

# Transgender Rights



Fact Sheet No. 16-13

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There has recently been a heated national debate over transgender rights in schools and public life. There is no doubt that transgender students and gender nonconforming students face difficulties and discrimination in New York Public schools. Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination on the basis of sex. There are federal civil rights statutes related to schools and harassment that outline a school's responsibility for addressing harassment incidents about which it knows or reasonably should have known. This Fact Sheet provides information on the latest guidance from the Obama administration on the rights of all students, including transgender students in public schools.

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## Background

In June 2015, the NYCLU released *Dignity For All? Discrimination Against Transgender and Gender Nonconforming Students in New York State*. The report identified issues of harassment and discrimination faced by transgender and gender nonconforming students throughout New York State since the passage of the Dignity Act. In response to this report, the State Education Department (SED) released [guidance](#) on transgender and gender nonconforming students.

Since 2010, the U.S Department of Education's Office for Civil Rights has issued over a dozen “Dear Colleague Letters” (DCLs) addressing “discriminatory conduct” in K-12 schools. These guidance documents have addressed issues such as retaliation, bullying/harassment, sexual violence, and inclusion of students with disabilities in athletics.

The Education Department's Office of Civil Rights previously released a 2010 "Dear Colleague" letter that addressed schools' obligations to protect transgender and gay students from bullying under Title IX (<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>). The 2010 Dear Colleague letter, clarifies the relationship between bullying and discriminatory harassment, and reminds schools that by limiting their responses to a specific application of an

anti-bullying or other disciplinary policy, they may fail to properly consider whether the student misconduct also results in discrimination in violation of students' federal civil rights. An updated question and answer guidance document was released in 2014 related to sexual assault and harassment (<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>). Many advocates felt these guidance documents did not go far enough to explicitly outline how schools must accommodate the gender identities of students.

## Dear Colleague Letter – May 13, 2016

The most recent DCL released jointly by the U.S. Department of Education's Office for Civil Rights (USDE OCR) and the Civil Rights Division of the U. S. Department of Justice (DOJ) on May 13, 2016, addresses how schools can ensure the civil rights of all students, including transgender students (<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>). The Education Department and the Department of Justice have determined this letter constitutes *significant guidance*. (Office of Management and Budget, final Bulletin for Agency Good guidance Practices, 72 Fed. Reg.3432. Jan. 25, 2007) Schools are required to comply with the DCLs' stipulations, along with state and federal regulations.

The Department's new guidance document was a result of an increasing number of questions from all education stakeholders about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) prohibits sex discrimination in schools receiving federal money. A school must not treat a transgender student differently from the way it treats other students of the same gender identity.

The guidance directs public schools to allow transgender students to use bathrooms, locker rooms and other sex-segregated facilities matching their gender identity. Staff should use the names and pronouns preferred by the students. Schools cannot require students to have a medical diagnosis, undergo any medical treatment, or produce a birth certificate before treating them consistent with their gender identity and students do not need parental approval to identify in school as they choose.

## NY State Requirements Related to the "Dear Colleague" Letter

### The Dignity for All Students Act (DASA)

No student shall be subjected to harassment or bullying by employees or students on school property or at a school function; nor shall any student be subjected to discrimination based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (including gender identity or expression), or sex by school employees or students on school property or at a school function.

### Dignity Act Regulations:

**Code of Conduct 100. 2(1):** Each school district code of conduct must include:

- Prohibition of discrimination, bullying, and harassment of students by students or staff and provisions for responding to acts of discrimination, bullying or harassment.

- Guidelines to ensure effective implementation of school policy on school conduct and discipline, which includes guidelines on promoting a safe and supportive student climate.
- A bill of rights and responsibilities of students which focuses on positive student behavior and a safe and supportive climate.

### **Instruction in Civility, Citizenship and Character Education 100.2(c)**

- Educators in grades K-12 are required to teach students civility and social skills to encourage a welcoming and positive school environment.
- Instruction is required to explicitly include bullying and cyberbullying, with an emphasis on discouraging acts of harassment, bullying and discrimination and included instruction in the safe, responsible use of the internet and electronic communication.

### **Training 100.2 (jj)**

School districts, BOCES and charter schools are required to:

- Implement an annual employee training program to promote a positive school environment;
- Provide employee training to raise awareness and understanding of the code of conduct, sensitivity to potential acts of discrimination and harassment, and to enable employees to prevent and to respond to acts of discrimination and harassment;
- Develop nondiscriminatory instructional and counseling methods; and
- Designate at least one Dignity Act coordinator per school.

