



# New USED and DOJ Guidance on Transgender Students and Title IX

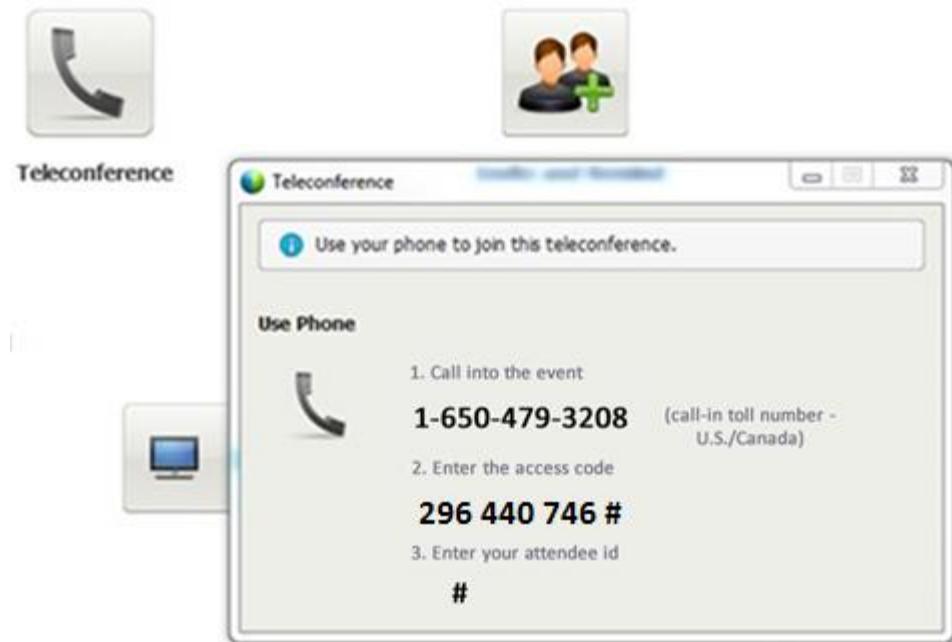
June 14, 2016



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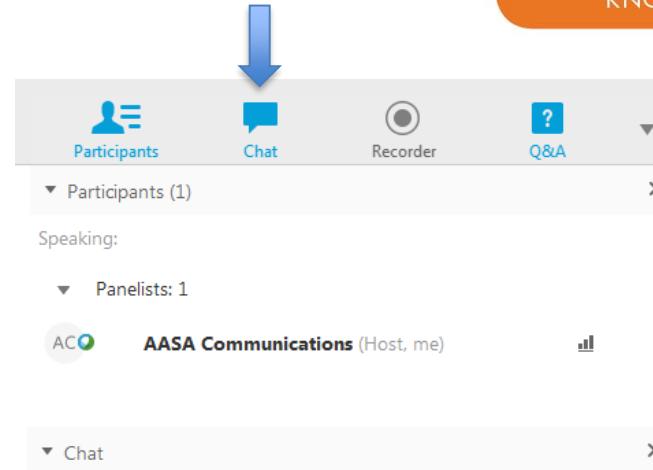
# Logistics

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- We have allotted time for **Q&A**, but you can submit questions at any time.
- Please use the **chat window** to submit questions. In the dropdown menu, select “**All Panelists**” and then type your question in the chat box.



# Today's Presenters



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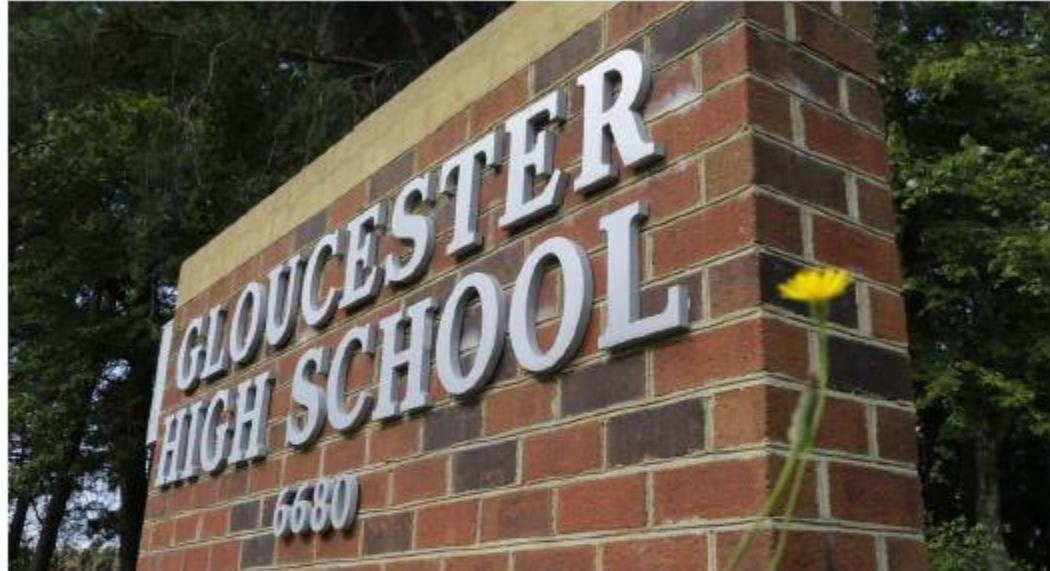


