A Legal Guide to Serving Transgender Students

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Presented at the 2016 School Law Seminar, April 7-9, Boston, Massachusetts

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Introduction

There is no single law that delineates the legal requirements for meeting the needs of LGBT students in public schools. However, our experience is that some LGBT students have needs that relate in important ways to their gender identity. This presentation reviews the following five areas in which schools should consider how they service transgender students: student records, extracurricular activities, school facilities, support plans, and addressing bullying/harassment issues.

Definitions

Understanding the terminology associated with gender identity is important. These definitions are provided not for the purpose of labeling students but rather to assist in understanding this issue.

- “Transgender” describes an individual whose gender identity is different from the individual’s assigned sex.
- “Transgender student” is a student who consistently and uniformly asserts a gender identity different from the student’s assigned sex, or for which there is documented legal or medical evidence that the gender identity is sincerely held as part of the student’s core identity.

School Records

Can a student’s name/gender be changed in their school records?

This issue may vary depending on state law.¹ In Illinois, yes²; the Illinois State Board of Education (ISBE) has issued the following instructions for identifying a student’s gender on his/her student record: “Gender Male or Female - For most students, the district should enter the student’s name and gender as it appears on the student’s birth certificate. However, for students identifying as transgender, districts may choose to enter the gender with which the student identifies rather than the student’s biological gender. If necessary, the district may also enter the first name the student uses if it differs from the birth

certificate. Districts must be careful to include the student’s SID number on the record so that a duplicate ID number is not created for the student.”

School districts in states like Illinois can use the preferred name on all District documents, such as student rosters, student ID cards, and test documents, and can do so without a court order or official name or gender change. School district personnel also should use the pronouns consistent with the student’s gender identity when talking to or referring to the student.

State law may require school districts to retain a copy of the birth certificate, which may state the birth sex. In Illinois, a copy of the student’s birth certificate must be kept pursuant to the Illinois Missing Children Records Act.

Can a graduate request a revised diploma or transcript that reflects his/her chosen name?

Yes. The District may issue a new diploma or transcript with the alum’s chosen name. Under Illinois law and the Family Educational Rights and Privacy Act (FERPA), parents, adult students, and former students can request a change to student records that are inaccurate or misleading. Illinois law and FERPA also provide for a hearing if that request is denied. The Department of Education’s Family Policy Compliance Office issued a letter in 1991 saying FERPA does not apply to requests for changes in records regarding transgender status, because records reflecting a student’s gender or name as of a certain date contain no “inaccuracy.”

If parents/students provide us with medical records concerning the student’s gender transition, how do we protect the confidentiality of those records?

All students have a right to privacy and this includes the right to keep one’s transgender status private at school. Disclosing this information to other students, their parents, or other third parties may violate privacy laws, such as FERPA or other state student records laws.

Must the student or parents provide a school district with medical or legal records in order for the school to change a student’s gender identity in school records?

No. Unless state law requires otherwise, a school district should accept a parent’s written request to change information in the school record to change a student’s gender identity,

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4 Letter from LeRoy S. Rooker, Director, FPCO, to Karol Johnson, Asst. Sup., Great Falls Public Schools (Nov. 13, 1991)

pursuant to the FERPA requirement that parents be allowed to request a change to student records that are inaccurate or misleading.

**How should school districts respond if a student wants us to discuss or does not want us to discuss their transgender status with peers or staff members?**

The school district may share information about the student’s gender transition with school personnel who have educational or administrative need for the information consistent with FERPA and applicable state privacy laws.\(^6\) The school district should handle communications with other students as disclosures that may require written parental consent pursuant to FERPA or state law.\(^7\)

School districts also may decide to provide training related to transgender issues to staff and students without identifying any particular student. Additional information and support may also be provided to particular classes or groups that include a student who is openly transgender or to address any instances of harassment or bullying.

**Extra-curricular Activities**

**How do state athletic associations address the participation of transgender students in interscholastic sports?**

Practices vary widely by state.\(^8\) In Illinois, the Illinois High School Association (IHSA) adopted a bylaw regarding the participation of transgender students in IHSA sanctioned sports, which is summarized below.