**New York State Education Law §3201-a** prohibits discrimination based on sex with respect to admission into or inclusion in courses of instruction and athletic teams in public schools.

### **Recent Court Activity**

On August 21, 2016, the United States District Court, Northern District of Texas, issued a nationwide preliminary injunction, effectively blocking the U.S. Departments of Education, Justice, Labor and the Equal Employment Opportunity Commission from taking any enforcement actions consistent with the Dear Colleague Letter (DCL) issued on May 13, 2016. The District Court reasoned that the "guidance" was legislative (rather than interpretive) and, as such, public notice and comment was required under the Administrative Procedures Act. The Court found that the plaintiffs met the high burden for a preliminary injunction, in part, by accepting their arguments that "gender identify" is not synonymous with "sex" and that the DCL conflicts with their long-standing policies and practices regarding sex-segregated bathrooms, locker-rooms etc. (*Texas v. U.S.*, --F.Supp.3d -- (N.D. Texas 2016), 2016 WL 4426495). The U.S. appealed this decision to Court of Appeals, Fifth Circuit, on October 21, 2016.

In another case, *G.G. v. Gloucester County School*, the United States Court of Appeals, Fourth Circuit, reversed a District's Court's dismissal of a transgender male's challenge to a school

district policy prohibiting him from using the bathroom facilities consistent with his gender identity (822 F.3d 709). The student alleged violations under the Equal Protection Clause and Title IX of the Education Amendments of 1972. The Fourth Circuit held that the District Court applied the wrong legal standard in considering the student's request for a preliminary injunction, failed to give due weight to the DCL and failed to consider the student's evidence. The Plaintiffs sought leave to appeal to the U.S. Supreme Court and, on October 28, 2016, the Court agreed to hear the case. Arguments are expected to be scheduled early in 2017.

## Advice to Local Leaders

- Work with your district to schedule ongoing trainings for teachers and students to prepare them to support all students. There is a need for training and guidance for all staff on how best to support transgender and gender nonconforming students, best practices to prevent bullying and harassment and how to improve school climate.
- Discuss VADIR and DASA reporting procedures with the district. SED is **proposing** to align the reporting of VADIR and DASA data into one reporting system so be aware of a possible change to reporting systems.
- Support and promote a positive school climate and positive behavioral interventions and supports. Encourage all staff to model behavior they wish to see in others.
- Promote representation of all types of diversity in school hallways, classrooms, curriculum and events.
- Contact the State Education Department Office of Student Support Services, [StudentSupportServices@nysed.gov](mailto:StudentSupportServices@nysed.gov) if a district is not following the requirements outlined in the May 2016 DCL.
- Resources and information on training can be found on NYSUT's LGBTQ Committee webpage: [www.nysut.org/lgbtq](http://www.nysut.org/lgbtq). For more information or questions, please contact Jim Larson, at [jl Larson@nysutmail.org](mailto:jl Larson@nysutmail.org)

## Resources

US Department of Education, Examples of Policies and Emerging Practices for Supporting Transgender Students: <http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>

New York State Education Department, Guidance to School Districts for Creating a Safe and Supportive School Environment For Transgender and Gender Nonconforming Students, July 2015: [http://www.p12.nysed.gov/dignityact/documents/Transg\\_GNCGuidanceFINAL.pdf](http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf)

New York State Safe Schools Against Violence in Education (SAVE):  
<http://www.nysut.org/resources/all-listing/2001/february/safe-schools-against-violence-in-education-act>

Dignity for All Students Act: <http://www.nysut.org/resources/all-listing/2014/march/fact-sheet-12-06--the-dignity-for-all-students-act>

Dignity for All Students Amendment : <http://www.nysut.org/resources/all-listing/2013/september/fact-sheet-13-10-amendment-to-the-dignity-for-all-students-act>

Resources for Implementation of the Dignity Act: <http://www.nysut.org/resources/all-listing/2013/march/resources-for-implementation-of-the-dignity-act>

Social Emotional Development Guidelines in New York State:  
<http://www.p12.nysed.gov/sss/sedl/SEDLguidelines.pdf>

Transgender Legal Defense and Education Fund (TLDEF)  
<http://tldef.org/>

Gay, Lesbian, and Straight Education Network (GLSEN)  
<http://www.glsen.org/>

The Capital Pride Center (Albany, NY)  
<https://www.capitalpridecenter.org/>

Teaching Tolerance <http://www.tolerance.org/lgbt-best-practices> Read their publication "Best Practices: Creating an LGBT inclusive school climate"

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