

Protecting LGBT Students: Rights and Limitations



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Gay and Transgender Students



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Idaho Legal Protections

Idaho does not have state-wide legal protections for LGBT students

Eleven cities in Idaho have adopted protections in the areas of employment, housing and public accommodation.

Sandpoint	Boise	Ketchum
Moscow	Coeur d'Alene	Pocatello
Victor	Driggs	Hailey
Bellevue	Idaho Falls	

The Idaho School Boards Association has drafted model LGBT school policies, which have been adopted by some school districts.



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Idaho

According to the ACLU of Idaho, LGBT students have the right to:

- Attend school, free of harassment due to their sexual orientation and/or gender identity
- Not be “outed” at school or to their parents or family
- Organize Gay-Straight Alliances and other clubs
- The same 1st Amendment rights to freedom of speech as other students
- Wear the gendered type of clothes that they feel comfortable in at prom or other dances
- Take a same sex date to prom or other dances

Source: <https://www.acluidaho.org/en/know-your-rights/lgbtq-rights>

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Idaho – 2017 GLSEN Report Findings

In its 2017 National School Climate Survey, GLSEN announced the following findings from its report:

- The vast majority of LGBTQ students in Idaho regularly (sometimes, often or frequently) heard anti-LGBTQ comments. Many also heard staff make homophobic (24%) or negative (44%) remarks.
- Most LGBTQ students reported experiencing victimization at schools.
 - Verbal harassment (60-71%)
 - Physical harassment (32-38%)
 - Physical assault (11-19%)
- Nearly 3 in 4 students experiences at least one form of anti-LGBTQ discrimination at school during the past year.
- Many LGBTQ students reported not having access to in-school resources and support

Source: https://www.glsen.org/sites/default/files/Idaho%20State%20Snapshot%20-%202017%20NSCS_0.pdf

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Idaho – 2018 Idaho School Health Profiles

Every two years, the Idaho State Department of Education conducts the Profiles, typically during the Spring semester. According to the most recent Profiles:

- 72% of schools identify “safe spaces” where LGBT youth can receive support from administrators, teachers or other schools staff.
- 96.3% of schools prohibit harassment based on a student’s perceived or actual sexual orientation or gender identity.
- 74% of schools encourage staff to attend professional development on safe and supportive school environments for all students, regardless of sexual orientation or gender identity.
- 53.3% of schools facilitate access to providers not on school property who have experience in providing health services, including HIV/STD testing and counseling, to LGBTQ youth.
- 52.8% of schools facilitate access to providers not on school property who have experience in providing social and psychological services to LGBTQ youth.
- 30.8% of schools provide curricula or supplementary materials that include HIV/STD or pregnancy prevention information that is relevant to LGBTQ youth.

Source: <http://www.sde.idaho.gov/student-engagement/school-health/files/profiles/2018-Idaho-School-Health-Profiles.pdf>

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Discriminatory Harassment & Bullying of Gay and Transgender Students

“. . . [M]ale-on-male sexual harassment . . . was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils Title VII prohibits ‘discrimination . . . because of . . . sex’ in the ‘terms’ or ‘conditions’ of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.” *Oncalev. Sundowner Offshore Servs*, 523 U.S. 75, 79-80 (1998) (opinion of the Court by Scalia, J.)(emphasis added).

Legal protection for gay and transgender students is least controversial when issues of bullying, harassment and violence are implicated. This is also the area in which definition of “transgender” is likely to be at its broadest (e.g., including gender non-conforming individuals).

There is broad recognition that discriminatory harassment or bullying, while problematic for many students, is pervasive with gay, lesbian and transgender students.

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Outing & Coming Out: Gay and Transgender Students

“Outing” a gay or transgender student or employee may violate constitutional rights to informational privacy. See *Sterling v. Borough of Minersville*, 232 F.3d 190 (3rd Cir. 2000) (police threat to reveal homosexuality to grandparent results in suicide; denial of qualified immunity in suit against police upheld).

- But see *Nguon v. Wolf*, 517 F.Supp.2d 1177 (C.D.Cal. 2007) (no violation where student had made her sexual orientation public and further disclosure was relevant to administrative duties).
- The constitutional underpinnings of *Sterling* remain debatable. See, e.g., *NASA v. Nelson*, 562 U.S. ____ (2011) (right to informational privacy “assumed” for purposes of analysis).
- Express transgender protection will often provide an independent prohibition.

Employees or students choosing to “come out” may be protected first amendment expressive activity. See *Weaver v. Nebo Sch. Dist.*, 29 F.Supp.2d 1279 (D.Utah1998).

