LSA – October 2015
Transgender Students:
Maryland’s Laws and Guidance on
Student Athletics, Title IX Aspects,
Other State Law Actions, Public &
Private Accommodations, Birth
Certificates, OCR Actions &
Resolutions, and the Latest Cases

Transgender Student Athletes

Maryland Public Secondary Schools Athletic
Association (MPSSAA) Transgender Person
Guidance for Participation in Interscholastic
Athletics

“The purpose of this guideline is to designate a set
of criteria in which student-athletes are able to on a
level compete playing field in a safe, competitive
and friendly environment, free of discrimination. At
the center of educational programming is the value
placed in providing equal opportunity for all
students.”

Adopted July 2, 2014
Transgender Student Athletes

MPSSAA Transgender Guidance

• Definitions
• Guiding Principles
• Participation Determination
• Appeal Review Committee

MPSSAA Guiding Principles

Local school system’s criteria for inclusion of students whose gender identity and expression does not match their gender assigned at birth should be consistent with the following guiding principles:

1. Participation in interscholastic athletics is a valuable part of the education experience for all students.
2. All student athletes should have equal opportunity to participate in sports.
3. The integrity of women’s sports should be preserved.
MPSSAA Guiding Principles

4. Policies governing sports should be based on sound medical knowledge and scientific validity.

5. Policies governing the participation in sports should be fair in light of the tremendous variation among individuals in strength, size, musculature, and ability.

6. The legitimate privacy interests of all student athletes should be protected at all times.

MPSSAA Guiding Principles

7. Policies governing the participation of students in athletics should comply with Maryland and federal laws protecting students from discrimination based on sex, disability, sexual orientation, and gender identity and expression.

8. Once the student has been granted eligibility to participate in the sport consistent with his/her gender identity, the eligibility is granted for the duration of the student’s participation and does not need to be renewed every sports season or school year.
Transgender Student Athletes

MPSSAA Transgender Guidance

Gender Identity: A person's deeply-felt internal sense of being male or female.

Transgender Person: A person whose gender identity does not match the sex assigned to him or her at birth.

Transgender Student Athletes

MPSSAA Transgender Guidance

Participation Determination: To ensure competitive fairness and equal opportunities to participate without discrimination, local criteria for transgender persons should reflect the following:

A. Transgender students can participate on the team of the student's birth gender;

B. Transgender students can participate on teams of the gender that the student has transitioned to. This may be supported by medical documentation (hormonal therapy, sexual re-assignment surgery, counseling, etc.) confirming transition of gender;
Transgender Student Athletes

MPSSAA Transgender Guidance

Participation Determination:
C. Transgender students may compete on the interscholastic team of the gender the student identifies with, as recognized by the local school system and established in official school system records.

(This may differ from the student’s gender listed in school system records).
Federal Statutes – Title IX

➤ Title IX of the Education Amendments of 1972 (Title IX), prohibits discrimination on the basis of sex. Title IX provides that “no person...shall, on the basis of sex, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

“Dear Colleague...”
Federal Statutes – DCLs

➢ Dear Colleague Letters (DCLs) are sent to all Districts by the US Dept. of Educ. (DOE)
➢ In 2010 DOE issued one (1) DCL
➢ In 2011 DOE issued two (2) DCLs
➢ In 2012 DOE issued one (1) DCL
➢ In 2013 DOE issued three (3) DCLs
➢ In 2014 DOE issued six (6) DCLs
➢ In 2015 DOE has so far issued four (4) DCLs
➢ As many as another two dozen DCLs are said to be in the pipeline by those in the know.

Title IX - DCLs

• Title IX Related Dear Colleague Letters (DCLs)
  • DCL is a misnomer in every way
  • Most are re-interpreting decades old laws
  • DCLs have become a new source of “law”
  • The number of DCLs are growing rapidly
  • Educators are uniformly considered as violators
  • DCLs are written as “How To” guides for lawsuits
Title IX - DCLs

➢ Title IX Related Dear Colleague Letter
➢ April 29, 2014 - Guidance Issued on Questions and Answers on Title IX and Sexual Violence
➢ Q & A B-1 states that all students are protected from sexual violence by Title IX including transgender students
➢ Q & A B-2 states 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 and OCR investigates such complaints

Title IX - DCLs

➢ Title IX Related Dear Colleague Letter
➢ April 29, 2014 - Guidance Issued on Questions and Answers on Title IX and Sexual Violence
➢ Q & A B-2 also states that Title IX compliance requires that schools should ensure that its counselors and other staff who are responsible for receiving and responding to complaints of sexual violence, including investigators and hearing board members, receive appropriate training about working with LBGT and gender-nonconforming students and same-sex violence
Transgender Students