Michelle Tellock  
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# *Ripped from the Headlines*



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The American Civil Liberties Union and ACLU of Virginia filed a brief earlier this month urging the full court not to rehear the case. | AP Photo

## **Virginia school board loses bid to keep transgender student from boys' bathroom**

By CAITLIN EMMA | 05/31/16 05:28 PM EDT | Updated 05/31/16 08:28 PM EDT

The U.S. Court of Appeals for the 4th Circuit on Tuesday refused to rehear the case of a transgender Virginia student who wants to use the boys' bathroom at his high school — and the plaintiff now hopes school officials "will do the right thing."

# *Ripped from the Headlines*



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## **Tempers flare at school board meeting over protections for transgender students**



By [Mike Murillo](http://wtop.com/author/mike-murillo/) (<http://wtop.com/author/mike-murillo/>) | @MikeMurilloWTOP (<https://twitter.com/MikeMurilloWTOP>)

June 10, 2016 7:22 am



**The Washington Post**

**Post Nation**

## **Eleven states sue Obama administration over bathroom guidance for transgender students**

# Today's Agenda

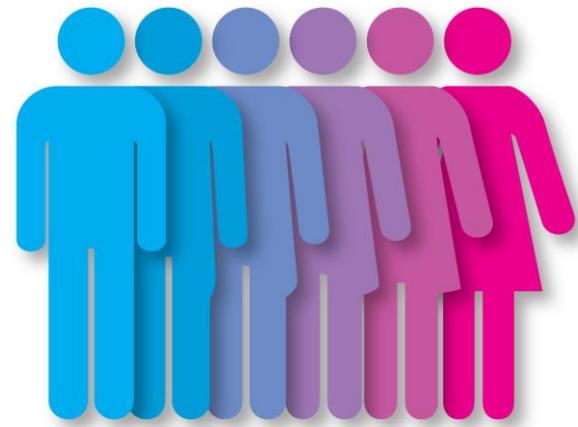


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- Terminology
- Overview: Transgender Students & Title IX Guidance
- The Law Behind the Guidance
- Dear Colleague Letter
  - What does it say?
  - How can my district comply?
- Q&A

# Useful Terminology

- Sex assigned at birth: the sex designation, usually “male” or “female,” assigned to a person when they are born (e.g., on a birth certificate)
- Gender identity: an individual’s internal sense of gender, which may be different from or the same as the person’s sex assigned at birth



# Useful Terminology



- **Transgender**: describes a person whose gender identity is different from the sex 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
- **Gender transition**: the process in which transgender individuals begin asserting the sex that corresponds with their gender identity instead of their sex assigned at birth
  - May not involve medical intervention

# Overview: Transgender Students and Title IX Guidance



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- Joint effort by U.S. Department of Education and Department of Justice
- Released May 13, 2016

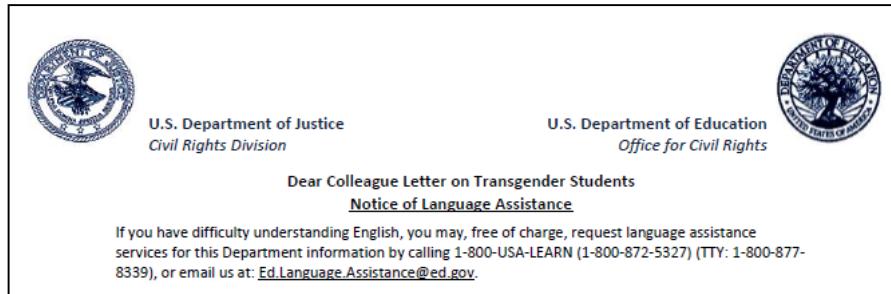
“As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities.”

“A student’s gender identity is the student’s sex for purposes of Title IX . . . a school must not treat a transgender student differently than other students of the same gender identity.”

