

August 26, 2020

Dear Principal or Superintendent,

You're being given this letter because your school or a school in your district may be refusing to update transgender students' records with the name they use and gender that they live every day, unless the student obtains a court order or other legal document changing their name or gender marker. While a student's legal name and gender marker may appear on their official legal records, there is *no* law requiring schools to use a student's legal name in the classroom or on rosters and attendance lists, yearbook, student ID, report card, etc. Refusing to update these documents can be extremely harmful to the health and well-being of transgender students and subject schools to liability under federal antidiscrimination and privacy law.



A transgender person is someone whose gender identity is different from the sex they were assigned at birth. For example, a transgender boy is a person who was assigned the sex female at birth, but his gender identity is male. Many people in school—or even before they reach school age—have and express a clearly established gender identity that is different from the sex they were assigned at birth.¹ The ability of transgender students to live as the gender they are is critical to their health and well-being. If schools refuse to acknowledge a transgender student's gender identity by prohibiting them from updating unofficial school records, such as attendance sheets, student IDs, yearbooks, *etc.*, with the name and pronouns that reflect the gender they live every day, it can severely impact the student's ability to learn and thrive at school. The American Psychological Association, the National Association of School Psychologists, and the National Association of Secondary School Principals ("NAASSP") all advise maintaining records that reflect transgender students' name and gender that they live every day, regardless of medical or legal transition.²

Discrimination against transgender students violates the Equal Protection Clause of the Constitution and Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681(a).³ Title IX prohibits sex discrimination in any education program, such as a public school, that receives federal financial

¹ See Wylie C. Hembree, *et al.*, *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, J. Clinical Endocrinology & Metabolism jc.2017-01658, 7 (Sept. 2017), <https://academic.oup.com/jcem/article/102/11/3869/4157558>; Amicus Br. of Am. Acad. of Pediatrics, *et al.*, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, ECF No. 244, at 17-18 (4th Cir.), https://www.aclu.org/sites/default/files/field_document/document_0.pdf; WPATH at 1.

² See Am. Psychological Ass'n & Nat'l Ass'n Sch. Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015), <http://www.apa.org/about/policy/orientation-diversity.aspx>; Nat'l Ass'n of Secondary Sch. Principals, *Position Statement on Transgender Students* (2016), <https://www.nassp.org/who-we-are/board-of-directors/position-statements/transgender-students?SSO=true>.

³ See, e.g., *Whitaker By Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017) (holding transgender student likely to succeed on the merits of his Title IX and Equal Protection claims against his high school's policy barring him from using the boys' restroom); *Dodds v. U.S. Dep't. of Educ.*, 845 F.3d 217 (6th Cir. 2016) (school denying transgender students access to restrooms corresponding with their gender identity not likely to succeed on appeal under Title IX).



assistance. Courts have recognized that deliberately refusing to address transgender individuals by the name and pronouns consistent with their gender identity can be a form of sex-based harassment under state and federal antidiscrimination law.⁴

In addition to violating federal antidiscrimination law, refusing to change school records can violate federal privacy laws by revealing the student's transgender status. Students have the right to share or withhold information about their sexual orientation and gender identity under the federal Constitution⁵ and the Family Educational Rights and Privacy Act ("FERPA").⁶ As NASSP advises, "transgender status, legal name or sex assigned at birth is confidential medical information and considered 'personally identifiable information' under the Family Educational Rights Privacy Act (FERPA). Disclosure of that information to other school staff or parents could violate the school's obligations under FERPA or constitutional privacy protections."⁷

We hope this letter has given you a firm understanding of why schools should—and must—update transgender students' unofficial school records in accordance with their gender identity, regardless of a legal name change. You may wish to consult *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* for suggestions about ways to handle school records and other school matters while providing a safe and supportive environment for all transgender and gender nonconforming students.⁸

⁴ See, e.g., *Doe v. City of New York*, 976 N.Y.S.2d 360 (N.Y. Sup. Ct. 2013) (holding that a transgender woman had sufficiently alleged discrimination under state sex discrimination law when the state HIV/AIDS Service Administration continued to address her by her former male name and male pronouns); *Burns v. Johnson*, 829 F.3d 1 (1st Cir. 2016) (plaintiff's allegations, including employer's purposeful and condescending use of the pronoun "she" to a male transgender employee, supported a reasonable inference of discrimination on the basis of sex); See also *OCR Instructions to the Field re Complaints Involving Transgender Students*, Dep't. of Educ. Office for Civil Rights (June 5, 2017), <https://assets.documentcloud.org/documents/3866816/OCR-Instructions-to-the-Field-Re-Transgender.pdf> ("refusing to use a transgender student's preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus" is an example of gender-based harassment).

⁵ See *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015) (state's unduly burdensome policy for changing sex on driver's license or ID violated the Constitution's Due Process and Equal Protection clauses); *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000) (holding officer's threat to disclose arrestee's perceived sexual orientation violated their constitutional right to privacy); *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) ("Publicly revealing information [about sexuality] exposes an aspect of our lives that we regard as highly personal and private."); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) ("the Constitution does indeed protect the right to maintain the confidentiality of one's transsexualism"); *Eastwood v. Dep't of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988) (right to privacy "is implicated when an individual is forced to disclose information regarding sexual matters").

⁶ See Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. §§ 99.00 et seq. Disclosure of private information related to sex or gender can also violate sex discrimination laws. See *Roberts v. Clark Cty. Sch. Dist.*, 215 F.Supp.3d 1001 (D. Nev. 2016) (disclosure of private information about employee's transgender status in an email established a prima facie case for harassment/hostile environment under Title VII's sex discrimination prohibition).

⁷ NASSP, *Position Statement on Transgender Students* (2016).

⁸ <http://www.aclu.org/Schools-in-Transition>.

Please do not hesitate to contact the ACLU if you have any questions about this issue or if we can be of any assistance to you in evaluating and formulating school policy. We can be reached at (212) 549-2673.

Sincerely,



James D. Esseks
Director
ACLU Lesbian Gay Bisexual Transgender & HIV Project



Students and parents: Feel free to use this letter as an advocacy tool in your school.