

Transgender Student Rights: An Update

By Annemarie K. Harr, Esq.

In our March article, we continued our updates on the quickly evolving law surrounding transgender students and the rights that these students maintain within the school setting. Since that time, the U.S. Department of Justice and the U.S. Department of Education have published a joint letter highlighting these rights, and discussing the steps districts must take in order to ensure their compliance with their legal obligations.

While this letter is not law, nor does it add requirements to applicable law, it is considered to be “significant guidance” and will carry substantial weight in determining whether applicable laws have been violated.

First, it is important to note that the letter succinctly defines the terms that are to be used in discussing transgender students, and in writing transgender policies. These definitions are as follows:

- **Gender Identity:** refers to an individual’s internal sense of gender. A person’s gender identity may be different from or the same as the person’s sex assigned at birth.
- **Sex Assigned at Birth:** refers to the sex designation recorded on an infant’s birth certificate should such a record be provided 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.
- **Gender Transition:** refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives and gender transition can happen swiftly or over a long duration of time.

Under Title IX, a school may not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational

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Annemarie K. Harr

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New FLSA Regulations to Take Effect in December

By Joseph D. Shaulis, Esq.

New federal regulations will require employers, including school employers, to either raise the salaries of some types of employees or pay them overtime wages.



Joseph D. Shaulis

Since the New Deal era, the Fair Labor Standards Act (FLSA) has generally required employers to pay employees a minimum wage, as well as time-and-a-half for more than 40 hours worked in a workweek. The FLSA exempts certain kinds of employees from this requirement – among them, those working “in a bona fide executive, administrative, or professional capacity.” But the FLSA leaves it up to the U.S. Department of Labor to define those terms through regulations.

The current regulations, in place since 2004, allow employers to classify employees in those categories as FLSA-exempt only if they are salaried and earn at least \$455 per week, or \$23,660 a year. (That was a big increase from the regulations in effect from 1975 to 2004, which set the minimum salary at only \$155 per week.)

On May 18, 2016, the Department of Labor announced new regulations that will more than double the minimum salary for exempt employees, boosting it to \$913 per week – or \$47,476 for a year-round worker. (That figure is based on the 40th percentile of earnings for full-time salaried workers in the lowest-wage U.S. Census region.) The new rules take effect on December 1, 2016. And after that, the minimum salary will be adjusted automatically every three years, starting in 2020.

To comply with the new rules, public and private school employers will have to either raise some exempt employees’ salaries to meet the higher threshold, or pay time-and-a-half for hours exceeding 40 in a workweek. Some employees classified as “administrative” who perform academic roles need only earn at least the same salary as “the entrance salary for teachers in the educational establishment...” Other employees affected by the new rules may include:

- Those in areas such as finance, accounting, human

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programs or activities unless expressly authorized to do so under Title IX or its implementing regulations. This includes the prohibition of transgender discrimination as a type of sex discrimination. In order to ensure that students are not being discriminated against on the basis of their gender identity, a school must make certain that transgender students be allowed to participate in activities and access facilities consistent with their gender identities. This includes access to restrooms and locker rooms of the gender that the student identifies with, and equal access to athletics consistent with the gender that the student identifies with.

A school does not meet this requirement by providing an individual restroom or locker room for transgender students, as this will not be considered equal access under Title IX. A district may provide a private restroom or locker room, but it must be accessible to all students, and it should not be designated for any one group.

The Department of Justice and The Department of Education interpret Title IX's requirements to mean that as soon as a student or a student's parent make the school aware that the student will assert a gender identity that is different from previous representations or records, then the school must immediately begin to treat the student consistent with that identity. The Departments caution schools that this notification requirement cannot include a requirement to show any form of medical documentation or identification, and any such requirement could be a violation of Title IX. As a part of treating the student consistent with his or her gender identity, the school must address the student by the name chosen by that student if it is different from his or her given name, and must use pronouns that are consistent with the student's gender identity.

Moreover, schools must ensure a safe and nondiscriminatory environment for all students, including transgender students. If a school is aware that a student is being discriminated against on the basis of gender identity and this is creating a hostile environment, then the school must act swiftly and diligently to ensure that the harassment stops, and does not occur again. The failure to do so may result in a violation of Title IX.

Finally, nonconsensual disclosure of a student's personally identifiable information, such as a student's birth name or sex assigned at birth could violate FERPA. While a school may maintain these records, they should be kept confidential. Additionally, an eligible transgender student or a parent of a transgender student may request to change records in order to make those records consistent with the student's gender identity. Under FERPA, a school must consider the request for an amendment. If the school does not amend the record then it must inform the requestor, who will then be awarded a right to a hearing.

Based on these updates, it is recommended that school review and update their policies to ensure that all students are protected and not being discriminated against in anyway.

As always, do not hesitate to contact our office with any questions regarding this continually evolving area of the law.

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resources, public relations, security and information technology.

- Certificated or licensed professionals such as counselors, nurses, social workers, therapists and athletic trainers.
- Directors, managers and supervisors in nonacademic departments such as maintenance, transportation and food service.

To comply with the new rules, public and private school employers will have to either raise some exempt employees' salaries to meet the higher threshold, or pay time-and-a-half for hours exceeding 40 in a workweek.

But it is impossible to tell from a job title alone whether an employee is FLSA-exempt; that determination can only be made by examining the employees' qualifications and actual job duties to see whether they fit into one of the exempt categories, as defined by the FLSA and Department of Labor regulations.

Not affected by the new rules are elementary and secondary teachers, who are FLSA-exempt regardless of how much they make so long as the primary function of their position is instruction. School employers should consult their solicitor or another attorney with expertise in wage-and-hour matters to determine what impact, if any, the new regulations will have on the client's workforce. The attorneys of Weiss Burkardt Kramer, LLC, are experienced in advising school districts, intermediate units, career and technology centers, and other educational entities regarding FLSA issues. We can help an employer determine whether a certain employees are FLSA-exempt based on their job duties or conduct a comprehensive FLSA compliance audit. For assistance, please call us at (412) 391-9890, or e-mail me (jshaulis@wbklegal.com) or my colleague Nicole Williams (nwilliams@wbklegal.com).

Weiss Burkardt Kramer, LLC

445 Fort Pitt Boulevard Suite 503 Pittsburgh, PA 15219
www.wbklegal.com Phone: (412) 391-9890 Fax: (412) 391-9685

Ira Weiss	iweiss@wbklegal.com
M. Janet Burkardt	jburkardt@wbklegal.com
Jocelyn P. Kramer	jkramer@wbklegal.com
Laura M. McCurdy	lmccurdy@wbklegal.com
Aimee Rankin Zundel	azundel@wbklegal.com
Lisa M. Colautti	lcolautti@wbklegal.com
Nicole W. Williams	nwilliams@wbklegal.com
Rebecca Heaton Hall	rheatonhall@wbklegal.com
Claude C. Council	councilaw@verizon.net
Hobart J. Webster	hwebster@wbklegal.com
Annemarie K. Harr	aharr@wbklegal.com
Joseph D. Shaulis	jshaulis@wbklegal.com

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