- Note that the context and form of “coming out” speech or expression may impact analysis of whether it is protected under existing first amendment precedents on public employee and student expression.

KEEP IN MIND: The first line of the Supreme Court marriage-equality case states: “The Constitution promises liberty to all . . . to define and express their identity.”

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Transgender Students



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The Problem

A rigorous (but not random) survey of 6,436 transgender adults published in 2011 found extensive evidence of pervasive invidious treatment with severe negative outcomes. As relevant to schools (and among many other findings):

- 78% reported harassment in school (31% reported harassment by staff)
- 35% reported physical assault (5% by staff)
- 12% reported sexual violence (3% by staff)
- Those assaulted in school were 50% more likely to be incarcerated as adults than other survey respondents
- Enhanced rates of homelessness, drug use, and sex work all correlated (often dramatically) to harassment, assault or sexual violence experienced in school.
- 51% of those harassed, assaulted or victimized by sexual violence in school reported suicide attempts (the background rate in the population is 1.6%).

Source: Grant, Mottet & Tanis (with Harrison, Herman and Keisling), *Injustice at Every Turn: A Report of the National Transgender Survey* (National Center for Transgender Equality & National Gay & Lesbian Task Force: 2011)

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Possible Sources of Protection

Different laws may protect some or all transgender persons from some or all forms of discrimination.

The obvious sources of possible protection are laws against discrimination based on:

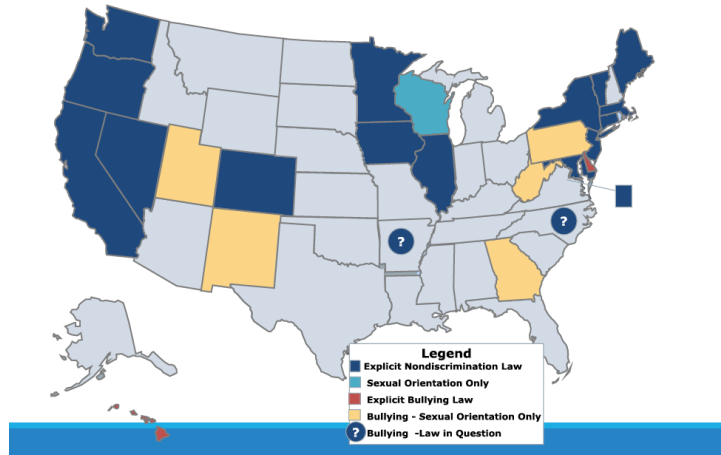
- Transgender status (state and local only)
- Sexual orientation (state and local only)
- Disability (federal*, state and local)
- Sex or gender (federal, state and local)

In addition, the same issues may be covered in charter authorizer policies, charter school policies or laws on more specific issues (e.g., bullying, student discipline)

NOTE: The upcoming maps draw on secondary sources, which are not consistent on this subject ---and may not be in all cases up to date.

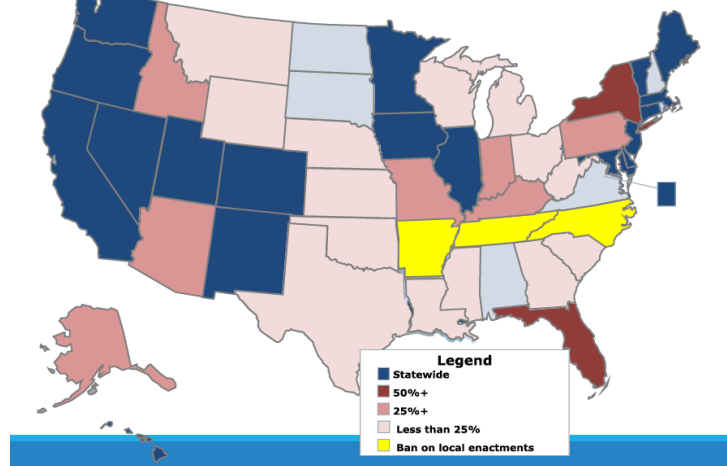
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Transgender Student Nondiscrimination Laws



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Local Transgender Nondiscrimination Ordinances



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Learning New Terminology

Note that what counts as “discrimination” may be affected by the scope of the definition. A court or agency may be more likely to *both* consider hostile environment harassment as discriminatory and to give “transgendered” a broad scope, while a similar court or agency may approach access to certain gender-identified activities narrowly (focused, for example, on individuals with a stable, well-defined change in their gender identity).

- **“Inter-sexual”** refers to individuals born with recognized biological features of both sexes. Inter-sexual persons can be persons with disabilities within the meaning of Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act. In the past, aggressive medical intervention after birth was common with inter-sexual individuals. That is by no means universal today. “Inter-sexual” individuals often identify as a member of a conventional gender, though some regard themselves as transgender.

