

GUIDANCE FOR EDUCATORS WORKING WITH TRANSGENDER AND GENDER NONCONFORMING STUDENTS



BACKGROUND

In 2008, the Colorado General Assembly passed SB08-200 prohibiting discrimination based on sexual orientation, including transgender status. In November 2009, the Colorado Civil Rights Commission adopted rules to implement SB08-200. In May 2016, the United States Department of Education issued a “Dear Colleague” letter¹ to schools affirming the rights of transgender and gender nonconforming students.

Given the statistical likelihood that each school district and public school will have transgender employees or students, it is essential that school boards, school administrators, and educators understand the requirements of the law. The Colorado Association of School Boards (CASB), the Colorado Association of School Executives (CASE), the Colorado High School Activities Association (CHSAA), the Colorado League of Charter Schools (the League), the Colorado Education Association (CEA), and One Colorado collaborated to create this document to provide practical guidance and resources to school districts and schools, educators, and school communities working with and meeting the needs of transgender students.

LEGAL PROVISIONS

Colorado Law

Through SB08-200, Colorado expanded the classes of individuals that public entities, including schools, must ensure are free from discrimination. Colorado law requires that all programs and activities be free from discrimination based on sexual orientation. SB08-200 specifically defined sexual orientation as “[a] person’s orientation towards heterosexuality, homosexuality, bisexuality, transgender status or another person’s perception thereof.”² The Civil Rights Commission rules (also Division of Regulatory Agencies “DORA” Rules) further define the scope of the statute as affording protections to individuals based on the following:

- Transgender means those individuals “having a gender identity or gender expression that differs from societal expectations based on gender assigned at birth.”³
- Gender identity means an individual’s “innate sense of one’s own gender,”⁴ a deeply held sense or psychological knowledge of one’s own gender, regardless of the gender assigned at birth.
- Gender expression means “external appearance, characteristics, or behaviors typically associated with a specific gender.”⁵ Gender expression is the way we communicate our gender identity to others. Gender nonconforming describes people whose gender expression differs from stereotypical expectations, such as “feminine” boys, “masculine” girls, and those who are perceived as androgynous.

¹ www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf

² C.R.S. § 24-34-301(7).

³ 3 C.C.R. 708-1, Rule 10.2(GG).

⁴ 3 C.C.R. 708-1, Rule 10.2(Q).

⁵ 3 C.C.R. 708-1, Rule 10.2(R).

Federal Law

Title IX, Education Amendments of 1972 is the federal education law that protects students from discrimination based on sex.⁶ The U.S. Justice and Education Departments and some federal courts had interpreted Title IX to prohibit discrimination against transgender and gender nonconforming students, even before the 2016 “Dear Colleague” letter that specifically affirms that Title IX does apply.⁷ Title IX applies to all schools (K-12 and post secondary) that accept federal funding.



As with any other civil rights protection, federal and state law and guidance focus on affording student access to school programs, facilitating students’ social integration, and minimizing stigmatization. There is no requirement in law for a student to take any medical or legal action in order to assert protections as a transgender individual or on the basis of sexual orientation.

ADDRESSING THE NEEDS OF STUDENTS IN PUBLIC SCHOOLS

Policies on Nondiscrimination, Bullying, and Harassment

School districts and schools are required under federal and state law to adopt board policies that protect employees, the public, and students from discrimination. CASB regularly issues updated nondiscrimination policies, including CASB sample policy AC Nondiscrimination/Equal Opportunity, and its implementing regulation and exhibits, that satisfy the myriad requirements of federal and state law. Additional protections are established through the required board policies regarding bullying and harassment (required by HB11-1254), which clearly apply to prohibit conduct directed at students on the basis of the student’s actual or perceived sexual orientation.⁸ Accordingly, complaints of discrimination, bullying, or harassment based on a person’s actual or perceived sexual orientation, including “transgender status,” are to be handled in the same manner as other complaints of discrimination, bullying, or harassment.

Process

Each school district is required by federal law to have a compliance coordinator who oversees the district’s compliance with nondiscrimination laws and policies and receives related complaints or concerns.⁹ Any concerns or complaints regarding individual schools, including public charter schools, should be directed first to the school administrator and, if necessary, then to the school district or the Charter School Institute, depending on the authorizing entity. At the school level,

⁶ 20 U.S.C. § 1681-1688; 34 C.F.R. Part 106.

⁷ www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf

⁸ One Colorado Scan of School District Policies (<http://www.one-colorado.org/news/one-colorado-education-fund-releases-scan-of-district-policies/>).

⁹ 34 C.F.R § 106.8.

it is helpful to have a contact person who has received education and training in identifying and responding appropriately to student concerns.

