

**CONNECTICUT STATE BOARD OF EDUCATION
Hartford**

TO: State Board of Education

FROM: Dr. Dianna R. Wentzell, Commissioner of Education

DATE: June 14, 2017

SUBJECT: Guidance on Civil Rights Protections and Supports for Transgender Students

Executive Summary

Pursuant to the Governor's Executive Order No. 56, the Connecticut State Department of Education (CSDE) is pleased to present the Connecticut State Board of Education with CSDE's *Guidance on Civil Rights Protections and Supports for Transgender Students* for discussion at the Board's June 14, 2017, meeting. The guidance discusses the fundamental requirement of non-discriminatory treatment of transgender persons under federal and state law and shows how this principle applies in various situations that affect the rights and wellbeing of transgender students on a daily basis. These include how a student should be addressed or referred to at school; issues concerning the name and pronoun used to describe the student in the student's educational records; and ensuring equal access to school facilities, such as restrooms and locker rooms.

In 2016, the U.S. Departments of Justice and Education issued a guidance on the rights of transgender students; states and school districts across the country relied on this federal guidance until February 2017, when it was rescinded by the Trump Administration. In response, Governor Malloy and Commissioner Wentzell jointly issued a memorandum to Superintendents reaffirming the State of Connecticut's unwavering commitment to provide every student in Connecticut with access to a high quality education in a safe, supportive, inclusive and welcoming environment. The Governor also issued Executive Order No. 56, directing the CSDE, with input from the Connecticut Commission on Human Rights and Opportunities (CHRO), to develop and present to the State Board guidance for Connecticut school districts on the rights of gender minority students.

CSDE's guidance, which was developed with input from CHRO, meets a critical need for clarity on the legal obligations of Connecticut school districts for ensuring equal treatment of transgender students. CSDE plans to issue the guidance to school districts later this month after completing a Frequently Asked Questions document that will serve as a plain language resource to accompany the main guidance document.

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Guidance on Civil Rights Protections and Supports for Transgender Students

Connecticut State Department of Education

June 2017

Introduction

On February 23, 2017, Governor Dannel P. Malloy and Commissioner Dianna R. Wentzell jointly issued a memorandum to Connecticut Superintendents of Schools reaffirming the State of Connecticut’s unwavering commitment to provide every student in Connecticut with access to a high quality education in a safe, supportive, inclusive and welcoming environment. On the same day, the Governor issued Executive Order No. 56, directing the Connecticut State Department of Education (“CSDE”), in consultation with the Connecticut Commission on Human Rights and Opportunities (“CHRO”), to develop guidance for Connecticut school districts on the rights, responsibilities and best educational practices for gender minority students. This guidance document is designed to assist schools and districts in implementing civil rights protections for transgender students under state and federal laws. To ensure consistent execution of these protections and meet the needs of transgender students, Connecticut schools and school districts should include professional development education regarding gender minority students in their professional development programming.

As a state with a long history of inclusive policies, Connecticut was one of the first states to recognize and affirm nondiscrimination protections based on gender identity and expression in our laws. In 2011, the Connecticut General Assembly passed a comprehensive transgender rights bill specifically prohibiting discrimination based on gender identity and expression in education, employment, public accommodation, housing, and granting credit. Public Act 11-55 codified protections for gender minority citizens previously recognized as early as 2000 in a declaratory ruling by the CHRO. In the educational context, Section 10-15c of the Connecticut General Statutes (“C.G.S.”) protects the fundamental rights of gender minority students and ensures that such students have equal access to educational programming and activities, free of discrimination. This statute reflects the state’s strong commitment to ensuring that all students feel valued, visible, protected, and empowered to pursue their education in a safe and inclusive learning environment.

The U.S. Department of Education and U.S. Department of Justice recently rescinded nationwide guidance on protecting the civil rights of transgender youth, but this action does not impact Connecticut laws and regulations and does not change Title IX or other federal anti-discrimination statutes. With or without the federal guidance, transgender students are protected under Title IX as well as state law. In rescinding the federal guidance, the administration specifically acknowledged that states have the authority and obligation to protect students from discrimination. Our statutes make clear that no person shall be subject to discrimination because of an individual’s gender identity or expression.

Under both state and federal laws, schools must treat transgender students according to their gender identity and expression, including when accessing restroom and locker room facilities. This guidance document is intended to provide information and guiding examples to assist school districts in meeting this obligation.¹ Districts should continue to consult updated

¹ This guidance document incorporates and draws information and best practice direction from the “Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws,” issued by the Connecticut Safe School Coalition in 2012 after Public Act 11-55 was enacted. This guidance also reflects federal court and agency decisions as well as interpretive information. Access to the Connecticut Safe Schools Coalition

statutes and seek legal advice from their attorneys for specific issues, factual scenarios and questions.