- **“Gender nonconforming” or “GNC”** persons are those whose gender expression does not match the common expectations of others for the student’s gender. This may include “feminine boys,” “tomboys,” “androgynous” individuals, etc. But it also includes individuals who no longer identify even minimally with conventional gender definitions. *Price Waterhouse* should reach GNC persons, as they do not conform to gender stereotypes.

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Learning New Terminology

“Transgender” is classically those individuals who do not have currently recognized ambiguous biological characteristics, but who profoundly identify as not belonging to the gender of their birth. Most of these individuals are MTF (male-to-female) or FTM (female-to-male). However, it is common for “transgender” to be used to refer to “inter-sexual” individuals; those whose identity is fluid or uncertain; and those who no longer identify simply with either conventional gender. Most broadly it may also reach GNC individuals.

Definitional scope may be affected if statutory terms like **“gender expression”** (more likely to reach GNC individuals) are or are not used.

Colorado’s statute provides an example of open or undefined use of the term: “Sexual orientation” means an individual’s orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual’s perception thereof.” C.R.S. §24-34-301(7). NOTE: in Colorado the general reference is refined in regulation as follows: Transgender “means having a gender identity or gender expression that differs from societal expectations based on gender assigned at birth.” 3 CCR 708-1, Rule 10.02 (GG)

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The Drama with Federal Guidance on Title IX Protection



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May 13, 2016 -Federal Guidance Issued

- Title IX Guidance issued by the Obama Administration's **U.S. Department of Education's Office for Civil Rights and the Department of Justice's Civil Rights Division** regarding the use of restroom facilities by transgender students.
- **Title IX of the Education Amendments of 1972** –“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.”
- **Schools must have policies to prevent sex discrimination.** Failure to follow Title IX can result in the loss of federal funding.

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May 13, 2016 –Federal Guidance Issued

“Transgender” = individuals whose gender identity is different from the sex they were assigned at birth.

“Sex” = physical status

“Gender identity” = personal sense

“Significance Guidance” = “guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations.”

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May 13, 2016 -Specific Guidance on Accommodations

1. Schools should investigate transgender discrimination and take effective steps to stop it.
2. Schools should use pronouns and student names consistent with the student’s gender identity.
3. Allow transgender students to use restrooms and locker rooms that coincide with their gender identity.
 - Review participation on sports team
 - Accommodate housing and overnight lodging; private rooms are not permissible if other students are sharing rooms
4. Accommodations should be made on case-by-case basis based on the student’s age, status in gender transition, and parent input.
5. Privacy and safety concerns of non-transgender students are not sufficient to isolate transgender students in unisex restrooms or locker rooms.
6. Schools may offer unisex restrooms to students with privacy concerns.

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May 25, 2016 -States File Lawsuit

- State of Texas
- Harrold ISD (TX)
- State of Alabama
- State of Wisconsin
- State of West Virginia
- State of Tennessee
- Arizona Department of Education
- State of Mississippi, by and through Governor
- Heber-Overgaard Unified School District (AZ)
- Governor, State of Maine
- State of Oklahoma
- State of Louisiana
- State of Utah
- State of Georgia
- State of Kentucky, by and through Governor

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August 21, 2016 –States Prevail, Order by U. S. District Judge Reed O’Connor

1. Granted nationwide temporary injunction preventing the federal guidance from going into effect.
2. Said this case presents “the difficult issue of balancing.”
3. Concluded that the Department of Education failed to comply with the Administrative Procedures Act.
4. The injunction remains intact; it has not been overturned

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February 22, 2017: Guidance Withdrawal by the Trump Administration

1. The U.S. Department of Justice (Civil Rights Division) and the U.S. Department of Education (Office for Civil Rights) withdrew the Letter to Emily Prince from James A. Ferg-Cadima (Jan 7, 2015) and the Dear Colleague Letter (May 13, 2016)
2. Rationale: The former guidance documents did not “contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.”
3. The interpretation has given rise to significant litigation regarding school restrooms and locker rooms (i.e., the 4thCircuit appeal and the Texas litigation).
4. **The “withdrawal of these guidance documents does not leave student without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment.**

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Private Federal Title IX Enforcement: *GG ex rel Grimm v. Gloucester Cnty. Sch. Bd*

- G.G., a transgender boy, sought to use the boys' restrooms at his high school. After G.G. began to use the boys' restrooms with the approval of the school administration, the local school board passed a policy banning G.G. from the boys' restroom.
- G.G. sued. The district court dismissed G.G.'s claims.
- On appeal to the Fourth Circuit, the court ruled in G.G.'s favor. It concluded that the district court did not accord appropriate deference to the relevant Department of Education regulations.
- On March 6, 2017, at the U.S. Supreme Court, the Fourth Circuit judgment was vacated, and the case remanded for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017. (May 6, 2017)
- It is now likely various federal courts will issue rulings in private cases stating that transgender students do or do not have “sex discrimination” protection. The *federal* initiative has moved from the administration to the judiciary.