Maryland Regulations

School Safety
All students in Maryland's public schools, without exception and regardless of race, ethnicity, region, religion, gender, sexual orientation, language, socioeconomic status, age, or disability, have the right to educational environments that are:

A. Safe;
B. Appropriate for academic achievement; and
C. Free from any form of harassment.

COMAR 13A.01.04.03

Transgender Students

Maryland State Law

Bullying Reporting Law
• In July, 2005, the Safe Schools Reporting Act required the development of a form to be used by students, parents, and close family members to report incidents of bullying, harassment, or intimidation to school administrators.
• The law also required all local school systems to record specific information from these forms and to submit that information to MSDE for inclusion in its annual report to the General Assembly.
Transgender Students

Maryland State Law
The Safe Schools Reporting Act defines “harassment or intimidation” as conduct, including verbal conduct, that:

(1) Creates a hostile educational environment by substantially interfering with a student’s educational benefits, opportunities, or performance, or with a student’s physical or psychological well-being and is:
   (i) Motivated by an actual or a perceived personal characteristic such as race, national origin, marital status, sex, sexual orientation, gender identity, religion, or disability; or
   (ii) Threatening or seriously intimidating; and
(2) Occurs on school property, at a school activity or event, or on a school bus.

Transgender Students

Maryland Regulations
Mandated Anti-Bullying Policies
In 2008, the Maryland General Assembly passed a law requiring the Maryland State Board of Education, in consultation with local school systems, to develop and adopt a model policy prohibiting bullying, harassment, or intimidation in schools.
Transgender Students

Maryland State Law

**Model Anti-Bullying Policy & Guidance**

MSDE issued a model policy in 2009, updated in 2013, to require that local school systems adopt bullying prevention efforts including at least annual professional development for administrators and all staff to increase awareness of the prevalence, causes, and consequences of bullying and to increase the use of evidence-based strategies for preventing bullying.

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Transgender Students

**Fairness for All Marylanders Act**

- Maryland enacted the Fairness for All Marylanders Act in 2014 (House Bill 212).
- This bill prohibits discrimination based on “gender identity” in public accommodations, labor and employment, and housing.
- The law also allows private facilities offering public accommodations (such as hotels and gyms) to not have to allow transgendered individuals access to a locker room of their chosen gender if equivalent space is offered to them.
Transgender Students

**Fairness for All Marylanders Act**

“Gender identity” means the gender-related identity, appearance, expression, or behavior of a person, regardless of the person’s assigned sex at birth, which may be demonstrated by (1) consistent and uniform assertion of the person’s gender identity or (2) any other evidence that the gender identity is sincerely held as part of the person’s core identity.

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Transgender Students

**Fairness for All Marylanders Act**

The bill does not apply to a private facility in a place of public accommodation.

The bill defines “private facility” as a facility

(1) that is designed to accommodate only a particular sex;

(2) that is designed to be used simultaneously by more than one user of the same sex; and

(3) in which it is customary to disrobe in view of other users of the facility.
Transgender Students

Official Documents – Birth Certificates

- All official documents prepared by the school system concerning a student must use the student’s legal name as it appears on the student’s birth certificate.
- Under a new law passed in 2015 (Senate Bill 743), a person may change their legal name either by obtaining a court order (prior law) or certification by a licensed health care professional of a sex change or diagnosis of intersex condition (new law).

Transgender Students

Official Documents – Birth Certificates

The new law defines “licensed health care practitioner” as a licensed physician, psychologist, registered nurse (who is also certified as a nurse practitioner, nurse psychotherapist, or clinical nurse specialist), or a certified social worker-clinical.

(Senate Bill 743 (2015))
Transgender Students

Official Documents – Birth Certificates
The professional certification must be based on the individual having undergone surgical, hormonal, or other treatment appropriate for the individual, based on generally accepted medical standards; or the individual has an intersex condition.
The new birth certificate may not be marked “amended” or show on its face that a change has been made to a sex designation.

Transgender Students

Unofficial Documents & Communications:
Teachers and school staff should honor requests by students to be called a name other than the legal name in classrooms and in general communications with the student.
This could include names consistent with the student’s identified gender (“Stephanie” rather than “Stephen”).
No student should be forced to answer to an undesired name in informal communications.
Other State Laws - California

In 2013 California enacted the School Success and Opportunity Act (Assembly Bill 1266) to ensure that students can fully participate in all school activities, sports teams, programs, and facilities that match their gender identity, irrespective of the gender listed on the pupil’s records.