The Big Picture: Equal Treatment for Transgender Students

Under state law, public schools must provide students with an equal opportunity to participate in school activities, programs, and courses of study without discrimination on account of gender identity or expression (as well as the other enumerated protected categories under C.G.S. §§ 10-15c and 46a-58). As a condition of receiving federal funds, Title IX similarly prohibits schools from treating students differently in educational programming or activities on the basis of sex. It is well-settled law that Title IX's protections based on sex include a student's gender identity or expression. Under C.G.S. § 46a-58, it is a discriminatory practice for anyone to deprive another person of any rights, privileges, or immunities secured or protected by Connecticut or federal laws or constitutions based on gender identity or expression.

A school's obligation to provide gender minority students with equal access to educational programs and activities applies irrespective of concerns or objections raised by other students, parents, staff, or community members. As recently as 2015, the federal Equal Employment Opportunities Commission ("EEOC") held that a desire to accommodate others' discomfort is not a permissible basis for failing to accommodate an individual's gender identity or expression or for implementing policies that discriminate against individuals on such bases.²

Nondiscriminatory Environment

Connecticut schools have a legal obligation to provide an equal educational opportunity for all students, including gender minority students. As such, schools must create a safe school environment and treat students consistent with their gender identity or expression. Failure to treat students consistent with their gender identity or expression creates a discriminatory environment in violation of state and/or federal laws. Students/parents may file discrimination complaints with state/federal courts and/or the CHRO or the Office of Civil Rights ("OCR") of the United States Department of Education for alleged violations of antidiscrimination statutes, including claims of harassment and hostile environment.

Guidelines can be found at

http://www.ctschoollaw.com/files/2017/02/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf.

² *Lusardi v. McHugh*, EEOC Appeal No. 0120133395 (April 1, 2015); (intentionally referring to a transgender person by incorrect gender pronouns and prohibiting her from using the restroom consistent with their gender identity violates Title VII; discomfort of other employees is not a basis for failing to accommodate transgender employee). For additional examples, see *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman "merely [to be] present in the women's faculty restroom" created a hostile environment); *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (defendant's justification that "other women might object to [the plaintiff]'s restroom use" did not mitigate discrimination).

Gender Identity and Expression Terminology

Gender identity or expression – Gender identity or expression refers to an individual’s internal sense of gender. A person’s gender may be different from or the same as the person’s sex assigned at birth. C.G.S. § 1-1n and § 46a-51 defines “gender identity or expression” as a person's gender-related identity, appearance, or behavior, whether or not that identity, appearance, or behavior differs from that traditionally associated with the person's physiology or sex assigned at birth.

Sex Assigned at birth – Sex assigned at birth refers to the sex designation recorded on an individual’s birth certificate at birth based on biological characteristics.

Cisgender – Cisgender refers to individuals whose gender identity, expression, or behavior conforms with those typically associated with their sex assigned at birth.

Transgender – Transgender is a broad term to describe people whose gender identity, expression or behavior is different from those typically associated with their sex assigned at birth.

Gender Fluid – Gender fluid may be a form of both gender identity and gender expression. It generally describes individuals who may not identify as the same gender all the time, and whose gender expression may change accordingly.

Gender Minority – An umbrella term referring to individuals not identifying as cisgender.

Gender Transition – Gender transition refers to the process in which transgender individuals begin asserting the gender that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transitioning may or may not also include medical and legal aspects, including taking hormones, having surgery, or changing identity documents (e.g. driver’s license, Social Security record) to reflect one’s gender identity.

Schools’ Obligations under State and Federal Laws

Establishing Gender Identity

Gender-related identity can be shown by providing evidence in various ways, including, but not limited to: (1) medical history, (2) care or treatment of the gender-related identity, (3) consistent and uniform assertion of such an identity, or (4) any other evidence that the identity is sincerely held, part of a person's core identity, or that the person is not asserting such an identity for an improper purpose. However, this list is not exhaustive and does not describe all the ways in which gender-identity may be established.

- Consistency of Expression Not Required: While consistency and uniform assertion may be a way for an individual to indicate their gender identity, this is not a requirement that

an individual consistently and uniformly assert or express themselves as “male” or “female.” A student who consistently asserts their identity as gender fluid may express that gender in ways which conform with more than one gender, even from one day to the next.

- **Documentation Not Required:** Students are not required to produce identification documents that reflect their gender identity in order for the school to treat such students consistent with their gender identity. Requiring such identification – which students are often unable to obtain – has the practical effect of limiting or denying students equal access to educational programming and activities. In general, schools must treat students consistent with the student’s stated gender identity even if their education records or identification documents indicate a different sex. The school’s obligation to treat a student consistent with the student’s gender identity or expression does not require notice from the parent or guardian.

