

National **School Boards** Association



Navigating Transgender Student Issues:

A Legal Guide for School Districts

New Mexico School Boards Association
School Law Conference

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Introduction

- Background and Current Legal Landscape
- NSBA Guide
- Goals
- Definitions

Legal Issues

- Discrimination
- Privacy
- Records
- Restrooms and Locker rooms
- Staff

Q&A

Federal Law

- **Title IX:** “No 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.” 20 USC § 1681.
- An educational institution may maintain “separate living facilities for the different sexes.” 20 USC § 1686.
- **Title IX regulations:** Schools may provide separate but comparable dorms, bathrooms, locker rooms, and shower facilities on the basis of sex. 34 CFR § § 106.32 and 106.33.

Federal Law

- **G.G. v. Gloucester Cnty. Sch. Bd.**, (4th Cir. Apr. 19, 2016) (WV, VA, NC, SC)
- Majority: ED' s interpretation of its own regulation, regarding restroom access by transgender individuals, is entitled to deference. “[W]hen a school elects to separate or treat students differently on the basis of sex...the school must generally treat transgender students consistent with their gender identity.”
- Dissent: when the “School Board assigned restrooms and locker rooms on the basis of biological sex, it was clearly complying precisely with the unambiguous language of Title IX and its regulations.”



Federal Law

- ***G.G. v. Gloucester Cnty. Sch. Bd.***, (4th Cir. Apr. 19, 2016) (WV, VA, NC, SC): ED’ s interpretation of its own regulation, regarding restroom access by transgender individuals, is entitled to deference. “[W]hen a school elects to separate or treat students differently on the basis of sex...the school must generally treat transgender students consistent with their gender identity.”
- Petition for *en banc* denied May 31, 2016. Dissenting justice said “... the momentous nature of the issue deserves an open road to the Supreme Court....”



Federal Guidance – U.S. ED Office for Civil Rights

- **April 3, 2014:** OCR Chief Catherine Lhamon tells COSA to advise school board clients to allow transgender students to use the bathroom of the gender with which they identify.
- **April, 29 2014 Q&A on Title IX and Sexual Violence:** “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity....”
- **Jan. 7, 2015 opinion letter interpreting Title IX bathroom regulations to transgender individuals:** “When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.”

Federal Guidance – U.S. ED Office for Civil Rights and Dept. of Justice

- **May 13, 2016 Guidance from ED/DOJ:** “This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments’ interpretation is consistent with courts’ and other agencies’ interpretations of Federal laws prohibiting sex discrimination.”

<http://www2.ed.gov/about/offices/list/ocr/letters/college-201605-title-ix-transgender.pdf>

State Laws

18 states + DC cover sexual orientation and gender identity in public accommodations non-discrimination law

- 200 cities ban discrimination based on gender identity



Public accommodations non-discrimination law covers sexual orientation and gender identity (18 states + D.C.)



Public accommodations non-discrimination law covers only sexual orientation (3 states)



No public accommodations non-discrimination law covering sexual orientation or gender identity (29 states)



State has law preventing passage or enforcement of local nondiscrimination laws

NOTE: This map reflects states that have statewide statutes banning discrimination in public accommodations. Some states may interpret "gender" to include gender identity/expression. Such states are not reflected on this map.

*New York promulgated regulations in 2016 that define "sex" in New York's human rights law to include gender identity.

State Laws – North Carolina H.B 2 enacted March 23, 2016

- “Local boards of education shall require every multiple occupancy bathroom or changing facility that is designated for student use to be designated for and used only by students based on their biological sex” (= birth certificate)
- Accommodations for “special circumstances” permitted, “but in no event shall that accommodation result in the local boards of education allowing a student to use a multiple occupancy bathroom or changing facility ... for a sex other than the student's biological sex.



State Laws – Reaction to H.B 2

- ACLU promises lawsuit
- May 4, 2016 DOJ issued letters to Governor, Dept. of Public Safety, and Univ. of NC saying:
 - H.B. 2 violates employment discrimination prohibitions of Title VII
 - The 4th Circuit has found OCR guidance entitled to deference re: analogous provisions in Title IX regulations.
 - Violence Against Women Act specifically prefaces receipt of federal funds on nondiscrimination based on gender identity
 - So you're all engaging in a pattern or practice of discrimination. We can start compliance proceedings. Let us know by COB May 9.



