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Guidance on Protection of Students in Illinois

A Non-Regulatory Guidance Relating to Protection of Transgender, Nonbinary, and Gender Nonconforming Students

All students in Illinois have the right to attend school in an environment free from discrimination and harassment on the basis of their gender identity. As outlined in this guidance, issued December 2021, schools in Illinois may not discriminate against a student because of their gender-related identity, including treating them differently because their gender-related identity does not align with their designated sex at birth.

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A Non-Regulatory Guidance Relating to Protection of Transgender, Nonbinary, and Gender Nonconforming Students

NOTE: To read this guidance with footnote citations that include references to statute and caselaw, ***view and download the standalone publication of this guidance****.*

I: Introduction

All students in Illinois have the right to attend school in an environment free from discrimination and harassment on the basis of their gender identity. Schools in Illinois may not discriminate against a student because of their gender-related identity, including treating them differently because their gender-related identity does not align with their designated sex at birth.

The Illinois Department of Human Rights ("Department") enforces **the Illinois Human Rights Act ("Act")** to protect students of all gender-related identities from discrimination and harassment and to ensure their full and equal enjoyment of and access to all aspects of a school's programs and activities. Because victims of discrimination and harassment often indicate that fear of reprisal inhibits them from exercising their rights, the Act also explicitly prohibits retaliation against a student.

This document provides non-regulatory guidance regarding compliance with the Act in the context of a school setting, with specific focus on how the Act protects the rights of transgender, nonbinary, and gender nonconforming individuals to equal enjoyment of and access to educational opportunities, programs and activities under Article 5 of the Act. The guidance is intended for school districts, students and their families and caregivers, to better understand their rights and responsibilities under the Act.

Schools in Illinois can implement the protections of the Act by developing policies, procedures, practices and training that ensure a nondiscriminatory and safe school environment for transgender, nonbinary, and gender nonconforming students. Key areas for consideration may include, but are not limited to, full and equal access to gender-based restrooms, locker rooms and changing rooms; participation in gender-based sports and activities; dress code policies; and avoiding conduct that may constitute harassment. These subjects are discussed below in the context of the protections afforded by the Act.

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II: Background On the Act's Protection from Discrimination Based on Gender-Related Identity

On December 6, 1979, the Act was signed into law, providing for broad civil rights coverage for the people of Illinois. In 2006, the Act was expanded to include "sexual orientation" as a distinct protected class and "gender-related identity" within the definition of "sexual orientation." Thus, Illinois became one of the first states in the nation to explicitly provide for the protection of the rights of transgender, nonbinary, and gender nonconforming individuals to be free from discrimination. At the time of the publication of this guidance, an increasing number of states have enacted laws that explicitly prohibit discrimination of students on the basis of both sexual orientation and gender-related identity.

The following sections provide an overview of how the Act protects students of all gender-related identities in the educational environment, and a list of definitions commonly used in the Act.

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II-A: The Meaning of Gender-Related Identity Under the Act

In Illinois, transgender, nonbinary, and gender nonconforming students are protected from discrimination on the basis of their sex, sexual orientation, and gender-related identity as it relates to their participation in educational opportunities, programs, and activities. Under the Act, the definition of "sexual orientation" specifically includes protection based on gender-related identity. A student's gender-related identity may or may not be the same as their designated sex at birth, and could be a range of identities, including male, female, a blend of both, neither, or gender fluid.

In the education context, transgender, nonbinary, and gender nonconforming students have the right to be treated in a manner equal to and consistent with other students whose gender identity conforms to their sex assigned at birth. That right extends to participation in school programs and activities. Schools cannot impose on transgender, nonbinary, and gender nonconforming students special conditions or restrictions on the use of facilities or participation in programs that are not imposed on students whose gender identity conforms to their sex assigned at birth.

Students also have the right to attend school and participate in activities free from harassment on the basis of their sex, sexual orientation or gender-related identity. If a school becomes aware that a student is being harassed and fails to take corrective action to stop the harassment, it may be a violation of the Act.

Although the definition of "sex" is separate from the definition of "sexual orientation" and "gender-related identity" in the Act, these terms are interrelated. All students, including transgender, nonbinary, and gender nonconforming students, are protected by the Act's prohibition on discrimination based on "sex" – which is defined as "the status of being male or female." The Act's definition of "sex" is "broad" and "does not draw distinctions based on genitalia, the sex marker used on a birth certificate, or genetic information." The "status" of being male or female is not an "immutable condition" that is eternally fixed. A student's gender-related identity is one of the factors that may be used to determine a student's sex.