All situations with transgender or gender nonconforming students should be handled on a case-by-case basis. To create a safe and supportive environment for the student, the school should hold a meeting with the student (and parent if involved in the process) to develop a plan that addresses the student's desires and concerns. This support plan can be helpful for families advocating for their transgender or gender nonconforming student and also for the school in making "need-to-know" school administrators and educators aware of the transgender or gender nonconforming student and the student's needs. The school should train administrators and educators that interact daily with students about how to properly implement these plans and any relevant legal information regarding the health, well-being, and safety of the student.

Restrooms and Locker Rooms

DORA Rule 81.11 provides:

- (A) Nothing in this Act prohibits segregation of facilities on the basis of gender.
- (B) All covered entities shall allow individuals the use of gender-segregated facilities that are consistent with their gender identity. Gender-segregated facilities include, but are not limited to restrooms, locker rooms, dressing rooms, and dormitories.
- (C) In gender-segregated facilities where undressing in the presence of others occurs, covered entities shall make reasonable accommodations to allow access consistent with an individual's gender identity.



As the DORA rules provide, preferred practice is to allow students access to the restroom or locker room that corresponds to their gender identity consistently asserted at school. In making decisions regarding an individual student's access to restrooms and locker rooms, schools should consider at least the following factors: the student's age, the student's preferences (including the student's need or desire for increased privacy regardless of the underlying reason), any relevant medical needs, the location of facilities in proximity to the student's classes and schedule, the design and layout of the facilities, the age and nature of the other students, the student's maturity level, and behavior or disciplinary history. It is essential for schools to ensure whatever arrangements are made for the student do not improperly limit the student's access to instruction or opportunity to participate in physical education classes and sports.

Use of single user restrooms or locker rooms, including but not limited to staff facilities, may be appropriate when all factors are considered, but should not be the assumed answer simply because the student is transgender or gender nonconforming. Other alternative arrangements may include using a nearby restroom stall with a door, a P.E. instructor's office in the locker room, a nearby health office restroom, or providing a student a separate changing schedule. Any alternative arrangement should be provided in a way that protects the student's confidentiality, including the student's transgender status.

Privacy at School

All students have a right to privacy, including the right to maintain privacy about one's transgender status and gender nonconforming presentation at school. Under the Family Educational Rights and Privacy Act (FERPA), only those school employees with a legitimate educational interest should have access to a student's records or the information contained within those records.¹⁰ Disclosing confidential student information to other employees, students, parents, or third parties may violate privacy laws, including but not limited to FERPA. Transgender and gender nonconforming students have the ability, as do all students, to discuss and express their gender identity and expression openly and decide when, with whom, and how much of their private information to share with others.

Official Records

School districts and schools are required to maintain a mandatory permanent student record, or "official record," that includes a student's legal name and legal gender. However, to the extent that schools are not legally required to use a student's legal name and gender on other school records or documents, schools are encouraged to use the name and gender preferred by the student. Schools should follow local school board, or individual charter public school, policy in addressing requests to



alter student records. If a district or charter public school has a practice of revising a current or former student's records to reflect a change of name or marital status, then schools should process a transgender or gender nonconforming student's request for a name change or gender status change in the same manner. It is not unlawful for school districts and schools to require all record revision requests to be supported by documentation of a court order or amendment of state or federally-issued identification. In situations where school staff or administrators are required by law to use or to report a transgender student's legal name or gender, such as for purposes of standardized testing, school staff and administration should confer with the student and, if a concern persists about disclosure of confidential information, should consult with legal counsel.

¹⁰ 34 CFR § 99.31.

Working with Families

When contacting parents or guardians of a transgender or gender nonconforming student, school personnel should use the student’s legal name and the pronoun corresponding to the student’s gender assigned at birth unless the student, parents and/or guardian has indicated otherwise. When working with the family, it’s important to use the following age-appropriate guidance to maintain confidentiality and privacy:

Elementary School: Generally, the student’s parents or guardians will inform the school of their transgender or gender nonconforming child. If school staff believe that a gender identity or expression issue is presenting itself and creating difficulty for the child at school, it is appropriate to approach the parents regarding this issue. Together, the family and the school can identify appropriate steps to support the student.

Secondary School: Generally, the student’s parents or guardians will be aware of their transgender or gender nonconforming child. In some cases, notifying parents or guardians of the student’s transgender or gender nonconforming status carries risk, such as being kicked out of the home or experiencing rejection from their family. Prior to notification of the family, school staff should work closely with the student and consider the health, well-being, and safety of the student.

