



Rebecca L. Robertson
Legal & Policy Director
713.942.8146 ext. 116
rrobertson@aclutx.org

August 26, 2016

Dear Superintendent:

Yesterday, Texas Attorney General Ken Paxton issued a letter¹ that significantly misstated the holding and impact of a temporary injunction (“Order”)² issued by a Wichita Falls federal court regarding Title IX’s application to transgender students. As you know, the Order was issued on a preliminary basis in response to a lawsuit filed by Texas and twelve other states seeking to block enforcement of federal guidelines concerning nondiscrimination protections for transgender students. Contrary to Mr. Paxton’s letter, the Order does not apply to Texas school districts. Texas school districts are not parties to the lawsuit and are not prevented from shielding their students from discrimination. Attorney General Paxton’s suggestion that your school district is now “protected” and may therefore discriminate against transgender students with impunity is a gross misstatement of the Order and the law.

Because school districts that follow Attorney General Paxton’s advice could face legal liability, we write to remind you of your continued obligations under existing federal law to protect transgender students from discrimination.

Regardless of the lawsuit, Title IX protects transgender students

On May 13, 2016, the U.S. Department of Justice (“DOJ”) and Department of Education (“DOE”) jointly issued significant guidance (the “Guidance”) regarding Title IX, noting that the prohibition against sex discrimination extends to discrimination based on a student’s gender identity, including transgender status.³ **This is not a new concept.** The Guidance did not add to or alter current law. As a recipient of federal financial assistance, a school district like yours must not discriminate on the basis of sex in education programs and activities.⁴ For years, school districts across the country have

¹ https://www.texasattorneygeneral.gov/files/epress/Significant_Guidance_Letter.pdf.

² Preliminary Injunction Order, *Texas v. United States*, Civil Action No. 7:16-cv-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016).

³ See Dear Colleague Letter: Transgender Students (May 13, 2016), [herein “Guidance”], available at www.ed.gov/ocr/letters/colleague-201605-title-ix-transgender.pdf.

⁴ 20 U.S.C. § 1681; 34 C.F.R. §§ 106.4, 106.31(a); 28 C.F.R. Part 54.

interpreted sex discrimination to include discrimination on the basis of gender identity. In doing so, they relied on language in Title VII and Title IX, which have identical prohibitions of discrimination “on the basis of sex,”⁵ and have been repeatedly interpreted by federal courts to bar discrimination based on the failure to conform to stereotypical notions of masculinity and femininity.⁶ The DOJ and DOE have similarly interpreted their own regulations since at least 2010. In 2010, the DOE issued a Dear Colleague Letter, stating that Title IX protects “all students, including . . . transgender . . . students, from sex discrimination”; and in April 2014, it further explained that “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.”⁷ Similarly, in the context of Title VII, then Attorney General Eric Holder, in a December 2014 memorandum issued to United States Attorneys and heads of DOJ components, explained that “the best reading of Title VII’s prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status.”⁸

The Order hailed by Attorney General Paxton temporarily prevents the Obama Administration from acting on the Guidance, but it does not disturb the underlying law upon which the Guidance was based. The growing body of federal case law interpreting “sex discrimination” to include discrimination on the basis of gender norms is still applicable to school districts and governs disputes that arise under Title IX.

Schools should protect and support transgender students

Discrimination against transgender students is a serious and unfortunately widespread problem. According to the National Association of Secondary School Principals, which has publicly opposed legislation and policies that discriminate against transgender students:

⁵ Courts look to case law interpreting Title VII for guidance in evaluating a claim brought under Title IX. *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999).

⁶ *See, e.g., G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016) (holding discrimination against transgender student by high school violated Title IX), *petition for cert. filed*; *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011) (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”); *Smith v. City of Salem*, 378 F.3d 566, 573-76 (6th Cir. 2004) (holding that discrimination on the basis of non-conforming gender behavior is impermissible under Title VII); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (same); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (same); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (same); *Fabian v. Hosp. of Central Conn.*, 2016 WL 1089178, at *11-13 (D. Conn. March 18, 2016) (“Discrimination on the basis of the ‘peculiarities’ that ‘typically’ manifest as maleness and femaleness, or on the basis of ‘the property by which’ people are classified as male or female, is much broader than discrimination against women because they are women and discrimination against men because they are men—it would surely include discrimination on the basis of gender stereotypes, and just as surely discrimination on the basis of gender identity.”).

⁷ <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>;
<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

⁸ <https://www.justice.gov/file/188671/download>.

Unfortunately, a climate conducive to the educational success of transgender students remains elusive in many schools. In an annual survey of more than 7,000 students ages 13–21, the Gay, Lesbian & Straight Education Network (GLSEN) found that transgender students were more likely than any other students to have negative experiences at school and were more likely to have felt unsafe and to experience victimization based on their gender identity or expression.⁹

We understand that the terminology of transgender students may be new to you. According to the American Psychological Association, “transgender” is an umbrella term that incorporates differences in gender identity wherein a person’s assigned biological sex does not match his or her deeply felt sense of identity as male or female.¹⁰ As explained in the Guidance:

“Gender identity” refers to an individual’s internal sense of gender. Everyone has a gender identity. A person’s gender identity may be different from or the same as the person’s sex assigned at birth.

