



## **Transgender Students and Policy: Update on 2016 Federal Guidance**

### **1. What did the federal government say in May 2016 about transgender students?**

On May 13, 2016, the U.S. Department of Justice (DOJ) and the U.S. Department of Education (ED) issued the following documents to assist districts in complying with those agencies' interpretation of Title IX requirements related to transgender students:

1. A joint *Dear Colleague* letter which summarizes a school's Title IX obligations regarding transgender students and explains how the DOJ and ED evaluate a school's compliance with these obligations<sup>1</sup>; and
2. *Examples of Policies and Emerging Practices for Supporting Transgender Students* compiled by ED's Office of Elementary and Secondary Education that includes common questions and sample policies to meet Title IX's requirements and ensure a supportive and nondiscriminatory school environment.<sup>2</sup>

While the recent federal guidance has generated a great deal of media attention, as well as pending litigation, the content of the new federal guidelines is not a surprise to school officials. This is because the guidance is not a departure from the position that the Office for Civil Rights (OCR) division of ED has taken in numerous widely reported investigations over the last couple of years.

Even before the guidance, school districts were receiving and responding to requests for accommodations for transgender students.<sup>3</sup> School districts handle requests for accommodations on a case-by-case basis. Requests are not just about bathrooms or changing facilities; they may also include questions about how the student is addressed (e.g., the name or pronoun used for the student), dress code issues, and more. Factors to be considered may include the student's age and whether the student is transitioning while at the same campus or is moving into a new school. Generally, schools are able to work with parents and students to reach arrangements without having to resort to complaints or lawsuits.

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<sup>1</sup> *Dear Colleague Letter*, U.S. Dep't. of Educ., Office for Civil Rights, and U.S. Dep't of Justice, Civil Rights Division (May 13, 2016), available at [www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf).

<sup>2</sup> *Examples of Policies and Emerging Practices for Supporting Transgender Student*, U.S. Dep't. of Educ., Office of Elementary and Secondary Education (May 2016), available at [www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf](http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf).

<sup>3</sup> Lieutenant Governor Dan Patrick has requested an attorney general opinion regarding the Fort Worth ISD's administrative guidelines providing procedures for accommodating transgender students. Request for Attorney General Opinion, RQ-010-7KP (May 31, 2016).

## 2. What is “significant guidance”?

The ED and DOJ characterized their *Dear Colleague* letter as *significant guidance*. This term is derived from a best practices guide for federal agencies intended to promote transparency, fairness, and accountability.<sup>4</sup> It is not unusual for a federal agency to characterize guidance as significant, and the designation does not make the guidance more binding on school districts than OCR’s other written policy guidance regarding Title IX. Other examples of significant guidance documents issued by OCR can be found on the ED Website, here: [www2.ed.gov/policy/gen/guid/significant-guidance.html](http://www2.ed.gov/policy/gen/guid/significant-guidance.html).

## 3. What does this mean for Texas school districts?

Schools do not have to do anything in response to the new federal guidance. On the other hand, school officials are experiencing pressure to respond to increased public awareness of transgender students, as concerned parents and others in the community inquire about the district’s policy and practices. Districts may find that the new federal guidance provides an opportunity to revisit their existing practices as well as any arrangements with transgender students and their parents. These issues require a case-by-case approach to determine the best possible resolution, in light of all the available options and potential risks.

## 4. Do districts need a policy for transgender students?

The *Dear Colleague* letter and policy examples were intended as guidance to help districts resolve issues as they arise. The guidance does not require districts to adopt a board policy that specifically addresses transgender students. When OCR investigates a district for compliance with Title IX, the district must show that:

- the district has adopted a compliant nondiscrimination policy,
- the policy identifies the district’s Title IX coordinator, and
- district personnel are implementing the policy to prevent and respond to potential discrimination or harassment of all students on the basis of sex or gender identity, including transgender students.

## 5. What does TASB policy say about transgender students?

TASB offers a model policy that: (1) prohibits discrimination, harassment, dating violence, and retaliation against students; and (2) outlines remedial steps to report, investigate, and respond to concerns. Since 2005, a version of this policy has been at code FFH(LOCAL) in Texas school districts’ policy manuals. The TASB policy prohibits various forms of discrimination, including discrimination on the basis of gender and sex. The policy does not

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<sup>4</sup> See Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), available at [www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507\\_good\\_guidance.pdf](http://www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf).

speak directly or solely about the rights of transgendered students. Based on the position of the OCR and other federal agencies, as well as numerous federal court decisions, discrimination on the basis of gender identity is a form of sex discrimination.<sup>5</sup>

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

## **6. What are the potential consequences of failure to follow the federal guidance?**

If a school district does not follow the guidance, the school district may be subject to an investigation by OCR.<sup>6</sup> If the complaint is not resolved, the district is at risk of losing federal funds. The district may also be sued for a civil rights violation. Most districts rely on federal funds for a substantial part of their annual budgets.