Other State Laws – New York

- Dignity for All Students Act passed in 2012.
- The State’s Education Department issued guidance in 2015 that schools provide transgender students access to restrooms and locker rooms that correspond with their gender identity. Private bathrooms and changing spaces should be available to all students who desire additional privacy. In addition, transgender students should have the opportunity to participate in gender-segregated activities.
- The guidelines affirm that the only requirement to confirm a student’s gender identity is a statement from the student.
Other State Laws – Colorado

• The state has enacted the Colorado Anti-Discrimination Act, but in addition its Civil Rights Commission has issued regulations to “contribute to the elimination of discrimination on the basis of sexual orientation, inclusive of transgender status, in employment, housing, public accommodations, and advertising.”
• Colorado’s “Sexual Orientation Discrimination Rules” define transgender, gender identity, and gender expression – and have been applied in cases involving schools.

Other State Cases – Maine, Etc.

➢ In late 2014, a ME district transgender student’s suit to use the bathroom of the gender with which she identifies ended in a $75,000 verdict against the school district from the Maine Supreme Judicial Court the case was decided based upon state law
➢ Several such bathroom disputes are pending in MI, NV and a number of other states based upon the interpretation of state laws
OCR’s Title IX Enforcement Action

- OCR is not backing away from investigating gender identity complaints against school districts and it is threatening the withholding of federal funds among other actions.
- Arcadia Unified School District (CA) entered into a Resolution Agreement with OCR permitting the student complainant to use the sex-specific facilities of his choice.

OCR’s Title IX Enforcement Action

- Arcadia’s Resolution Agreement with OCR calls for:
  - Engaging (and paying) approved third party consultants to assist in implementing the agreement.
  - Establish (at student/parent’s request) a support team to ensure access and protection from gender-based discrimination and the team includes; the parents, parent’s advocate, and parent’s medical professional and once formed it will remain in place for the remainder of the student’s enrollment in the district.
  - Revise all policies, procedures, regulations, etc., pertaining to discrimination; subject to approval by the United States and develop an implementation guide.
OCR’s Title IX Enforcement Action

- Arcadia’s Resolution Agreement with OCR calls for:
  - Provide annual training administrators addressing gender-based discrimination; implementation of new policies, etc.; best practices for helping transgender students; and administrators are to train all faculty and staff in these matters annually
  - Provide age-appropriate instruction to all students on gender-based discrimination and providing examples of prohibited conduct in school
  - Finally, to provide annual compliance reports specifically containing information and documentation in 8 major compliance areas listed in the agreement

OCR’s Title IX Enforcement Action

- In May 2015 US DOE & OCR threatened withholding of $42 million in federal funding from the Fairfax County Schools which then changed its policy to allowing students to use bathrooms and locker rooms based upon gender identity
- An Illinois district was just reported (Oct. 2015) to have refused locker room access to a transgender student despite the threat of a $6 million federal withholding; the district had already provided bathroom and all other requested accommodations
Federal Cases Interpreting Title IX

➤ The recent case of *Doe v. Board of Educ. of Prince George's County* (MD) questioned the liability standard to be applied in student-on-student harassment cases deliberate indifference or a negligence standard

➤ The *Davis* standard just reaffirmed by the Fourth Circuit requires proof of actual knowledge by school officials to prevail

➤ In *Doe*, they sought to change the standard to what school officials should have known as urged in a recent DCLs from US DOE

Federal Cases Interpreting Title IX

➤ The March 2015 case of *Johnston v. Univ. of Pittsburgh* (PA), a US District Court held that Title IX does not prohibit discrimination on the basis of gender identity and affirming the university's policy of having bathroom and locker room use based upon sex at birth and not gender identity

➤ Court stated plain language of “on the basis of sex” means traditional binary concept of male and female based upon birth sex or biological sex

➤ Court also noted that Title IX regulations permit separate (comparable) bathrooms and locker rooms
Federal Cases Interpreting Title IX

➢ In the September 17, 2015 case of G.G. v. Gloucester Cnty. Sch. Bd. a VA federal district court dismissed a student’s Title IX and 14th Amendment Equal Protection claim seeking use of the bathroom that corresponds with gender identity
➢ The court held that the only fair reading of the Title IX provision permitting separate bathrooms, etc., based upon sex, means upon biological sex
➢ The court pointed out that there was no claim that the facilities provided were not comparable

Federal Cases Interpreting Title IX

➢ Further in G.G. v. Gloucester Cnty. Sch. Bd. the court also rejected the contention that OCR’s guidance letter on Title IX should be the interpretation adopted by the court
➢ The court found that to follow OCR’s DCL would be to wrongly permit OCR to “create defacto a new regulation” without the regulatory process
➢ Finally, the court recognized a constitutional right to “bodily privacy” of all students and found that “the need for privacy is even more pronounced in the state educational system”