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II-B: Schools as Places of Public Accommodation Under the Act

Since 1979, the Act has prohibited discrimination in "places of public accommodation" such as stores, theaters, banks, health clubs and amusement parks. In 2007, the Act's list of places of public accommodation was expanded to include "non-sectarian" (non-religious) schools. Thus, places of public accommodation include educational institutions – specifically "a non-sectarian nursery, day care center, elementary, secondary, undergraduate or postgraduate school, or other place of education."

The protection of students from discrimination is rooted in **Article 5 of the Act** which prohibits the following types of conduct in the educational context: "(1) the failure to enroll an individual; (2) the denial of access to facilities, goods, or services; or (3) severe or pervasive harassment of an individual when the covered entity fails to take corrective action to stop the severe or pervasive harassment."

In addition to the non-discrimination provisions of the Human Rights Act, federal law also requires Illinois school districts to treat transgender, nonbinary, and gender nonconforming students in a manner consistent with their gender-related identity. Under federal law, discrimination on the basis of gender identity is a form of sex discrimination.

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II-C: Terms and Definitions in the Act

Failure to Enroll - The Act prohibits a school from failing to enroll a student on the basis of their sex, sexual orientation, or gender-related identity.

Denying Access to Facilities, Goods, or Services - The Act makes it a civil rights violation for schools to deny or refuse to a student the full and equal enjoyment of the facilities, goods, and services of the school on the basis of their sex, sexual orientation, or gender-related identity.

Harassment - The Act prohibits "severe or pervasive harassment" of students, which occurs when (1) a person is subjected to unwelcome conduct based on their actual or perceived sex, sexual orientation, or gender-related identity regardless of whether the conduct is verbal, physical, or both; and (2) the conduct "has the purpose or effect of substantially interfering with the individual's...performance or creating an intimidating, hostile, or offensive...environment;" and (3) a school "fails to take corrective action to stop the severe or pervasive harassment." It is important to note that sexual harassment of students in schools is also prohibited by a different article of the Act.

Retaliation - The Act provides that "It is a civil rights violation for a person, or for two or more persons to conspire to [...] retaliate against a person because [they have] opposed that which [they]reasonably and in good faith believe to be unlawful discrimination, [...] sexual harassment in elementary, secondary, and higher education [...] because they have made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act, or because they have requested, attempted to request, used, or attempted to use a reasonable accommodation as allowed by this Act."

Sex - Defined in the Act as "the status of being male or female." A student's sex is not limited to their sex at birth or genitalia, because the legal definition of "status" is broad, and status may change as it is not externally fixed.

Sexual Orientation - Defined in the Act as "actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth.

Disability - Defined in the Act as "a determinable physical or mental characteristic of a person...which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic is unrelated to the person's ability to utilize and benefit from a place of public accommodation [and] also includes any mental, psychological, or developmental disability[.]"

Places of Public Accommodation - Defined in the Act to include a non-sectarian nursery school, daycare, elementary school, junior high, and high school.

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III: How the Human Rights Act Protects Students of All Gender-Related Identities In School Settings

The Act prohibits discrimination against students based on their gender-related identity in multiple contexts. A school may be found to have engaged in discrimination when a school fails or refuses to enroll a student, denies a student equal access to its facilities, goods or services or permits or fails to prevent severe or pervasive harassment of a student. A school is further prohibited from retaliating or taking an adverse action against a student when that student asserts their rights under the Act. The sections below will explain protections under the Act and identify steps to consider for schools, school officials, students and their families and caregivers.

III-A: Failure to Enroll

Under the Act, a school cannot fail to enroll a student, including a transgender, nonbinary, or gender nonconforming student, because of their actual or perceived sex, sexual orientation, or gender-related identity.

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III-B: Denial of Access to Facilities, Goods, or Services

Under the Act, a school cannot deny a student access to its “facilities, goods or services” because of their actual or perceived sex, sexual orientation or gender-related identity.

It is important to note that the Act protects not only mere “access” to facilities, but also the “full and equal enjoyment” of all school services, programs and activities.

In the context of discrimination based on gender-related identity, some of the most common compliance issues occur in the following scenarios:

- III-B-1: **Gender-based Restrooms, Locker Rooms, and Changing Rooms**
- III-B-2: **Student Participation in Gender-Based Sports and Other Gender-Based Activities**
- III-B-3: **Application of Dress Codes**

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III-B-1: Gender-based Restrooms, Locker Rooms, and Changing Rooms

Use of restrooms, locker rooms and changing rooms may not be restricted based upon a student’s physical anatomy or chromosomal sex. A student must be permitted to access restrooms or bathrooms, locker rooms and changing rooms that align with their gender-related identity and without having to provide documentation or other proof of gender.