## **7. What is the impact of the current litigation regarding the federal guidance?**

On May 25, 2016, the State of Texas, Harrold ISD, and plaintiffs representing multiple other states filed a lawsuit in federal court against the U.S. Departments of Education, Justice, and Labor, the U.S. Equal Employment Opportunity Commission, and the heads of those agencies, regarding the May 13, 2016, *Dear Colleague Letter* and related guidance issued by the federal agencies regarding the rights of transgender individuals to use facilities in accordance with their gender identity rather than their biological sex. The lawsuit argues that the federal government has exceeded its authority by interpreting Title VII of the Civil Rights Act and Title IX of the Education Amendments of 1972 to include protection of gender identity within the prohibition on unlawful sex discrimination. The plaintiffs seek a

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<sup>5</sup> See *Dear Colleague Letter*, U.S. Dep’t. of Educ., Office for Civil Rights, and U.S. Dep’t of Justice, Civil Rights Division (May 13, 2016), available at [www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf) (citing the U.S. Supreme Court, federal courts of appeal decisions, and agency guidance interpreting prohibited sex discrimination to include discrimination on the basis of gender identity); see also *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (finding transgender applicant for employment presented sufficient evidence of Title VII sex discrimination).

<sup>6</sup> In 2015, OCR entered into a resolution agreement to resolve a complaint regarding an Illinois school district’s refusal to allow a transgender female student use the girls’ locker rooms at her high school. This was the first time that OCR found a school district in violation of civil rights laws regarding transgender issues. See U.S. Dep’t. of Educ., Office for Civil Rights, Resolution Agreement, *In re Township High Sch. Dist. 211, IL*, OCR Case No. 05-14-1055 (Dec. 2, 2015), available at [www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf](http://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf); Letter to Dr. Daniel E. Cates, Superintendent, Township High School District 211 (Nov. 2, 2015); available at [www2.ed.gov/documents/press-releases/township-high-211-letter.pdf](http://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf).

declaratory judgment that the federal guidance and interpretations are procedurally and substantively unlawful and an injunction preventing the guidance from having any effect.<sup>7</sup>

Texas' lawsuit does not currently have any impact on a school district's obligations under Title IX. The pending claims, as well as litigation in other parts of the country, do highlight the importance of seeking legal advice before making any districtwide decisions regarding these issues.<sup>8</sup>

## 8. What should we be saying to our communities about this?

Many people in the school community have valid questions and concerns regarding transgender students at school, the new federal guidance, and related matters. When emotions run high, school officials know that it is more important than ever to disseminate clear, accurate, and timely information to address these issues. Whether to issue a public statement is a local decision. If your district decides that a statement is necessary, TASB Legal and Policy Services recommend that districts consider the following talking points:

- The U.S. Department of Education Office for Civil Rights, which is the division responsible for enforcing Title IX in public schools, has long interpreted Title IX to prohibit discrimination on the basis of gender identity. Transgender students express a gender identity that is different from their biological sex. As such, these students are protected by Title IX.
- The guidance issued by OCR and DOJ on May 13, 2016, was not new to school officials, since it summarized and expanded on OCR's past interpretation of Title IX. As recipients of federal funds, school districts are subject to OCR's interpretations of the laws that the agency enforces.
- When a student requests to be acknowledged by a new gender identity, educators and parents work together to find workable solutions that take into account student privacy, safety, and minimal disruption to the educational environment. Accommodations are not just about bathrooms and locker rooms. Related issues include how the student will be addressed at school and in education records, the student's attire, and participation in extracurricular activities. These sensitive issues must be approached on a case-by-case basis.
- Student privacy is important and protected by federal law. Therefore, many in the school community may not know when a student has transitioned to a new gender identity.
- The district's nondiscrimination policy protects all students against discrimination, harassment, and dating violence. The district is committed to ensuring a safe educational environment for all students.

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<sup>7</sup> See Complaint for Declaratory and Injunctive Relief, Case 7:16-cv-00054-O (N.D. Tex. 2016), available at [www.texasattorneygeneral.gov/files/epress/files/2016/complaint\\_FM.pdf?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](http://www.texasattorneygeneral.gov/files/epress/files/2016/complaint_FM.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=).

<sup>8</sup> See *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016); also see *G.G. ex rel. Grimm v. Gloucester Cnty Sch. Bd.*, No. 15-2056, 2016 WL 3080263 (4th Cir. May 31, 2016) (denying petition for rehearing *en banc*).

## 9. Where can we find more information?

TASB Legal Services has posted guidance about transgender students:

[www.tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Students/documents/transgender\\_students\\_may16.pdf](http://www.tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Students/documents/transgender_students_may16.pdf).

NSBA has published a guide as well: [www.nsba.org/nsba-faqs-transgender-students-schools](http://www.nsba.org/nsba-faqs-transgender-students-schools).

For more information on this and other school law topics,  
visit TASB School Law eSource online at [schoolawesource.tasb.org](http://schoolawesource.tasb.org).

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

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