Names, Pronouns and Gender Marker

Schools must use names and pronouns consistent with a student’s stated gender identity even if education records or identification documents indicate a different sex. If requested by a student or parent/guardian, the name and/or gender marker (designation of student’s gender on educational records) on the student’s educational records should be changed to ensure that school records accurately reflect the student’s chosen name and gender identity. Please refer to the section below regarding changes to student records.

As noted in the Guidelines by the Connecticut Safe School Coalition (“CSSC Guidelines”), it is important for schools and school districts to promptly train all teachers, staff and school administrators to use a student’s chosen name and correct pronouns regardless of the student’s sex assigned at birth. If school personnel are uncertain about what name and pronouns to use when addressing or referring to a student, trained staff should privately raise the subject with the student in an age-appropriate manner. Schools and districts should become familiar with best practices concerning effective and appropriate communication with elementary and secondary students regarding these issues. Various resources are available for guidance, including the CSSC Guidelines (see footnote 1 at pp. 1-2, above) and Examples of Policies and Emerging Practices for Supporting Transgender Students, U.S. Department of Education, May 2016, available at <https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>.

Respect for student preferences is important for the student’s well-being and the school’s legal obligations. Continued misuse of the student’s former name and pronouns, and reference to the student’s former gender by school personnel or peers, is contrary to the goal of treating all students with dignity and respect and may constitute a violation of state and federal antidiscrimination laws. Such misuse may also breach the student’s privacy, and may cause emotional harm to the student.

Issues Concerning Student Records

A student and/or parent/guardian may request that the school correct a student's education records to make them consistent with the student's chosen name and gender identity. Schools should establish a process for requesting such changes for gender minority students but that process should not require unique hurdles for gender minority students and their families.³ In general, a school should treat requests to change student records based on transgender status no differently than it would treat any other request for a change to student records. Updating a transgender student's education records to reflect the student's gender identity and chosen name protects the student's privacy and ensures that school staff consistently use appropriate names and pronouns. Upon such a request, schools should correct student education records to accurately reflect the student's chosen name and gender identity, regardless of whether the student has completed a legal name change. As noted in the previous section, students are not required to submit any particular kind of documentation to change student records relative to gender-identity.⁴

In instances where a student is using a chosen name, the student's birth name and gender information is considered private information and may not be disclosed except as permitted by the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g ("FERPA"). The student's sex assigned at birth is considered private medical information. Records with the student's sex assigned at birth or birth name (e.g., birth certificate, medical records) should be kept in a separate file from the student's cumulative record to ensure privacy. Inappropriately disclosing personally identifiable information from education records to the school community may violate FERPA and interfere with gender minority students' rights under Title IX to be treated consistent with their gender identity. In the event that the student has not completed a legal name change but the educational record is amended, districts should note the existence of potential impacts of inconsistent records on college materials, driver's licenses and other future documents and advise the family to consider legal counsel regarding such matters.

School districts regularly receive requests from parents/guardians or students themselves to change student educational records in a variety of contexts. Under FERPA, school districts are free to (and commonly do) change educational records based on a minor student's request. When it comes to who has the legal right under FERPA to demand a change to student educational records, FERPA provides that students who are 18 or older and parents/guardians of students under 18 have a right to request an amendment to a student's education records to correct inaccurate or misleading information. Inconsistent name and gender identity information may be considered "inaccurate or misleading information." This, however, is simply a provision to ensure accuracy of student educational records – it is different from, and should not be understood to limit, the student's right under antidiscrimination laws to be treated consistent with

³ At a minimum, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 ("Title IX"), and its implementing regulations, require schools to respond to requests to amend information related to a student's transgender status in a manner consistent with their general practices for amending other students' records. 34 C.F.R. § 106.31(b)(4).

⁴ The CSSC Guidelines correctly note that schools do not need to retain documentation regarding a student's gender or submit the same to the Department of Education. The school need only indicate "correction of existing record," or "medical documentation," for example, as the reason for the change of gender marker.

the student's gender identity. Thus, as discussed below, there may be situations in which civil rights laws require changing a minor student's records regardless of whether a parent/guardian consents or whether the FERPA right to demand a change to records even applies.

There may be instances where a parent/guardian of a student who is under 18 disagrees with the student regarding the name, gender marker and pronoun to be used at school and in the student's education records. For example, the parent/guardian may object to a minor student's request for a change to education records or to a change already made at the student's request. Current law does not provide a clear rule for school districts to follow in these situations. However, declining to use a transgender student's chosen name, gender marker and pronoun at school or in the student's records (or otherwise failing to treat the student consistent with the student's gender identity) because a parent/guardian objects would raise serious civil rights concerns under existing law and could cause severe psychological/emotional harm to the student.