Under the Act, the discomfort or privacy concerns of other students, teachers, or parents are not valid reasons to deny or limit the full and equal use of facilities based on a student’s gender-related identity. Instead, any student, teacher or other individual seeking more privacy should be accommodated by providing that individual a more private option upon their request, if possible. “The prejudices of others are part of what the [Act] was meant to prevent.” “[T]here is no right that insulates a student from coming in contact with others who are different than them or a Bathroom Privacy Act, unless the behavior violates a school policy or is criminal.”

EXAMPLES OF DISCRIMINATORY TREATMENT

In the context of use of restrooms, locker rooms, and changing rooms, examples of discriminatory treatment prohibited by the Act may include:

- A school policy which prohibits a student from using a facility that corresponds to the student’s gender-related identity.
- Denying a transgender female student the use of the girls’ restrooms and instead offering her use of a unisex restroom.
- Requiring a transgender male student to use a privacy curtain to change clothes while using the boys’ locker room.

Pro Tips for Schools

Examples of Positive School Solutions

In the context of use of **restrooms, locker rooms, and changing rooms**, schools should consider steps including, but not limited to:

- Developing and implementing a policy that allows students to use facilities that align with their gender-related identity, including but not limited to: locker rooms, restrooms, showers, changing rooms, costume rooms/backstage areas, nurse's offices, and athletic training rooms.
- Taking measures to ensure that facilities are safe and secure for all students.
- Providing other options for any student – regardless of gender-related identity – who desires more privacy in school facilities.

✓ Pro Tips for Students & Families

Examples of Solutions for Students & Families

Students and their families or caregivers should consider steps including, but not limited to:

- Discussing how much information they wish to share with the school about the student's gender-related identity and which facilities the student feels most comfortable using.
- Identifying to the school which facilities the student wishes to use and whether they need more privacy.

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III-B-2: Student Participation in Gender-Based Sports and Other Gender-Based Activities

Transgender, nonbinary, and gender nonconforming students often face barriers to participation in school athletics and other gender-based activities. Physical education, school sports teams, and school clubs are considered "facilities, goods and services" under the Act and students are entitled to participate in these activities free from discrimination based on sex, sexual orientation, or gender-related identity.

Allowing students to participate in sports, clubs and other gender-based activities that align with their gender identity is consistent with both Illinois and federal law. Students are protected by the Act not only in their mere "access" to sports, clubs and other extracurricular activities, but in their "full and equal enjoyment" of these activities. Accordingly, students cannot be prevented from access to, full participation in, or the equal enjoyment of extracurricular activities due to their gender-related identity.

Pro Tips for Schools

Examples of Positive School Solutions

In the context of **participation in sports and activities**, schools should consider steps including, but not limited to:

- Developing and implementing policies that allow students to compete on athletic teams and participate in interscholastic activities that are aligned with their gender-related identity.
- Avoiding gender-based activities, including homeroom assignments, classroom activities, school ceremonies, athletics, dances, proms, and school photos.
- Training coaches and volunteers so that inspirational speeches, motivational phrases, locker-room talk, pep rallies, and team chants are inclusive and use gender neutral language.

✓ Pro Tips for Students & Families

Examples of Solutions for Students & Families

Students and their families or caregivers should consider steps including, but not limited to:

- Discussing which teams or activities the student wishes to join and what uniforms or costumes the student would feel most comfortable wearing.
- Communicating with the school about the student's preferences as to extracurricular activities.
- Requesting that uniforms, costumes or other apparel required for classes or extracurricular activities be modified as needed.

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III-B-3: Application of Dress Codes

If a school's policy includes a dress code that is based on gender differences, the rules must not be applied to require transgender, nonbinary, and gender nonconforming students to dress in a manner consistent with their assigned sex at birth. Under the Act, schools must allow every student – regardless of their gender identity – to wear any clothing or makeup that is appropriate under the dress code, even if doing so does not conform to gender-based stereotypes.

A policy that requires a student to dress in a manner that does not align with their gender identity may violate federal law and the Act if it penalizes a student for their gender non-conformance. Thus, when appropriate attire under the school's rules includes dresses or pants, schools may not dictate which students are permitted to wear dresses or pants.

Pro Tips for Schools

Examples of Positive School Solutions

In the context of dress codes, schools should consider steps including, but not limited to:

- Developing and implementing gender-neutral dress codes that are not based on gender- based stereotypes.
- Permitting all students to express themselves in such ways as their dress, hairstyle, and accessories, regardless of their sex assigned at birth or their gender-related identity.