State Laws – H.B. 2 Dueling law suits

- May 9 North Carolina sued the U.S., DOJ, the AG, and the Assistant AG for Civil Rights, asking for declaratory judgment that neither the State nor its Dept. of Public Safety are violating Title VII or the VAMA, as H.B. 2 requires *all* employees are required to use multi-occupant bathrooms consistent with biological sex and allows for accommodations in some circumstances.
- May 9 DOJ sued State, Dept. of Public Safety Univ. of NC and its Board of Governors asking court to find all 3 violating Title VII, UNC violating Title IX, and Dept and UNC violating VAWA



Litigation – NC, VA, IL

- NC dueling law suits
- VA/4th Circuit G.G. case +
- IL: students and parents sued ED, DOJ and the Palatine 211 school board over Res. Agreement requiring transgender student access to locker rooms. ACLU to intervene. Hearing Aug. 3 on preliminary injunction.



Litigation –


TX + 10 States + 2 school districts v. U.S. + ED + DOJ + EEOC + DOL

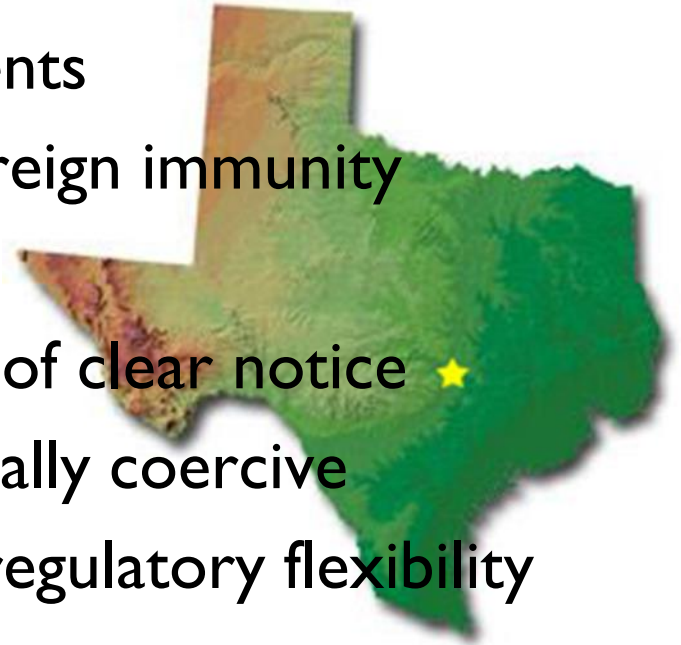
- Request injunction and declaratory relief specifically regarding the joint guidance issued by DOJ and ED on May 13.
- Guidance has “no basis in law,” and could cause “seismic changes in the operations of the nation’s school districts.”



Litigation –

TX + 10 States + 2 school districts v. U.S. + ED + DOJ + EEOC + DOL

- Suit alleges that May 13 Guidance:
 - Was issued without procedures required by APA
 - Exceeds scope of Congressional Authorization
 - Violates 10th and 14th Amendments
 - Attempt to abrogate state sovereign immunity
 - Are arbitrary and capricious
 - Violate constitutional standards of clear notice 
 - Are unlawful and unconstitutionally coercive
 - Were issued without a proper regulatory flexibility analysis