**Step 1:** The student and/or parents shall contact the school administrator or athletic director at their member school notifying them that the student has a different gender identity than listed on the student’s school registration card or birth certificate and that the student wishes to participate in athletics/activities in a manner consistent with their gender identity. The school shall collect the following for the participation ruling:

1. Gender identity used for school registration records.

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\(^8\) Pat Griffin, *Developing Policies for Transgender Students on High School Teams*, National Federation of State High School Associations (Sept. 8, 2013), [https://www.nfhs.org/articles/developing-policies-for-transgender-students-on-high-school-teams/](https://www.nfhs.org/articles/developing-policies-for-transgender-students-on-high-school-teams/) (“Because state policies vary, a transgender student’s opportunity to participate on high school athletic teams may be determined by the state in which they live. A growing number of state associations have enacted policies on the inclusion of transgender students on athletic teams.”)
2. Medical documentation (hormonal treatments, sexual re-assignment surgery, counseling, medical personnel, etc.).

3. Gender identity related advantages for approved participation.

**Step 2:** Once the school administrator has collected the relevant information, the member school shall contact the IHSA office in writing of the request for the ruling, the student’s gender identity, and the selected athletics/activities that the student would like the opportunity to participate in if they are selected through the team try-out process. Once the student is approved, participation is granted through the duration of their high school career. It does not need to be renewed annually.

**IHSA Procedure:** IHSA will make final rulings on student participation. The IHSA will establish a group of medical personnel to act in an advisory role when reviewing rulings. Appealing parties should provide the following documentation:

1. A current transcript and school registration information.

2. Documentation of the student’s consistent gender identification (e.g. affirmation statements from student, parent/guardian, and/or health care provider.

3. Any other pertinent documentation or information.

**Can students form clubs or groups related to LGBT issues?**

Yes. Students may form a Gay-Straight Alliance or other support or advocacy group related to LGBT issues. Such an extracurricular club must be treated in the same way and subject to the same rules as all other student clubs.

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9 The Equal Access Act (EAA), 20 U.S.C. § 4071 (2016), provides the federal statutory basis for the forming of noncurricular student clubs. However, the EAA’s application is limited to secondary schools (20 U.S.C. § 4071 (a) (2016)).

School Facilities

Are school districts required to permit transgender students to self-select what restrooms and locker rooms they use?

The answer to this question remains unsettled. On December 2, 2015, the U.S. Department of Education, Office for Civil Rights (OCR) found that an Illinois school district violated Title IX of the Education Amendments of 1972 by denying a transgender high school student access to the locker room of the student’s gender identity.11 In contrast, the first federal district court to address the issue for a K-12 school district found that a public school board did not violate Title IX by maintaining a policy that limited facility use to “biological genders” and providing students “with gender identity issues” an alternative “appropriate private facility.”12

Support Plans

Should transgender students have a plan related to their gender identity?

Yes, the current best practice is for school districts to offer to develop a gender support plan with the student and parents. The plan should address the issues raised by the individual family as well as any other concerns that school district personnel may have.

Should transgender students have an IEP or 504 plan?

While transgender students may qualify for an IEP or 504 plan because of a disability, the student’s transgender status does not meet eligibility requirements for these plans.13

Efforts by schools to provide only limited access to school communication channels to such groups have been unsuccessful. At least one court found an Equal Access Act violation when other non-curricular student groups were given more extensive use of the school’s facilities than the gay student group. SAGE v. Osseo Area Sch. Dist. No. 279, 540 F.3d 911 (8th Cir. 2008).


13 Kevin M. Barry, Disabilityqueer: Federal Disability Rights Protection for Transgender People 16 Yale Hum. Rts. & Dev. L.J. 1 (Feb. 18, 2014), available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1115&context=yhrdlj (“The Americans with Disabilities Act (ADA) does not protect everyone. It notably excludes people with Gender Identity Disorder (GID), an impairment involving the misalignment between one's anatomy and gender identity.) On May 22, 2013, the
Bullying/Harassment

Should school districts investigate bullying based on transgender status?

Yes. Bullying, harassment, and discrimination on the basis of sex is prohibited by federal law and many state laws separately prohibit bullying/harassment based on sexual orientation and gender identity. School districts should investigate promptly all complaints of bullying/harassment. School districts should take sufficient corrective action to reasonably deter future bullying/harassment of the victim.

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Diagnostic and Statistical Manual of Mental Disorders (DSM-V) was issued in which the diagnosis of gender identity disorder (GID) was replaced by gender dysphoria, reflecting a new emphasis, “The old DSM-IV, GID focused on the "identity" issue -- namely, the incongruity between someone's birth gender and the gender with which he or she identifies. While this incongruity is still crucial to gender dysphoria, the drafters of the new DSM-5 wanted to emphasize the importance of distress about the incongruity for a diagnosis.” Wynne Parry, Gender Dysphoria: DSM-5 Reflects Shift In Perspective On Gender Identity, HuffPost Healthy Living (Jun. 4, 2013), http://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5_n_3385287.html.