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III-C: Severe or Pervasive Harassment

Under the Act, students have the right to attend school in an environment free from harassment based on their sex, sexual orientation, or gender-related identity. Harassment consists of unwelcome behavior that is so severe or pervasive that it creates a hostile environment, or in other words, it negatively impacts a student's school environment. Name-calling, inappropriate touching, violence, or any behavior that is intentionally meant to intimidate or offend based on the student's sex, sexual orientation or gender-related identity may constitute severe or pervasive harassment. In addition to protection from "harassment" under the Act, the Illinois School Code also prohibits "bullying" of students.

Under the Act, a school's responsibility is not only to prevent harassment but to take corrective action once it has knowledge or should have knowledge that harassment is occurring. When a school becomes aware that a student is being harassed and fails to take corrective action, it may be a violation of the Act.

Pro Tips for Schools

Examples of Positive School Solutions

To avoid the creation of a harassing or hostile school environment, schools should consider steps including, but not limited to:

- Developing and implementing a policy that protects all students from harassment based on gender identity and that contains a procedure to report harassment, whether by other students or school personnel.
- Implementing a process for intervening or taking corrective action when the school becomes aware that a student is being harassed because of their sex, sexual orientation, or gender identity.
- Revising any requirements that students provide their legal name and/or submit medical or psychological documentation in order to use their preferred name or pronoun.

Pro Tips for Students & Families

Examples of Solutions for Students & Families

Students and their families or caregivers should consider steps including, but not limited to:

- Informing the school how a student wishes to be addressed at school events, including in the classrooms, yearbooks, school records, and at school functions.
- Familiarizing themselves with school policies prohibiting harassment and the procedure for reporting harassment.

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III-D: Retaliation

PROTECTED ACTIVITY UNDER THE ACT

Students are protected from retaliation for asserting the available protections from discrimination and harassment under the Act. Retaliation occurs when a school takes an adverse action against a student because the student has engaged in a "protected activity" (conduct that is protected) under the Act. A "protected activity" under the Act includes, but is not limited to:

- Reporting unlawful discrimination or harassment;
- Filing a charge of unlawful discrimination or sexual harassment with the Department; or
- Filing a lawsuit in court alleging a violation of the Act.

Pro Tips for Schools

Examples of Positive School Solutions

To avoid retaliation against a student for engaging in protected conduct, schools should consider steps including, but not limited to:

- Developing and implementing sound policies and procedures addressing student complaints.
- Ensuring students are aware of their right to report discrimination without fear of retaliation.
- Training staff on what conduct constitutes as retaliation under the Act.

Pro Tips for Students & Families

Examples of Solutions for Students & Families

Students and their families or caregivers should consider steps including, but not limited to:

- Familiarizing themselves with school policies prohibiting retaliation and the procedure for reporting retaliation.

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III-E: Additional Legal Protection on the Basis of Disability

The Act also prohibits discriminatory practices in schools because of an individual's disability. The definition of "disability" under the Act has been found to encompass the physical and mental condition of gender dysphoria, which is a medical diagnosis. In addition to prohibiting discrimination, the Act requires schools to reasonably accommodate a student's disability.

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IV: Enforcement and Adjudication of Gender-Related Identity Protections

Violations of the Act are investigated by the Department and adjudicated by the Illinois Human Rights Commission ("Commission"). A student may file a charge with the Department if they believe that they are being discriminated or retaliated against due to their sex, sexual orientation, or gender-related identity. A student may also file a complaint with the Commission and/or with the circuit court once the Department has completed an investigation and issued its findings. Below is a brief overview of procedures at the Department and Commission. More detailed information can also be found at the links provided in each section.

IV-A: Illinois Department of Human Rights (IDHR) Procedures

IV-A-1: Filing a Charge

A parent of a minor student or a student who believes they have experienced discrimination, harassment or retaliation may file a charge of discrimination with the Department within 300 days of the date of the incident (violation). The charge may be submitted by email, regular mail, fax or in person. **Learn more about how to file a charge**, **hours and office restrictions related COVID-19**, or **Contact IDHR directly**.

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IV-A-2: Mediation and Investigation

Once a charge is received, the Department serves notice of the filing of a charge to both the school and the student. The notice also contains an invitation to participate in the Department's mediation services. If both parties agree to mediation, the Department will assign a mediator who will schedule a mediation meeting with the goal of resolving the dispute in a mutually beneficial manner. If any party does not agree to mediation or the parties are unsuccessful reaching a resolution, the Department will assign the charge to an investigator who will conduct an investigation. An investigation includes but is not limited to interviewing of witnesses, requesting the production of documents, and conducting a conference to determine the facts ("a fact-finding conference").