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What's the Federal Bottom Line?

Handle transgender student issues with great care, ensuring the proper application and balance of :

- The Title IX restrictions on sex discrimination
- Applicable state, local, and authorizer standards
- The safety/modesty and privacy interests of non-transgender students
- Applicable association rules governing participation in athletics.

REMEMBER: The federal developments will continue to inform national debate and may filter into state law, BUT IDAHO DOES NOT HAVE EXPLICIT TRANSGENDER PROTECTION.



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And . . .

Significant protections may exist that are not keyed to anti-discrimination law, as such. Thus, transgender students may invoke:

- Laws providing protection against bullying, or
- Limitations on the power of the school to “expel” students,
- Laws prohibiting hate crimes, or
- General protections of the right to amend student records, or
- Laws requiring student confidentiality.



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But ...

As with any “new” category recognized for anti-discrimination protection, transgender status (and even gay and lesbian status) raises new and unexpected issues;

Especially: transgendered individuals often go through a process in which their identity is shifting or fluid—while discrimination law tends to assume reasonably stable categorization;

In some cases identity may remain fluid or may be characterized as a stable “third” gender; and

Again: markedly different legal scope may be appropriate to the term “transgendered” in different contexts.



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Beyond the Drama

Real Considerations in Public Schools



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Student Transition

Most frequently transgender issues will be brought to a school by parents and a student who have reached a family understanding on the student's status and situation, BUT —

With older students, in particular, a student may reveal their transgender status first to school officials and wish to keep it private from their parents;

- Student requests for privacy should be taken seriously. Revealing transgender status can endanger students. More below.
- State laws on counseling and mental health services may inform whether the student has a statutory right to privacy running against their parents. For example, Idaho Code §16-2428(1) prohibits a person in possession of confidential statements made by a child over the age of fourteen (14) years in the course of treatment to disclose such information to the child's parent or others without the written permission of the child, unless such disclosure is necessary to obtain insurance coverage, to carry out the treatment plan, or prevent harm to the child or others, or, unless authorized to disclose such information by order of a court.
- Best practice in most cases is to persuade the student to allow the school to reveal their transgender status in a way that assures safety and security for the student.
- Remember that FERPA may mean "school records" that reveal student identity can "out" the student to parents —there is no clear right, until age of majority, to bar parents from these records. Staff can keep "sole possession" records that gain some protection from disclosure.

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A Transgender Discrimination Tri-lemma: Identity, Accommodation & Privacy

Transgender status is often medicalized and carries with it protection for privacy directly or by analogy drawn from the privacy afforded medical information.

- Accommodation may be required for transgender students, yet may compromise privacy by directly or indirectly revealing transgender status.
- Transgender students often have a name on their birth certificate that is gender-identified and contrary to the name they use day-to-day. This also presents a risk of compromising privacy.
- In many cases, a student's transgender status will be known to persons not in the school's control despite any school efforts to assure informational privacy.

Ideally, privacy should be assured to the degree that follows and is consistent with parent and student requests (including those that necessarily compromise privacy). Where requests may compromise privacy, point this out and attempt to achieve common understanding on the balance to be struck.

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Of Proper Nouns & Pronouns: School Records & Interpersonal References

A child may be transgendered for school purposes before any state-law legal change of name.

- To not discriminate, school staff should abide by parent/child choice of name and use pronouns appropriate to the child's gender identity. AND:
- Be certain to maintain the confidentiality of records that may contain a legal name identified with the opposite sex.

FERPA allows a parent to "amend" school records that are "inaccurate, misleading, or in violation of the student's privacy rights." 34 CFR 99.20

If the school declines to amend school records, parents have a right of appeal. See 34 CFR 99.20 –99.22. Potential difficult situations include:

- Parental disagreement;
- Student requests not supported (but perhaps not decisively opposed) by parents —and possible discrepancies between formal records and day-to-day usage in the school; and
- For students going through transition without notice to parents, "school records," could inadvertently "out" the student to the parent.

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Conclusion

There will be continued attention to this issue in state and local legislatures and in federal courts.

In spite of the drama over the last couple years, we remain essentially where we were before the last election:

"Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning."

-Winston Churchill

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Questions? Please contact us.

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