**WHERE DOES THIS LEAVE
SCHOOL LEADERS?**

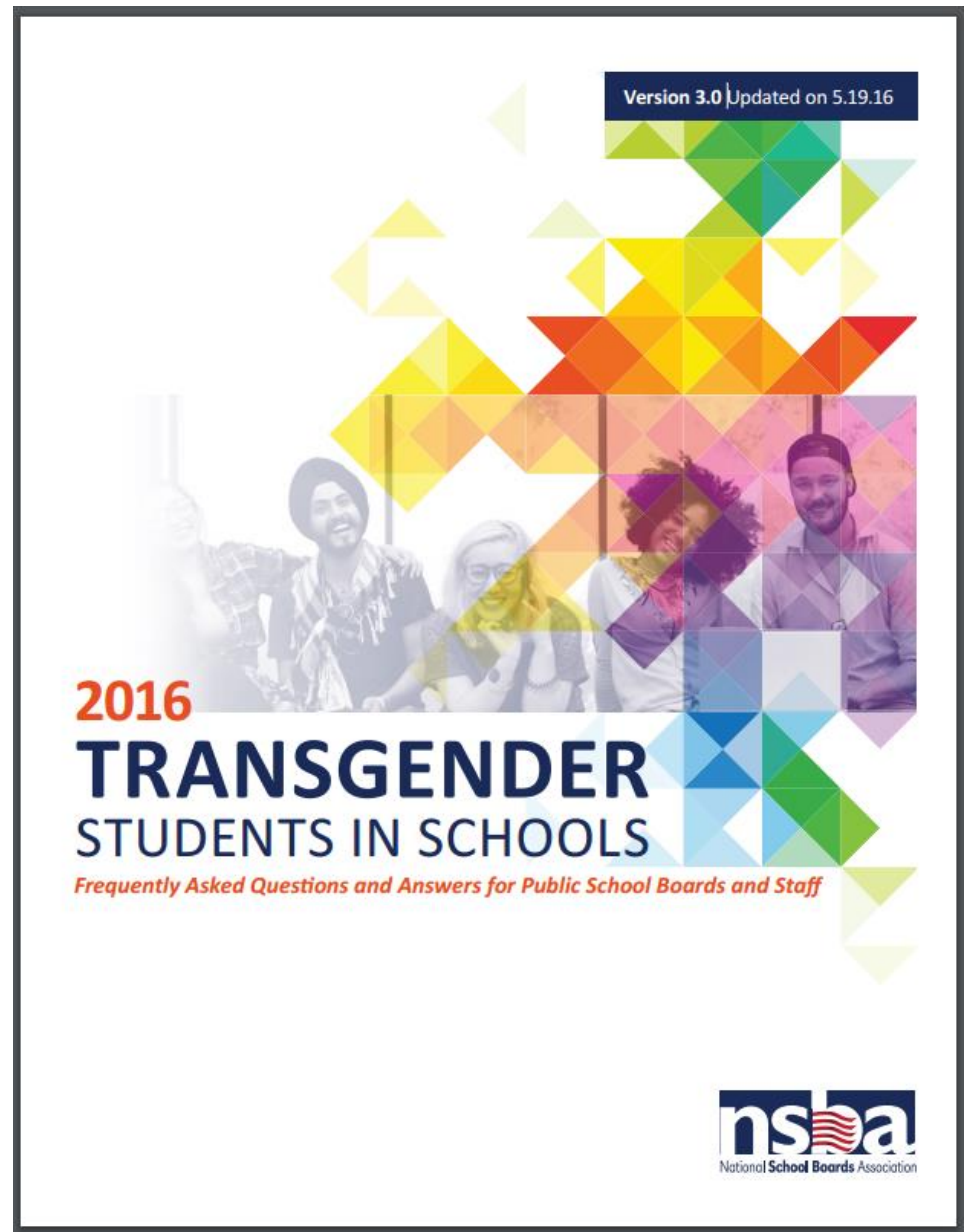
“And today, we hear from that rarest of things in this polarized political landscape, a neutral voice.” -- Mary Louise Kelly, NPR



*“There are some tricky situations for school districts because of the unsettled sort of national nature of the law. The federal guidance, of course, takes a certain position, ... [b]ut then there are certain states where ... the law appears to be diametrically opposed to what the federal guidance says. And so schools in those situations are really placed **in an untenable position.**” – Francisco Negrón, NSBA General Counsel*

Transgender Students in Schools:

*Frequently
Asked
Questions and
Answers for
Public School
Boards and
Staff*



<http://www.nsba.org/nsba-faqs-transgender-students-schools>

Goal: Educational access and safe learning environments for all

Guide: “All children have a right to learn, and they deserve public schools free from discrimination and harassment.”

<http://www.nsba.org/nsba-faqs-transgender-students-schools>

Goal: Community Engagement

Guide: “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.”

<http://www.nsba.org/nsba-faqs-transgender-students-schools>

Goal: Recognizing and Respecting all Voices

Guide: “Public schools belong to all, and policy decisions...should be made only after appropriate involvement of those affected... and with due consideration for the rights of those holding dissenting views....”

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.” -- American Psychological Association
- **Gender identity** is not **sexual orientation**.

Discrimination and Harassment

Discrimination and Harassment

- Transgender students are protected from discrimination, harassment and bullying, just like any other student. – NSBA Guide
- OCR’s position is that Title IX covers discrimination (including that resulting from harassment) against transgender students based on their gender identity.
- Beware treating transgender student requests for accommodation differently from other students based on gender identity.
- No current federal requirement to specifically delineate “gender identity” as a protected class.

Student Privacy

Student Privacy

- A student's transgender status in an education record is “personally identifiable information” protected by the Family Education Rights and Privacy Act from disclosure without the parent/student's consent.
- Information may be shared with school officials with a legitimate educational interest in the information.
- OCR guidance says a school may not designate a student's sex, including transgender status, as directory information (which may be released without consent, with proper yearly notice).

Student Records

Student Records

- FERPA requires schools to allow parents/students to review education records, and to request that the school change “inaccurate” or “misleading” records or those that violate the student’s privacy rights.
- OCR/DOJ say schools must process requests to amend information in a student’s record related to transgender status in the same way other student records amendment requests are processed, and that failure to do so may result in a Title IX violation.

Restrooms and Locker Rooms

Restrooms and Locker Rooms

- Proceed with care!
- School districts in the 4th Circuit have a U.S. Court of Appeals ruling that ED's interpretation is entitled to weight. Policies restricting access to rest rooms/locker rooms based on biological sex likely will invite OCR enforcement.