# Overview: Transgender Students and Title IX Guidance



- The Guidance Package includes two resources:
  1. Dear Colleague Letter (“DCL”)



2. Examples of Policies and Emerging Practices for Supporting Transgender Students

# Behind the Guidance: The Law



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- Title IX of the Civil Rights Act of 1972
  - Forbids institutions that receive federal financial assistance to discriminate on the basis of sex
  - Aims to provide individuals with effective protection against discriminatory practices

# Behind the Guidance: The Law



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- Title IX applies to:
  - All public elementary and secondary schools and school districts receiving federal financial assistance
  - Programs and activities affiliated with schools that receive federal funds
  - Federally funded education programs run by other entities such as correctional facilities, unions and businesses



# Behind the Guidance: The Law



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- Family Educational Rights and Privacy Act (FERPA)
  - Prohibits nonconsensual disclosure of education records and personally identifiable information derived from such records
  - A school cannot disclose PII from education records unless:
    - Written permission from parents or eligible (18+) student OR
    - Disclosure under an exception

# Dear Colleague Letter: Legal Background



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- According to the Departments:
  - The Dear Colleague Letter “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.”
- Courts may show deference to the Departments’ interpretations and guidance, but . . .

# Dear Colleague Letter: Legal Background

- . . . several states have filed a lawsuit challenging the Obama administration's positions regarding the rights of transgender individuals, including as stated in the Dear Colleague Letter.



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Case 7:16-cv-00054-O Document 1 Filed 05/25/16 Page 1 of 32 PageID 1

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
WICHITA FALLS DIVISION

STATE OF TEXAS;  
HARROLD INDEPENDENT  
SCHOOL DISTRICT (TX);  
STATE OF ALABAMA;  
STATE OF WISCONSIN;  
STATE OF WEST VIRGINIA;  
STATE OF TENNESSEE;  
ARIZONA DEPARTMENT  
OF EDUCATION;  
HEBER-OVERGAARD  
UNIFIED SCHOOL DISTRICT (AZ);  
PAUL LEPAGE, GOVERNOR OF  
THE STATE OF MAINE;  
STATE OF OKLAHOMA;  
STATE OF LOUISIANA;  
STATE OF UTAH; and  
STATE OF GEORGIA

Plaintiffs,

v.

UNITED STATES OF AMERICA;  
UNITED STATES DEPARTMENT  
OF EDUCATION; JOHN B. KING,  
JR., in his Official Capacity as United

CIVIL ACTION NO. \_\_\_\_\_

# Dear Colleague Letter: Legal Background



- There have been other legal challenges to the federal government's position
  - U.S. Court of Appeals for the Fourth Circuit declined to reconsider a panel's 2-1 decision allowing a Virginia transgender student's challenge to a restrictive bathroom policy to proceed
  - Parent sued Duval County (FL) after district announced it would abide by the federal Guidance
  - Group of students in Palatine (IL) sued to prevent implementation of school board's agreement with ED to permit transgender student to use locker room consistent with student's gender identity
  - NC and DOJ lawsuits over legality of NC's "HB2" law

# Dear Colleague Letter: Legal Background



- Whether the federal government will move to terminate the federal funding of school districts that fail to follow the Guidance remains to be seen
- There is little case law on the application of Title IX to transgender students, and courts disagree as to whether the analogous prohibition on “sex”-based employment discrimination under Title VII covers discrimination based on gender identity or transgender status
- **Stay tuned**

# What the DCL says: Observations, in brief



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- The Departments “treat a student’s identity as the student’s sex for the purposes of Title IX and its implementing regulations”
- The Departments consider sex discrimination to include discrimination based on a student’s gender identity, including a student’s transgender status
- School “must not treat a transgender student differently from the way it treats other students of the same gender identity”
- Schools must take prompt and effective action to address sex-based harassment, prevent its recurrence, and remedy its effects



# *Ripped from the Headlines*



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## How Schools Around The Country Are Treating Transgender Student Rights

May 13, 2016 · 4:09 PM ET

Heard on *All Things Considered*

ANYA KAMENETZ



GABRIELLE EMANUEL

In addition to the [letter today to the nation's school districts](#) urging them to protect the rights of transgender students, the Education Department provided a long report on states and districts it says are already doing so.

That list includes the nation's three largest school districts: New York, Los Angeles and Chicago. It also names plenty of smaller places, like Matanuska-Susitna Borough School District in Alaska, and Shorewood School District in Wisconsin. And while inclusion on the list doesn't mean those states and districts are doing everything the federal government now says they should, it does provide a snapshot of policies the department thinks are worth highlighting:

# Title IX and Transgender Students: USED Guidance



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## Guidance Example

*How do schools address harassment or bullying of transgender students?*

Under Title IX, “[i]f sex-based harassment creates a hostile environment, the school must take prompt and effective steps to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects.”