“Transgender” describes those individuals whose gender identity is different from the sex they were assigned at birth. A transgender male is someone who identifies as male but was assigned the sex of female at birth. A transgender female is someone who identifies as female but was assigned the sex of male at birth.¹¹

Medical and scientific opinion is unequivocal that for transgender people, gender identity is not a choice. Many people have and express a clearly established gender identity as or before they reach school age.¹²

Schools have an important role to play in insuring that transgender students have the same access to educational opportunities as every other student, including a safe and fair learning environment and full participation in the formative experiences of youth, such as school functions and extracurricular activities.

⁹ <https://www.nassp.org/who-we-are/board-of-directors/position-statements/transgender-students>. “The survey also indicated that 42.2% of transgender students had been prevented from using their preferred name, 59.2% had been required to use a bathroom or locker room of their legal sex, and 31.6% had been prevented from wearing clothes considered inappropriate based on their legal sex.” *Id.*

¹⁰ <https://www.nassp.org/who-we-are/board-of-directors/position-statements/transgender-students>; <http://www.apa.org/topics/lgbt/transgender.aspx>.

¹¹ See Guidance, *supra* n.3.

¹² See World Prof’l Ass’n for Transgender Health (“WPATH”), WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A., 1 (June 17, 2008), http://www.wpath.org/uploaded_files/140/files/Med%20Nec%20on%202008%20Letterhead.pdf (“WPATH Clarification”) (citing American Academy of Pediatrics).

What your district must do to comply with Title IX

A school receiving federal funds must not discriminate against a student based on sex, including gender identity. Nothing in federal law, Texas law, or the Order prevents school districts that already have or are planning to implement Title IX nondiscrimination policies protecting transgender students from taking such steps.

To comply with Title IX under current law:

- You have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students.
- You must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex.
- When you provide sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity. This specifically includes providing students access to restrooms and locker rooms consistent with their gender identity.¹³
- Where a recipient of federal financial assistance, such as your district, is on notice that a Title IX violation has occurred or is occurring, the recipient must ensure that complaints are resolved promptly and appropriately.¹⁴

Importantly, you must take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth.¹⁵ Sharing information about a student's gender identity with a parent or family member could endanger the mental or physical health and safety of the student and result in family rejection.¹⁶ In a seminal case on protection of a student's right to privacy, the student

¹³ 34 C.F.R. § 106.33. Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of transgendered students' participation on the competitive fairness or physical safety of the sport. A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same gender identity.

¹⁴ <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>.

¹⁵ 34 C.F.R. § 106.31(b)(7).

¹⁶ A 2011 study found that 19% of transgender individuals were subject to violence at home due to transgender identity/gender non-conformity, [http://www.avp.org/storage/documents/Training%20and%20TA%20Center/FORGE Transgender Violence Fast Facts.pdf](http://www.avp.org/storage/documents/Training%20and%20TA%20Center/FORGE%20Transgender%20Violence%20Fast%20Facts.pdf). In addition, in a study conducted in 2012, family rejection on the basis of sexual orientation and gender identity was the most frequently cited factor contributing to LGBT homelessness; the second most frequently cited reason was youth being forced out of their family homes as a result of coming out as lesbian, gay, bisexual, or transgender. Overall, respondents in the study indicated that nearly seven in ten (68%) of their LGBT homeless clients have experienced family rejection and more than half of clients (54%) had experienced abuse in their family. L.E. Durso & G.J. Gates. *Serving Our Youth: Findings from a National Survey of Service Providers Working with Lesbian, Gay, Bisexual, and Transgender Youth who are Homeless or At Risk of Becoming Homeless*, 4 (Williams Institute with True Colors Fund and The Palette Fund 2012), available at

committed suicide after a police officer threatened to “out” him to his grandfather.¹⁷ Administrators should protect students’ privacy.

Districts that discriminate against transgender students risk legal liability

To be clear, there is nothing in Texas or federal law that prevents school districts from embracing inclusiveness and non-discrimination and implementing policies that support and protect transgender students. To the extent your school district already has implemented such policies, your district is free to enforce them.¹⁸

If your school district does not have policies prohibiting discrimination against students based on sex, including gender identity, you should consult counsel and consider taking steps to avoid legal liability to affected students and families. The Order does not prevent an affected transgender student from filing suit against your school district on the basis of discrimination under Title IX, nor does it prevent the court hearing any such a dispute from applying existing interpretations of Title IX.

At the ACLU of Texas, we will continue to monitor whether school districts comply with the law in a manner that creates the conditions for transgender students to thrive. We are confident that school districts around the state will rise to the occasion. After all, students are depending on you.

Regards,



Rebecca L. Robertson

<http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>.

¹⁷ *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) (reasoning that government has no legitimate interest in disclosing such private matters). Mr. Paxton has issued an attorney general opinion, <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0100.pdf>, urging that parents cannot be denied access to students’ information, including information about the child’s gender identity. School administrators who heed Mr. Paxton’s advice could put students at grave risk.

¹⁸ In fact, the Order specifically states that for any school district that currently interprets “sex” as including “gender identity,” or wishes to do so going forward, the temporary injunction issued by the Order does not apply. *See* Order, *supra* n.2, at 36-37 (“As the separate facilities provision in § 106.33 is permissive, states that authorize schools to define sex to include gender identity for purposes of providing separate restroom, locker room, showers, and other intimate facilities will not be impacted by it. Those states who do not want to be covered by this injunction can easily avoid doing so by state law that recognizes the permissive nature § 106.33. It therefore only applies to those states whose laws direct separation.”).