and homosexuality are not synonymous with gender identity.[52] 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.)

7. 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.

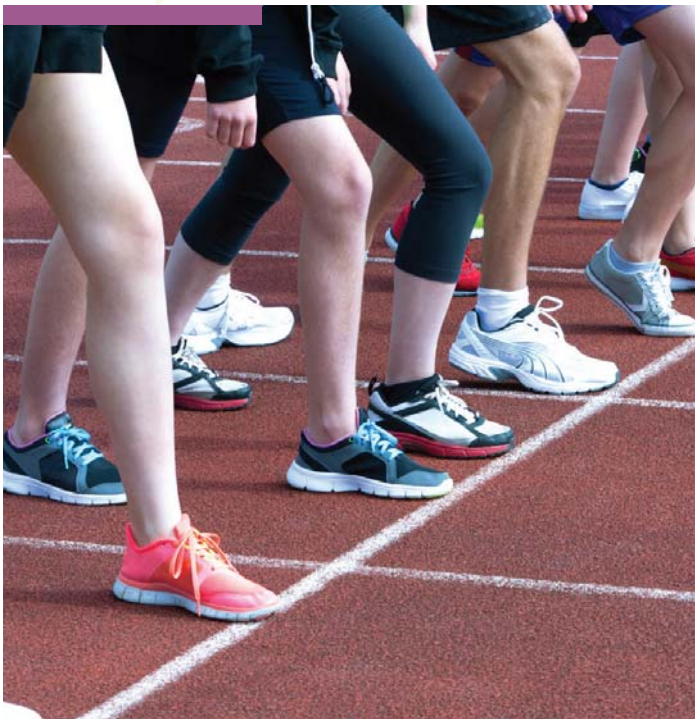
For sports activities, a transgender student's ability to participate will vary by state. In those sports not governed by the state's athletic association, a transgender student should, in general, be permitted to participate in those activities for the sex that is consistent with the student's gender 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.[53]

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.

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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.[54]

8. 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 facilities on the basis of sex.[55]

In May of 2016, the Obama administration issued guidance indicating that Title IX requires school districts to provide transgender students with full access to locker rooms and restrooms that are consistent with the students' gender identity. On February 22, 2017, the Trump administration rescinded that guidance and has advised school districts that the U.S. Departments of Education and Justice will not find them to be in violation of Title IX if they refuse to accommodate a transgender student's request to use a bathroom or locker room consistent with the student's gender identity. Many lawsuits have been filed challenging the Obama administration's interpretation of Title IX. The United States Supreme Court recently vacated an order in favor of a transgender student and remanded the case to the Fourth Circuit Court of Appeals to consider the it "in light of" the Trump administration's rescission of a May 2016 Department of Education and Department of Justice guidance opining that Title IX applied to transgender students.[56]

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.[57] 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.[58] Still other jurisdictions have remained silent on the issue.

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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.[59] 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."[60]

Your school attorney may be able to help you determine the impact, if any, of state criminal statutes prohibiting indecent exposure[61] 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."[62]

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, state department of education regulation or district policy that prohibits it.



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.[63]

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.[64]

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.[65]

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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.[66] 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

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the work of the school or the rights of other students.[67] 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.[68] 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,[69] the Supreme Court has also accorded employers significant control over employee speech that constitutes part of official job duties.[70]

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

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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,"[71] 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] 132 F.Supp.3d 736 (E.D. Va. 2015), *rev'd in part, vacated in part,* 822 F.3d 709 (4th Cir. 2016), *reh'g en banc denied*, 824 F.3d 450 (4th Cir. 2016), *remanded,* 2016 WL 3581852 (E.D. Va. Jun. 23, 2016), *stay pending appeal denied,* 2016 WL 3743189 (4th Cir. Jul. 12, 2016), *order stayed,* 136 S.Ct. 2442 (2016), 822 F.3d 709 (4th Cir. 2016), *mandate recalled, stay granted,* 136S.Ct. 2442 (2016), *cert. granted,* 2016 WL 4565643 (Oct. 28, 2016); Gloucester County School Board v. G.G., No. 16-273, 2017 WL 855755 (Mar. 6, 2017); *Auer v. Robbins,* 519 U.S. 452 (1997).

[5] 132 F.Supp.3d 736 (E.D. Va. 2015), *rev'd in part, vacated in part,* 822 F.3d 709 (4th Cir. 2016), *reh'g en banc denied,* 824 F.3d 450 (4th Cir. 2016), *remanded,* 2016 WL 3581852 (E.D. Va. Jun. 23, 2016), *stay pending appeal denied,* 2016 WL 3743189 (4th Cir. Jul. 12, 2016), *order stayed,* 136 S.Ct. 2442 (2016), 822 F.3d 709 (4th Cir. 2016), *mandate recalled, stay granted,* 136S.Ct. 2442 (2016), *cert. granted,* 2016 WL 4565643 (Oct. 28, 2016).

[6] 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. ; Letter from Sandra Battle, U.S. Dep't of Educ. Acting Assistant Secretary for Civil Rights and T.E. Wheeler III, U.S. Dep't of Justice Acting Assistant Attorney General for Civil Rights to Colleagues, (February 22, 2017), https://assets.documentcloud.org/documents/3473560/Departments-of-Education-and-Justice-roll-back.pdf.