- The Shorewood Guidelines specify that harassment based on a student’s actual or perceived transgender status or gender nonconformity is prohibited, and notes that these complaints are to be handled in the same manner as other discrimination, harassment, and bullying complaints.

# What the DCL says: Observations, in brief



- When a student or student's parent/guardian "notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity"
- Schools "must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex"



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## Transgender Student Asks School System To Use Preferred Name

February 7, 2016 11:24 AM



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By CINDY HUANG

The Capital



MILLERSVILLE, Md. (AP) — Matthew Nolte's report card is stacked with A's, but he scratched out the name on it — which is not Matthew — until the paper wore away, leaving a rectangular hole.



Matt, a junior at Old Mill High School, is a transgender student fighting for the school system to recognize his preferred, not legal, name.



# Title IX and Transgender Students: USED Guidance



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## Guidance Example

*How do schools confirm a student's gender identity?*

“Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.”

- Los Angeles Unified School District issued a policy noting that there is no medical or mental health diagnosis or treatment threshold that students must meet in order to have their gender identity recognized and respected, and that evidence may include an expressed desire to be consistently recognized by their gender identity.

# What the DCL says: Observations, in brief



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- Schools that provide sex-segregated activities and facilities must allow transgender students “to participate in such activities and access such facilities consistent with their gender identity”



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The American Civil Liberties Union and ACLU of Virginia filed a brief earlier this month urging the full court not to rehear the case. | AP Photo

## **Virginia school board loses bid to keep transgender student from boys' bathroom**

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The U.S. Court of Appeals for the 4th Circuit on Tuesday refused to rehear the case of a transgender Virginia student who wants to use the boys' bathroom at his high school — and the plaintiff now hopes school officials "will do the right thing."

The order in *G.G. v. Gloucester County School Board* upholds an appeals court ruling last month that allowed the student, Gavin Grimm, to use bathrooms that align with his gender identity. In so doing, the 4th Circuit gave a win to the Obama administration, which issued guidance earlier this month affirming that transgender students are entitled to all civil rights protections under Title IX, the federal law that prohibits sex-based discrimination in federally funded educational programs and activities.

# Title IX and Transgender Students: USED Guidance



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## Guidance Example

*How do schools address restroom and locker room access?*

Under Title IX, schools “may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity. A school may not require transgender students to . . . use individual-user facilities when other students are not required to do so.” Individual-user facilities may be made available to all students who voluntarily seek additional privacy.

- The Washington State Guidelines provide that any student who wants increased privacy should be provided access to an alternative restroom or changing area. The guidelines explain: “This allows students who may feel uncomfortable sharing the facility with transgender students the option to make use of a separate restroom and have their concerns addressed without stigmatizing any individual student.”

# Title IX and Transgender Students: USED Guidance



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## Guidance Example

*How do schools ensure transgender students have the opportunity to participate in athletics consistent with their gender?*

Under Title IX, schools are permitted “to operate or sponsor sex-segregated athletic teams when selection for such teams is based on competitive skill or when the activity involved is a contact sport.” A school may not “adopt or adhere to requirements that rely on overly broad generalizations or stereotypes”. Tailored requirements must be based on sound, current and research-based medical knowledge about the impact of the students’ participation on the competitive fairness or physical safety of the sport.

- The California Interscholastic Federation establishes a panel of professionals, including at least one person with training or expertise in gender identity health care or advocacy, to make eligibility decisions.

# Title IX and Transgender Students: USED Guidance



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## Guidance Example

*When can a school separate students in a class by sex?*

Under Title IX, “separating students by sex in classes and activities is generally prohibited”. Under certain circumstances, “non-vocational elementary and secondary schools may offer non-vocational single-sex classes and extracurricular activities”. “When offering such classes and activities, a school must allow transgender students to participate consistent with their gender identity.”

# Title IX and Transgender Students: USED Guidance



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## Guidance Example

*What about single-sex schools?*

A school district may offer a single-sex non-vocational elementary or secondary school so long as the district provides students of the excluded sex a “substantially equal single-sex school or coeducational school”. Single-sex schools are “permitted under Title IX to set their own sex-based admissions policies.”

# Title IX and Transgender Students: USED Guidance



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## Guidance Example

*How do schools address trips or activities that require overnight accommodations?*

Under Title IX, schools may “provide separate housing on the basis of sex”, but “must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations . . . when not required of other students.” Nothing prohibits a school from honoring students’ voluntary request for single-occupancy accommodations if it chooses.

