



Transgendered Students and Students with Disabilities in Extracurricular Athletics

CAS- CIAC
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Equal Opportunity is Protected by Law

- **Sec. 10-15c. Discrimination in public schools prohibited. School attendance by five-year-olds.**

(a) The public schools shall be open to all children five years of age and over ... and each such child shall have ... an equal opportunity to participate in the activities, programs and courses of study offered in such public schools, at such time as the child becomes eligible to participate in such activities, programs and courses of study, without discrimination on account of race, color, sex, gender identity or expression, religion, national origin or sexual orientation



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Students with Disabilities



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Relevant Laws

- Both IDEA and Section 504 of the Rehabilitation Act impose obligations on school districts relative to the participation of students with disabilities in extracurricular activities
- Both require public school districts to provide a free appropriate public education (FAPE); and
- Provide modifications and accommodations to allow for student access to school programs

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IDEA

- ▶ Applies only to school-aged students (i.e. not post-secondary)
- ▶ Requires that students with disabilities have appropriate opportunities to participate in extracurricular activities
- ▶ IEP must include a statement describing the supplemental aids and services afforded to students, as well as a statement of any program modifications needed to allow for participation
- ▶ Decisions about FAPE made by PPT

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Sports in an IEP

- If participation is recommended through PPT process and is part of the student's IEP, the district will likely need to permit student participation in the required activity.
- Students in out-of-district placements may be allowed to participate in sending school programs, if otherwise eligible.

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Sports in an IEP

- Example:
 - ▶ In an Ohio case, a hearing officer determined that interscholastic athletics were a "necessary component of [the student's] IEP, without which he cannot attain educational benefit or FAPE." Because there was no evidence that the student's participation would harm other athletes, the court ordered that the student be allowed to participate on the teams in accordance with his IEP, notwithstanding student's age.
 - ▶ State athletic association could not penalize school for violating age eligibility requirements.
 - ▶ King v. Mentor Public School District, 34 IDELR 149 N.D. Ohio 2001)

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Connecticut Case

- Student with Down Syndrome turned 19 while in high school and wanted to continue to compete on swim team. PPT had "strongly recommended" that he continue due to improvement in social skills and other educational benefits. District Court granted preliminary injunction, requiring waiver, noting:
 - ▶ No competitive advantage
 - ▶ Not a "red shirt threat"
 - ▶ Part of IEP
 - ▶ Would not fundamentally alter the nature of the program; and
 - ▶ No undue burden on CIAC

Dennin v. CIAC, 94 F.3d 96 (2nd Cir. 1996)

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What is Section 504?

- First federal legislation to address the needs of individuals with disabilities:

"No otherwise qualified handicapped individual in the United States...shall, solely by reason of...a handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."
- Applies only to recipients of federal funds

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How is it different from IDEA?

- Civil rights law
- May include students, employees, parents or members of the public
- Tracks language of ADA
- Applies to all recipients of federal funds, including colleges/universities
- Broader in scope; no defined categories of eligibility
- IDEA students will be covered by Section 504; but not vice versa

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What Does Section 504 Require?

- Must provide FAPE to qualified students with disabilities
 - ▶ Q: *What is FAPE under Section 504?*
- Must also provide qualified students with disabilities opportunity to participate in, and benefit from school programs, including extracurricular activities
 - ▶ Q: *What constitutes a school program?*
- May need to provide an **aid, benefit or service** to afford a disabled student equal opportunity to benefit or participate in school program

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Who is covered under Section 504?

An individual who:

1. Has a physical or mental impairment that substantially limits one or more major life activities of such individual; OR
2. Has a record of such an impairment; OR
3. Is regarded as having such an impairment.