Once the investigation is complete, the Department will issue a determination either dismissing the charge due to a lack of substantial evidence that discrimination occurred or find that substantial evidence exists that discrimination occurred.

- Where the Department dismisses a charge due to lack of substantial evidence or any other reason and the student believes the Department made an error, the student can file a Request for Review of the Department's determination with the Commission or they can file a complaint in the appropriate circuit court.[77]
- If the Department concludes that substantial evidence exists to support the charge, the student may request that the Department prepare and file a complaint on their behalf in the Commission or they may prepare and file their own complaint with either the Commission or the appropriate circuit court.

Learn more about how to file a charge here on the IDHR website.

For further information and resources, including referrals to legal and counseling services, students may also call the **Sexual Harassment & Discrimination Helpline** at 877-236-7703.

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IV-B: Illinois Human Rights Commission (Commission) Procedures

IV-B-1: Overview of the Hearing Process

Once a complaint has been filed with the Commission, an Administrative Law Judge ("ALJ") will be assigned to oversee the adjudication of the case and the matter will be set for a hearing before the ALJ. After the hearing, the ALJ issues a Recommended Order and Decision ("ROD"). If either party objects to the ROD, exceptions may be filed and the ROD will be reviewed by a three-member panel of Commissioners. The panel may adopt, reverse or modify the ROD, or remand the ROD back to the ALJ. If the ROD is adopted, it becomes the Commission's final decision. At any point in the process, the parties may choose to reach a settlement of the case.

IV-B-2: Final Orders Issued by the Commission

If the Commission finds that a school has violated the Act, it can order the school to enroll the student; provide the student access to the school's facility or program; or take corrective action to address the harassment experienced by the student. The Commission can also order a school to file a compliance report and post notices; to pay actual damages, such as emotional damages; to pay attorney's fees and costs; and/or to order "make whole relief" including accrued interest. More detailed information on the Commission's process can be found at **https://hrc.illinois.gov/process.html**.

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IV-C: Relevant Commission Decisions

Commission Decisions Concerning Gender-Related Identity

To date, the Commission has issued awards in at least two cases involving discrimination based on gender-related identity:

- In **Hobby Lobby Stores, Inc. v. Meggan Sommerville**, a Hobby Lobby store denied a transgender woman access to the women's restroom. The Commission found in favor of Sommerville and ordered Hobby Lobby to pay Sommerville $248.00 as reimbursement for out-of-pocket expenses and $220,000.00 as compensation for her emotional distress. The Commission also ordered Hobby Lobby to cease and desist from discriminating against individuals based on their gender-related identity; to permit Sommerville to use Hobby Lobby's women's restroom; and to pay Sommerville $90,000.00 for attorneys' fees, $7,000.00 for legal services, and $50.00 in costs of litigation. Hobby Lobby appealed the decision to the Illinois Second District Appellate Court. The appellate court upheld the Commission's findings that Hobby Lobby violated the Act and determined that the award of compensation for emotional distress was not excessive.

- In **Michael S. v. Komarek Sch. Dist. 94**, a school district denied a transgender male student access to the school's boys' communal restrooms. The Commission found in the student's favor and ordered the school district to pay the student $55,000.00 as compensation for his emotional distress; to cease and desist from engaging in gender-related identity discrimination; to permit the student access to the boys' communal restrooms; to pay the student $100,000.00 for attorneys' fees; and to pay the student $3,610.00 in costs of litigation.

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V: Conclusion

Illinois is a leader in advancing and protecting the rights of all persons regardless of sex, sexual orientation, or gender-related identity. This includes the right of transgender, nonbinary, and gender nonconforming students to attend school free from discrimination and harassment and participate in programs and activities on equal footing with their peers. At a time when some states are seeking to impose discriminatory restrictions, the Act provides protection statewide against discrimination and harassment. The guidance provided above reinforces a collective commitment in Illinois to protect students from discrimination, harassment, and retaliation and to affirm our civil rights laws, which protect the dignity and equal worth of all persons.

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About the Illinois Department of Human Rights

The Illinois Department of Human Rights ("IDHR") is a state agency charged with the enforcement of the Illinois Human Rights Act ("Act"). The Act prohibits unlawful discrimination in Illinois with respect to employment, real estate transactions, financial credit, and public accommodations (including education). IDHR protects and guarantees the rights of all Illinoisans to be free from unlawful discrimination by issuing, receiving, investigating, conciliating, settling and dismissing charges filed in conformity with the Act and by engaging in rulemaking pursuant to the Illinois Administrative Procedure Act to effectuate the Illinois Human Rights Act.

NOTE: To read this guidance with footnote citations that incude references to statute and caselaw, ***view and download the standalone publication****.*

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