[7] *State of Texas v. United States*, No. 16-00054 (N.D. Tex. Filed May 25, 2016).

[8] *Board of Education of the Highland Local School District v. U.S. Dep't of Education,* No. 16-524 (S.D. Ohio Sept. 26, 2016).

[9] *Students and Parents for Privacy v. U.S. Dep't of Educ*., No. 16-4945 (N.D. Ill. Filed May 4, 2016).

[10] *Tooley v. Van Buren Pub. Schools*, No. 14-13466 (E.D. Mich. filed Sept. 5, 2014).

[11] *Board of Education of the Highland Local School District v. U.S. Dep't of Education,* No. 16-524 (S.D. Ohio Sept. 26, 2016).

[12] *McCrory v. United States*, No. 16-00238 (E.D. N.C. filed May 9, 2016)(The Governor voluntarily dismissed the lawsuit on September 16, 2016).

[13] *Berger v. U.S. Dep't of Justice,* No. 16-00240 (E.D. N.C. filed May 9, 2016).

[14] *United States v. State of North Carolina,* No. 16-00425 (M. D. N.C. filed May 9, 2016)(The court has suspended the trial in this matter to see what the United States Supreme Court does in *G.G. v. Gloucester*).

[15] *Carcano v. McCrory,* No. 16-236 (M.D. N.C. filed Mar. 28, 2016)(The court has suspended trial in this matter to see what the United States Supreme Court does in *G.G. v. Gloucester*).

[16] *North Carolinians for Privacy v. U.S. Dep't of Justice*, No. 16-235 (E.D. N.C. May 10, 2016).

[17] *See* First Amendment Center & Bridgebuilders, Public Schools and Sexual Orientation: A First Amendment framework for finding common ground, http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/sexual.orientation.guidelines.pdf (endorsed by, among others, the American Association of School Administrators, CEAI and GLSEN).

[18] 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.

[19] *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.

[20] 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.aappublications.org/content/pediatrics/134/6/1184.full.pdf.

[21] Am. Psychological Ass'n, *Sexual Orientation & Homosexuality: Answers to Your Questions For a Better Understanding*

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(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.

[22] Gender Equity Resource Center, *Definition of Terms*, http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms#transgender.

[23] D.C. Pub. Schs., Transgender and Gender-Nonconforming Policy Guidance (June 2015), *available at* http://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/DCPS%20Transgender%20Gender%20Non%20Conforming%20Policy%20Guidance.pdf.

[24] 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_GNCGuidanceFINAL.pdf.

[25] 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.

[26] *G.G. v. Gloucester Cnty, Sch. Bd.,* 15-cv-00054, 2016 WL 3581852 (E.D.Va. Jun. 23, 2016), Stay Pending Appeal Denied, 15-cv-00054, 2016 WL 3743189 (4th Cir. Jul. 12, 2016), Mandate Recalled, Stay Granted, ---S.Ct. ---, 2016 WL 4131636 (Aug. 3, 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.

[27] 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.

[28] *See* GLSEN, Nondiscrimination Laws Protecting Students By State, http://www.glsen.org/sites/default/files/NonDiscrim_Laws_byState.pdf.

[29] 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.

[30] 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.

[31] 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.

[32] 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.

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

[34] *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).

[35] *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).

[36] ***In loco parentis***: Of, relating to, or acting as a temporary guard-

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ian 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).

[37] ACLU, Schools in Transition, *supra* note 12.

[38] 20 U.S.C. § 1232g(2); 34 C.F.R. §§ 99.20-.22.

[39] 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 99.21.

[40] 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.

[41] *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/eo/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.

[42] 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/index2aspx?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/eo/faqs.asp.

[43] *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/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf.

[44] Letter from Catherine Lhamon, *supra* note 13 at 5-6.

[45] 20 U.S.C. § 1681.

[46] 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.csba.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.).

[47] 325 Ill. Comp. Stat. 50/5(b)(1) (2016).

[48] *See* Mass. Dep't of Elementary and Secondary Educ., Guidance for Massachusetts Public Schools, *supra* note 26.

[49] 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.

[50] Cal. Educ. Code § 51204.5 (2016).

[51] Ariz. Rev. Stat. § 15-716 (2016); *see also* La. Rev. Stat. § 17:281; Miss. Code § 37-13-171.

[52] *See* source cited *supra* note 7.

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

[54] *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).

[55] 34 C.F.R. § 106.33.

[56] 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.

[57] N.C. Gen. Stat. § 115C-521.2

[58] The governor of South Dakota recently vetoed a bill (H.B.

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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.

[59] *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).

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

[61] *E.g.,* Kan. Rev. Stat. § 510.148.

[62] *See, e.g.,* Kan. Rev. Stat. § 344.145(2)(a); Louisville-Metro Ordinance 92.05.

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

[64] 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.

[65] 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/faqs-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.)

[66] 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.)

[67] *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).

[68] *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).

[69] *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).

[70] *See Garcetti v. Ceballos*, 547 U.S. 410 (2006).

[71] *See supra* note 4.

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