Names and Pronouns

Schools should not assume a student’s preferred name or pronoun; rather schools should seek out guidance from the student and use the requested names and pronouns consistently. A court-ordered name or gender change is not required, and students need not change their official records. The Colorado Civil Rights Commission specifically identifies prohibited conduct as “deliberately misusing an individual’s preferred name, form of address, or gender-related pronouns,” such as intentionally referring to the student by a name or pronoun that does not correspond to the student’s gender identity.¹¹

Dress Code

Schools may enforce dress codes pursuant to school policy. However, students have the right to dress in accordance with their gender identity consistently asserted at school, within the constraints of the dress codes adopted by the school. School staff must not enforce a school’s dress code more strictly against transgender or gender nonconforming students than other students.



Athletics

The Colorado High School Activities Association (CHSAA) and its member schools believe all students in Colorado should have access to athletics and activities

¹¹ 3 C.C.R. 708-1, Rule 81.6(A)(4).

without discrimination, including on the basis of transgender status. The CHSAA transgender policy¹² allows students to participate in athletics consistent with a student’s gender identity consistently asserted at school. Students or parents can contact their school’s athletic director for guidance and to learn more about the next steps in participating in school activities and athletics. Equity, access, and inclusion are an important part of CHSAA’s goals for its students. CHSAA partners with You Can Play, a national athlete organization, to share the vision of equality, access, and inclusion.

Public Charter Schools

Public charter schools are tuition-free, independently-run public schools. Public charter schools do not charge tuition and do not have any special entrance exams. The “charter” establishing each school is a contract detailing the school’s mission, programs, goals, students served, methods of assessment, and ways to measure success. The “charter” contract is between the charter public school and the entity granting the charter (“the authorizer”). In Colorado, the authorizer is generally the local school district, but in some cases it is the state via the Colorado Charter School Institute (CSI). Public charter schools are bound by federal and state public school laws, similarly to school districts, including all nondiscrimination and civil rights laws. The information contained in this bulletin applies to charter schools in the same way it does to individual schools operated by the school district. Concerns, questions, complaints, or requests for additional information regarding the policies, procedure, or implementation of law at a charter school can be directed to the charter school administrator and sent to the authorizing district (or CSI) if needed.

CONCLUSION

This document is meant to provide guidance and resources to school districts and schools, educators, and school communities working with, and meeting the needs of, transgender and gender nonconforming students. While not all situations are addressed in this document, the best approach is for schools to work collaboratively with the student and family to meet the needs of the student.

If you have additional questions about meeting the needs of transgender or gender nonconforming students, please contact:

CASB: Kathleen Sullivan, Chief Counsel – ksullivan@casb.org

CASE: Lisa Escárcega, Executive Director – lescargea@co-case.org

CLCS (the League): Jessica Johnson, Director of Policy and Legal Initiatives – jmjohnson@coloradoleague.org

CHSAA: Bethany Brookens, Assistant Commissioner – bbrookens@chsa.org

CEA: Julie Whitacre, Government Affairs Director – jwhitacre@coloradoea.org

¹² <http://www2.chsaa.org/home/pdf/TRANSGENDERPROCEDUREPOLICY.pdf>

ADDITIONAL RESOURCES

- Office of Civil Rights, “Dear Colleague” letter (from Russlyn Ali, Assistant Secretary for Civil Rights) about Bullying:
www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf
- Office of Civil Rights, Sexual Harassment Guidance:
www.ed.gov/about/offices/list/ocr/docs/shguide.html
- Colorado Civil Rights Division:
<https://www.colorado.gov/pacific/dora/civil-rights>

POLICY RESOURCES

- Boulder Valley School District, Guidelines Regarding the Support of Students and Staff who are Transgender and/or Gender Nonconforming:
<http://www.bvsd.org/policies/Policies/AC-E3.pdf>
- Jefferson County Public Schools, Equal Education Opportunity – Transgender Students:
<http://www.boarddocs.com/co/jeffco/Board.nsf/goto?open&id=9DH3J76E6966>
- GLSEN (Gay, Lesbian, and Straight Education Network): Model District Policy on Transgender and Gender Nonconforming Students:
[http://www.glsen.org/sites/default/files/GLSEN Trans Model Policy 2016_0.pdf](http://www.glsen.org/sites/default/files/GLSEN%20Trans%20Model%20Policy%202016_0.pdf)

EXAMPLES OF GENDER SUPPORT PLANS

- Boulder Valley School District:
<http://www.bvsd.org/policies/Policies/AC-E5.pdf>
- Gender Spectrum:
<https://www.genderspectrum.org/staging/wp-content/uploads/2015/08/Schools-in-Transition-2015.pdf>

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