At the same time, the fact that there is a dispute between a minor student and parent/guardian concerning the student's gender identity indicates a need for counseling or other supports to assist the family and ensure the well-being of the student. In these situations, the school should consult with legal counsel and relevant counseling staff to reach an appropriate outcome. Pending resolution of the issue, staff should informally refer to the student in accordance with the student's preference at school and refer the family to appropriate counseling/support services.

Restrooms, Locker Rooms and Physical Education

In general, schools may not segregate or otherwise distinguish students on the basis of their sex, including gender identity or expression, in any school activities or the application of any school rule. Notwithstanding that general principle, state and federal laws do permit school districts to provide single-sex restrooms, locker rooms, shower facilities, and athletic teams. Transgender students must be allowed to participate in such activities, including physical education-related activities, and access such facilities consistent with their gender identity. Failure to provide such access or requiring gender minority students to use separate, non-integrated facilities constitutes a violation of state and federal antidiscrimination laws.

Most schools segregate restrooms and locker rooms by sex. While a school may provide single-sex restroom and locker facilities, transgender students must be allowed to access those facilities consistent with their gender identity. Under no circumstances should a school require transgender students to use facilities inconsistent with their gender identity or use individual-user facilities when other students are not required to do so even if students, parents, staff or other community members raise objections.

- **Ensuring Privacy for All Students:** A private option should be made available to any student interested in additional privacy. If a student and school administration believe that there is a reason for increased privacy or safety, the school should provide any student interested in the option access to a reasonable alternative restroom, such as a single stall "unisex" restroom or the health office restroom. In locker rooms, additional privacy may be accomplished through private changing areas, such as a curtained changing room or bathroom stall with a door; a private changing area within the

public area of the locker room; a separate changing schedule; or use of a nearby private area. If a privacy/unisex option is utilized, said facility should be as close as possible to the facilities the other students are using, and should not be located in another building or on a different floor.

Dress Code

Schools must permit gender minority students to dress in accordance with their gender identity and wear clothing that is appropriate for students with the same gender identity. If a school maintains a particular dress code or uniform policy, the school must allow gender minority students to dress in accordance with the code or policy consistent with their gender identity or expression. This requirement applies to graduation attire and requires schools to allow gender minority students to wear the graduation attire consistent with their gender identity or expression.

Resources

Schools and school districts are encouraged to train teachers, staff and administrators on the protections afforded gender minority students as part of their professional development programming. Districts should consult updated statutes and seek legal advice from their attorneys regarding specific issues, factual scenarios and questions to ensure compliance with schools' legal obligations and students' access to a safe, respectful and inclusive educational environment. This guidance document incorporates and draws information and best practice direction from the CSSC Guidelines, the U.S. Department of Education's Examples of Policies and Emerging Practices for Supporting Transgender Students, federal court and agency decisions, and federal interpretive information.

Districts should refer to the CSSC Guidelines for a comprehensive list of agency and support organizations for transgender students.

Appendix: Relevant Statutory Language Protecting Transgender Students

The following statutory provisions from the Connecticut General Statutes ("C.G.S.") provide civil rights protections to Connecticut students based on gender identity and expression. While this list includes the primary statutory protections under Connecticut law and Title IX, it is not exhaustive and does not cover additional protections in other areas, such as employment.

C.G.S. §10-15c(a)

The public schools shall be open to all children five years of age and over who reach age five on or before the first day of January of any school year, and each such child shall have, and shall be so advised by the appropriate school authorities, an equal opportunity to participate in the activities, programs and courses of study offered in such public schools, at such time as the child becomes

*eligible to participate in such activities, programs and courses of study, without discrimination on account of race, color, sex, **gender identity or expression**, religion, national origin or sexual orientation; provided boards of education may, by vote at a meeting duly called, admit to any school children under five years of age.*

C.G.S. §46a-58(a)

*It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, **gender identity or expression**, sexual orientation, blindness, mental disability or physical disability.*

C.G.S. §46a-64(a)(1), (2)

*It shall be a discriminatory practice in violation of this section: (1) To deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability or physical disability, including, but not limited to, blindness or deafness of the applicant, subject only to the conditions and limitations established by law and applicable alike to all persons; (2) to discriminate, segregate or separate on account of race, creed, color, national origin, ancestry, sex, **gender identity or expression**, marital status, age, lawful source of income, intellectual disability, mental disability, learning disability or physical disability, including, but not limited to, blindness or deafness. . . .*

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §1681(a)

*No person in the United States 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 . . .*

*Under Title IX and other federal anti-discrimination laws, the prohibition against sex discrimination covers discrimination on the basis of gender identity or expression.