

# Ensure Your School Policies Protect Gender Diverse Students

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With an increasing number of teens and tweens identifying as transgender or nonbinary, or “gender diverse,” school districts are grappling with a number of potential issues that may not have been on their radar just a few years ago.

A study of 3,200 high school students in Pittsburgh released last year found that nearly 10% of students identified themselves as transgender, nonbinary or gender questioning. Regardless of the exact number, though, educational institutions across the country need to navigate how to respect these students’ privacy, protect their mental health, provide equal access to educational opportunities and other issues.

In short, courts and federal agencies have determined that gender diverse students have the same fundamental rights afforded to all students, which cannot be denied on the basis of gender identity, including:

- The right not to be disciplined or treated differently because they are transgender or gender nonconforming.
- The right to be treated with respect and not be harassed or bullied. Educational institutions have a duty to prevent and remedy unlawful sexual harassment, including harassment based on gender identity.
- The right to equal educational opportunities, including using locker rooms and restrooms consistent with a student’s gender identity and participating equally in athletic or extracurricular activities and school events. In most circumstances, students do not need to provide medical documentation of a gender transition to have access.
- The right not to be compelled to provide personal and medical information to school officials. Similarly, school officials must not disclose personal information about a transgender student – including the student’s sex at birth, medical history, gender identity or gender transition – without the student’s, or their parent’s, consent.

- The right to transition at school, including expressing their gender identity through how they dress and their preferred name and pronouns.

Despite these rights, many transgender, nonbinary and gender questioning students still face widespread bullying, harassment and discrimination. A 2017 study by the Gay Lesbian & Straight Education Network found that 59% of transgender students were required to use a bathroom that did not match their gender identity. The same study found that 51% of transgender students could not use the name or pronoun that matched their gender at school and 25% had been prevented from wearing a certain type of clothing because it was considered inappropriate based on legal sex. Given this, it's not surprising that 83% of transgender students feel unsafe at school.

Courts and federal law have consistently upheld that schools have a duty to protect students from bullying and create a safe learning environment for all, regardless of gender identity. The U.S. Department of Justice has upheld that Title IX prohibits discrimination based on sexual orientation and gender identity, and the Office of Civil Rights has said it will review allegations from anyone who files a complaint, including students who identify as transgender.

Numerous court cases have also upheld the responsibility of schools to protect transgender students. In *Grimm v. Gloucester County School Board*, a school district initially allowed a high school transgender boy to use the boys' restroom. However, once the school district faced backlash from parents, the district adopted a policy where students had to use bathrooms matching their "biological gender." The district also created single-stall bathrooms for transgender students. The student ultimately underwent chest reconstruction surgery, received a court order stating that he is male, and amended his birth certificate to reflect that he is male. He presented these documents to the school district, but the district would not amend his school records (or budge on the bathroom issue). The district's inaction led to serious emotional distress and health issues for the transgender student. The U.S. District Court for the Fourth Circuit, which includes North Carolina, analyzed the district's bathroom policy under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and ultimately determined that the bathroom policy was "not substantially related to the important objective of protecting student privacy" and ruled in favor of the transgender student.

### **When Rights Collide**

While transgender and nonbinary students have very specific rights, so do parents and teachers. Sometimes, those rights collide, creating legal situations that can be tricky to navigate.

For example, some teachers have refused to use students' pronouns, saying to do so would violate their First Amendment rights. The courts have come down on this issue both ways, some concluding that teachers may be disciplined for refusing to refer to a student by the pronouns

associated with their gender identity, others concluding that school districts infringe on First Amendment rights if they do so.

The rights of parents create a slightly greyer area, especially when parents are not aware of or do not agree with their child's gender identity. Schools must grapple with their attorneys where student privacy rights end and parents' rights to educational records begin. Generally, schools should use the student's pronouns in all school-based communications, with the student's consent. Schools are not obligated to notify parents of their child's gender identity. To prevent accidental disclosure of a student's transgender status, schools should keep records that reflect a transgender student's birth name and assigned sex (e.g., copy of the original birth certificate) apart from the student's cumulative school records in a separate file. Schools should also implement similar safeguards to protect against disclosing information contained in electronic records. In instances where a student uses a chosen name, the student's birth name and gender information are considered private information and may not be disclosed except as permitted by the Family Educational Rights and Privacy Act (FERPA). Inappropriately disclosing personally identifiable information from education records to the school community may violate FERPA and interfere with transgender students' rights under antidiscrimination laws. Schools also need to remember their responsibility to report suspected child abuse, to provide mental health services, and follow their protocols for students at-risk of suicide.

### **Creating Policies**

The rights of transgender and nonbinary students continue to be an emerging area of law. The most effective way for educational institutions to comply with their legal obligations is to develop policies and procedures that consider the legal rights of students and treat them with respect. Among other things, school districts should consider policies that:

- Prohibit harassment and discrimination against transgender and gender nonconforming students, including establishing consequences for those who harass or discriminate against students.
- Accept a student's assertion of the student's gender identity and not require any substantiating evidence.
- Address students by their preferred names and pronouns without being required to obtain a court-ordered name or gender change or to change their official records. If a student provides documentation of a legal name or gender change, then the official student record must be changed.
- Allow students to use the restroom, locker room or other facilities that correspond with their gender identity.

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- Allow students to participate in sex-segregated programs, such as physical education or athletics, in a manner consistent with their gender identity.
- Provide students the right to control the disclosure of highly personal and private information such as gender identity, transgender status or sexual orientation, including disclosure to parents, school personnel and other students.

**PEOPLE**

Sarah M. Saint

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