



# Federal Government Guidance On Transgender Students Breaks Barriers

Insights

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On May 13, 2016, the U.S. Department of Education and U.S. Department of Justice published a guidance document for elementary and secondary schools that summarizes emerging practices for supporting transgender students. While intended for K-12 schools, the document provides excellent insight for every employer confronting the transgender issue.

## **Transgender Students (And Employees) Should Be Supported**

In the school context, it is no secret that compliance with Title IX of the Education Amendments of 1972 is required for schools to receive federal financial assistance. For schools that rely upon this federal funding to exist and operate, transgender students must not be excluded, separated, denied benefits, or otherwise treated differently on the basis of sex.

This means that a transgender student must be treated the same way as other students of the same gender identity. “Gender identity” is defined as “an individual’s internal sense of gender” which may be different or the same as that person’s sex at birth.

While federal funding may not be at stake for private or public employers, various federal and state antidiscrimination, harassment, and confidentiality laws come into play. All of these laws must be examined and reviewed regularly because the legal obligations are often murky or conflicting. Failure to comply with any applicable legal requirements can create legal exposure and related expense.

## **Takeaways From The Transgender Guidance**

Therefore, every school and every employer should take heed of this guidance in order to better ensure compliance with various legal obligations. The takeaways that can be gleaned from this groundbreaking guidance document include the following lessons.

### ***How to determine a person’s gender identity***

Confirming a person’s gender identity does not require medical or mental health diagnosis or treatment. Rather, you should look at two things – what a person says and what a person does. Each person knows his or her gender identity because it is only that person’s internal sense of gender that counts. You should take each person at his or her word regarding gender identity and then see whether the person acts in a manner that confirms the asserted gender identity.

### ***Privacy is required***

Various federal and state privacy laws require a student's transgender status to remain confidential. Navigating privacy and confidentiality for a transgender student becomes more challenging when the child is not open about his or her transgender status in all circles of life. Within the school, the transgender status is on a need-to-know basis where there is a legitimate educational or safety interest. This need-to-know approach is appropriate for employers as well.

### ***Access to restrooms and locker rooms***

Schools must allow every student to use the restroom and locker room that is consistent with the individual's gender identity. Transgender students cannot be forced to use alternative facilities. Easier said than done, right?

The guidance explains that the privacy rights of all students in restrooms and locker rooms must be protected. Therefore, any student who wants increased privacy may request it. If there is an alternative facility (such as a unisex bathroom or separate changing area), then the student who requests the increased privacy may use it.

The key is for the students who are uncomfortable with the integrated space to request to remove themselves. If alternative facilities do not exist, then the school should review how to modify the area to provide the required privacy needed to make the uncomfortable student comfortable (for example, in a locker room, creating changing schedules, etc.).

It should be noted that OSHA Sanitation Standard 1910.141 requires employers to provide their employees with restrooms that are sanitary and accessible in prompt fashion. An OSHA guidance issued in 2015 states that "all employees, including transgender employees, should have access to restrooms that correspond to their gender identity." The approach suggested in the May 13, 2016 guidance to K-12 schools on the bathroom issue is also appropriate for employers to consider in determining how to comply with the 2015 OSHA guidance on worker restroom access.

### ***Athletics***

Transgender students should be allowed to participate in athletics consistent with their gender identity. In most states, athletic leagues or associations are charged with implementing these eligibility determinations. The guidance addresses overnight accommodations for athletic trips (and field trips) and confirms the student's gender identity should be used in making assignments, with consideration given to the student's safety.

### **Action Steps For Summer 2016**

Given the school year is nearly over for most, use this summer to implement these action steps:

First, schools, colleges, and universities should revise their Title IX policies to squarely address the transgender guidance and implement practical training for school administrators. This training should equip them with practical lessons on how to support a transgender student and what protocols should be followed

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Second, academic institutions should evaluate all gender-based policies, rules, and practices and maintain only those that have clear and sound pedagogical purpose. Identify, by building, all gender-based policies, rules, and practices to identify whether any should remain and have them reviewed to ensure compliance with Title IX requirements.

By fully complying with Title IX as it concerns transgender students, schools in our country will inevitably eliminate any remaining gender barriers in education. Examining all gender-based vestiges and only allowing those with legitimate pedagogical purpose to remain will accomplish this goal and serve to avoid legal entanglements.

If you have any questions about this guidance or how it may affect your business or institution, please contact your Fisher Phillips attorney.

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*This Legal Alert provides an overview of a specific new federal guidance document. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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