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ADA Amendment Act of 2008

- Impacts Section 504 by expanding coverage
- Explicitly expands definition of major life activity
- “Substantially limits” must be interpreted more broadly than before
- Episodic impairments may qualify
- May not consider mitigating measures (i.e. whether medication lessens impact of a disability)

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New Guidance From OCR

- Form of “Dear Colleague” letter (Jan. 25, 2013)
- Intended to clarify 504 obligations with respect to extracurricular athletic programs
- Result of a report by US Government Accountability Office (GAO) citing the benefits of athletic opportunities and finding that students with disabilities are not being afforded equal opportunities

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Key Highlights from OCR

- District cannot provide “significant assistance” to any organization etc. that discriminates on the basis of disability.
- A school’s 504 obligations supersede “any rule of any association, organization, club, or league that would render a student ineligible to participate, or limit the eligibility ... on the basis of disability.”
 - ▶ Q: Are athletic associations like CIAC covered by Section 504?
 - ▶ Q: What kind of rules does OCR mean?

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Avoiding Generalizations or Stereotypes

- Example # 1: Student with a learning disability participated in lacrosse club during middle school. As a 9th grader, she tries out and makes the high school team. Coach is aware of her disability and believes that students with her particular learning disability would not be able to handle time constraints and pressure of actual games.

OCR Dear Colleague Letter, p.5-6 (Jan. 25, 2013)

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Guaranteed Participation?

- Does this mean that qualified (i.e. 504 eligible) students with disabilities must be allowed to participate in any selective or competitive program?
 - ▶ No.
- What if participation would not be safe or change the nature of the activity?
 - ▶ Key -- Student must be "otherwise qualified."
 - ▶ Q: *What does this mean?*

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OCR is clear that

- Schools may require that a student demonstrate a certain skill level to participate in competitive or selective programs
- While a school must make "reasonable" modifications and provide aids and services necessary for equal participation, it need not do so if it would result in a "fundamental alteration to its program."
- Allowed to have bona fide safety standards


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Determining Reasonable Modifications

- Individualized, case by case determination
- First, must determine if:
 - ▶ modification needed to allow participation?
 - ▶ If yes, then consider whether the modification would:
 - ❖ “**fundamentally alter**” the nature of the activity; or
 - ❖ result in an “**undue burden**”
- In addition to reasonable modifications, must also provide reasonable aids and services


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OCR Examples

- Example #2: High school student has a hearing impairment and wants to run track. At tryouts, he relies on a visual cue to signal the start of the race and, based on speed, is fast enough to make the team in certain events. Before the first meet, the student asks that visual cue be used simultaneously when the starter pistol sounds. The district refuses, out of concern that the cue may be distracting to other runners and trigger complaints. The student is still allowed to practice, but not compete.


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OCR Examples

- Example #3: High school student born with one hand wants to participate on the swim team. Student has requisite level of swimming ability, but has asked to waive the “two-hand touch” finish required of all swimmers in swim meets. District refuses out of concern that it would give the student an unfair advantage.

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OCR Examples

- Example #4: Elementary student with diabetes has a 504 plan which includes help with glucose testing and insulin administration during the school day. The student wants to join the gymnastics club that meets after school. Parents request that the school provide such services/ accommodations to allow for participation in gymnastics; school responds that it is not required to provide the requested services because it is an extracurricular activity.

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OCR's Position on Athletic Opportunities

- Must ensure that students with disabilities participate in school activities to maximum extent appropriate with nondisabled peers.
- Discriminatory to provide (or require) "unnecessarily" separate services, or activities.

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OCR's Position on Athletic Opportunities

- OCR states that if reasonable modifications, aids or services, cannot permit students with disabilities to participate in existing programs, then district "should" create additional opportunities
- Uses language borrowed from Title IX:
 - ▶ Districts should create opportunities in order to meet the "the interests and abilities" of disabled students "as fully and effectively" as met by existing athletic programs
 - ▶ Q: *What does this mean? Is this a change in the law?*

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OCR's Advice

- In case where current programs cannot accommodate disabled students, districts "should" offer athletic opportunities that are "separate or different."
- These separate programs must be "supported equally" by the district.
- Consider creative options:
 - ▶ co-ed teams
 - ▶ district wide programs or regional teams
 - ▶ "allied" or "unified" sports

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Transgendered Students

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Gender Identity and Expression