- The Chicago Guidelines remind school staff: “In no case should a transgender student be denied the right to participate in an overnight field trip because of the student’s transgender status.”

# Title IX and Transgender Students: USED Guidance



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## Guidance Example

*What about other sex-specific activities and rules not directly addressed in the new guidance?*

“Unless expressly authorized by Title IX or its implementing regulations, schools may not segregate or otherwise distinguish students on the basis of their sex, including gender identity, in any school activities or the application of any school rule.”

- Schools may not, for example, discipline or exclude a student for appearing in a manner consistent with their gender identity in yearbook, at school dances or at graduation ceremonies.

# What the DCL says: Observations, in brief



- Schools must take reasonable steps to protect students' privacy related to their transgender status
- ED "may find a Title IX violation when a school limits students' educational rights or opportunities by failing to take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth"
- Nonconsensual disclosure of birth name or sex assigned at birth may violate FERPA



# Title IX and Transgender Students: USED Guidance



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## Guidance Example

*What should schools do to keep students' personally identifiable information (PII) confidential?*

Under FERPA, nonconsensual disclosure of students' personally identifiable information is generally prohibited. Under Title IX inappropriately disclosing PII from education records can interfere with transgender students' right to be treated consistent with their gender identity. Schools may disclose PII only to school personnel with a legitimate educational interest.

- The Massachusetts Guidance advises schools to collect or maintain information about students' gender only when necessary and offers an example: “One school reviewed the documentation requests it sent out to families and noticed that the forms included a line to fill in indicating the student’s gender. The school determined that the requested information was irrelevant to the field trip activities and deleted the line.”

# FERPA Exceptions



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- Under FERPA, records may be disclosed to individual school personnel who have been determined to have a legitimate educational interest in the information
  - The term school personnel is not defined in the statute or regulations, but is generally interpreted to include people such as: instructors, administrators, counselors, health staff, etc.
  - A school official generally has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility

# Title IX and Transgender Students: USED Guidance



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## Guidance Example

*What student information can schools include as directory information?*

Under FERPA, a school “may disclose appropriately designated directory information from a student’s education record if disclosure would not generally be considered harmful or an invasion of privacy.” Schools must allow parents or students over 18 years of age a reasonable amount of time to request that the school not disclose a student’s directory information.

- Directory information may include a student’s name, address, telephone number, date and place of birth, honors and awards, and dates of attendance
- Schools “may not designate student’s sex, including transgender status, as directory information”

# Title IX and Transgender Students: USED Guidance



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## Guidance Example

*How do schools handle requests to change the name or sex designation on a student's records?*

Under FERPA, schools “must consider the request of an eligible student or parent to amend information that is inaccurate, misleading, or a violation of a student’s privacy rights.” Under Title IX, schools “must respond to a request to amend information related to a student’s transgender status consistent with its general practices for amending other students’ records.”

- The DCPS Guidance notes: “A court-ordered name or gender change is not required, and the student does not need to change their official records. If a student wishes to go by another name, the school’s registrar can enter that name into the ‘Preferred First’ name field of [the school’s] database.”

# What additional proactive steps can my district take?



- Adopt classroom practices that do not distinguish or differentiate students based on their gender and eliminate unnecessary gender dividers
- Modify bathrooms and locker rooms: make single-user facilities available to all; add privacy curtains; extend bathroom stall walls from floor to ceiling, etc.
- Consider dress codes that apply the same requirements regardless of gender
- Reinforce commitments to providing safe, healthy, and nondiscriminatory school climates by training all school personnel and students about appropriate and respectful treatment of all students

# What additional proactive steps can my district take?



- Communicate to all students the resources available from school counselors, nurses, social workers, psychologists, etc.
- Identify points of contact and administrative support teams for transgender students
- Update school policies on addressing complaints to include that complaints from transgender students be handled under the same policy used to resolve other complaints of discrimination and harassment

# Questions & Answers



- What happens if a school refuses to comply?
- Where can schools find additional resources on the guidance?
- Other questions?

# Questions & Concerns



If you seek more information on USED technical assistance, or would like a copy of this presentation, please email Sasha Pudelski ([spudelski@aasa.org](mailto:spudelski@aasa.org)).

If you have any questions, please email (Maree Sneed [maree.sneed@hoganlovells.com](mailto:maree.sneed@hoganlovells.com)) or Michelle Tellock ([michelle.tellock@hoganlovells.com](mailto:michelle.tellock@hoganlovells.com)).