Staff Concerns and Interaction with Policy

Staff Concerns and Interaction with Policy

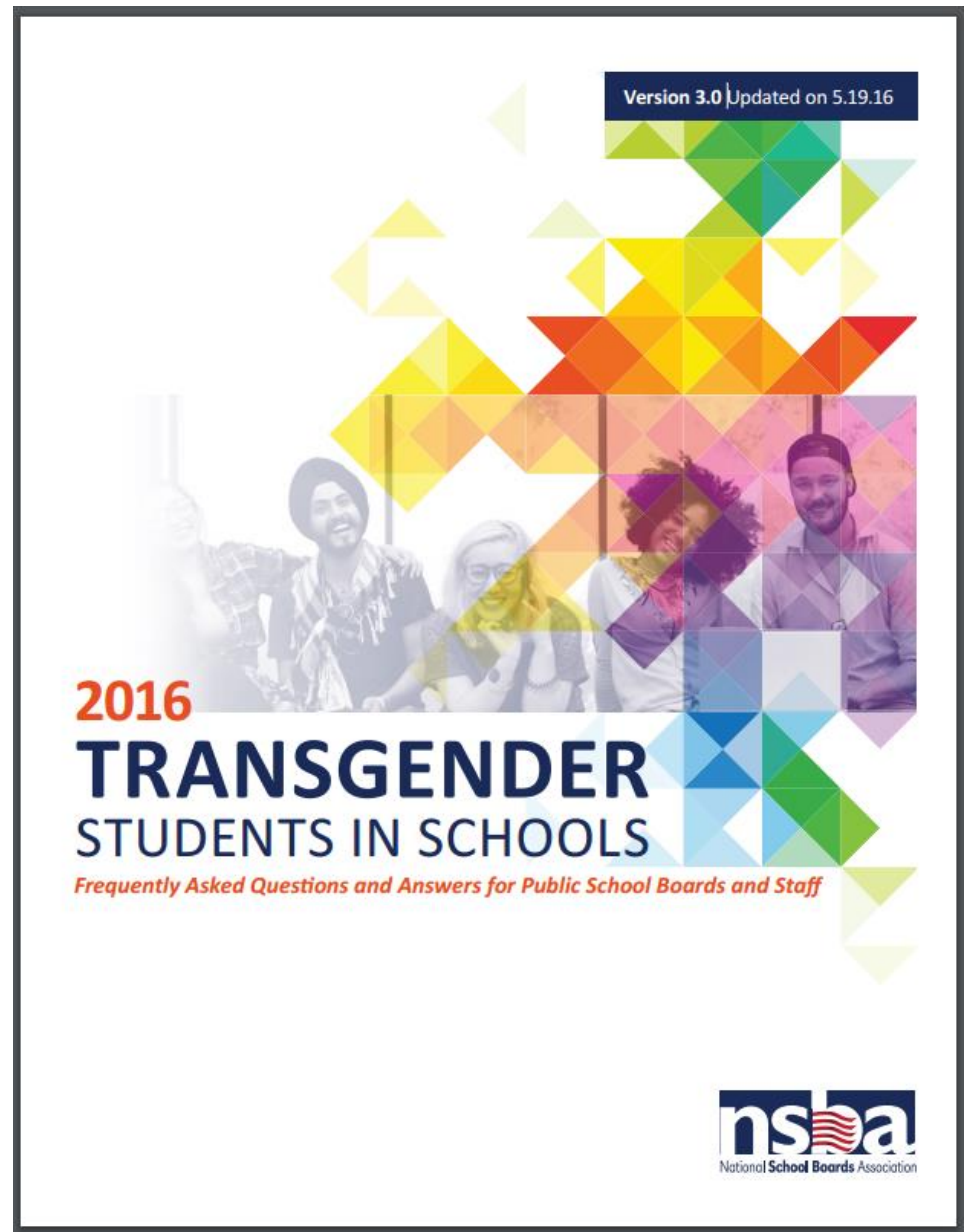
- Federal law does not require staff training, but it's a best practice.
 - Heighten awareness of challenges and policy
- Complying with the school administration's directive or policy likely will not interfere with an employee's personally held beliefs.
- While SCOTUS has recognized a 1st Amendment Free Exercise exemption to a government mandate contrary to a sincerely held religious belief, it also has accorded employers significant control over employee speech that constitutes part of official job duties.

Resources

- NSBA Statement on OCR/DOJ guidance:
<https://www.nsba.org/newsroom/press-releases/nsba-statement-regarding-guidance-departments-justice-and-education>
- U.S. ED OCR LGBT guidance page (letters and Resolution Agreements):
<http://www2.ed.gov/about/offices/list/ocr/lgbt.html>
- U.S. ED OCR April 2014 guidance on sexual violence
<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

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Q&A

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