- Public Act 11-55; effective October 2011
- Prohibits discrimination on the basis of gender identity or expression in employment, public accommodations, the sale or rental of housing, the granting of credit, and other laws which the CHRO has jurisdiction.
- Allows for filing of discrimination suits with CHRO
- Authorizes CHRO to investigate claims of discrimination against students on the basis of gender identity or expression by public schools

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Public Act 11-55

- Gives CHRO jurisdiction to investigate complaints of discrimination on the basis of gender identity or expression against students by **public schools**.
- Requires that public schools be open to all children and to give them an equal opportunity to participate in the activities, programs, and courses of study the schools offer without discrimination on account of gender identity or expression.
- Prohibits boards of education from discriminating on the basis of gender identity or expression in employing or paying teachers

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Public Act 11-55

- Does not apply to religious schools
- Criminal offenses:
 - ▶ Class A misdemeanor (imprisonment up to one year, fine of up to \$2,000 or both) to deprive someone of rights, privileges, or immunities secured or protected by the state or federal laws or constitutions because of the person's gender identity or expression.
 - ▶ Class D felony for anyone to do so based on gender identity or expression while wearing a mask, hood, or other device designed to conceal one's identity (imprisonment for up to five years, fine up to \$5,000 or both).

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What is Gender Identity or Expression?


**Public Act 11-55 defines as:*

A person's gender-related identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth.

*Amending Conn. Gen. Stat. § 46a-51

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How do you show gender identity?

- May be shown by providing evidence in various ways, including:
 - ▶ (1) medical history
 - ▶ (2) care or treatment of the gender-related identity
 - ▶ (3) consistent and uniform assertion of such an identity or
 - ▶ (4) any other evidence that the identity is sincerely held, part of person's core identity, or that the person is not asserting such an identity for an improper purpose

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Guidance for Schools

- Continues to evolve
- CT Safe School Coalition: Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws (Oct. 4, 2012)
- MA Department of Education issued guidance in February 2013 which aligns with CT guidelines
- Both emphasize need to create safe and supportive school environments

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Who determines gender identity?

- MA guidance suggests that gender identity is an "innate, largely inflexible characteristic.... generally established by age four...."
- *Ex: Parents of pre-k biologically female child note that child identified as a boy for as long as they could remember; preferred to play with boys, wanted short hair, rejected wearing girl clothes and ignored anyone who called him by his feminine name. When about to enter K, he said to parents "You have to tell them when I go to kindergarten that I'm a boy."*

Guidance for Massachusetts Public Schools, Creating a Safe and Supportive School Environment: Non Discrimination on the Basis of Gender Identity (Feb. 2013).

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Who determines gender identity?


- Guidance states that districts should accept student's assertion when it is "consistent and uniform," even without medical documentation.

Q: What if student does not present self as asserted gender in all situations (i.e. when visiting relatives)

- School may question assertion if it has "credible basis for believing that the student's gender identity is being asserted for some improper purpose."

(MA Guidance, p. 4)

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Example

- Biologically male middle school student does not express female gender identity at school. She explains to guidance counselor that she does present self as girl at home; hiding female gender identity is causing stress and impacting mental health. Parents and student ask whether it would be okay for her to express her female gender identity at school.

► **Is this sufficient to confirm asserted gender identity without more?**

(MA Guidance, p. 4).

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How should we respond to request to use different name?

- Should consistently refer to student by requested name and pronoun, regardless of birth sex.
- Schools should accurately reflect chosen name on all records
- Need not have legal name change to utilize chosen name
 - Ex: Transgendered girl enters high school and ask principal to inform teachers that even though name is "John," she prefers to go by "Jane."

(MA Guidance, p. 5)

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Same with pronouns

- Use pronouns appropriate to gender identity, regardless of assigned birth sex.
 - ▶ Q: *gender neutral pronouns?*
- Be alert for continued intentional misuse
- May want to ask student privately at start of year how student wants to be addressed

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Student Records and Sharing Information

- Personally identifiable student information such as birth sex, name change, medical records etc. are confidential under FERPA
- Disclosure to other school officials on “need to know” basis
- May wish to consider maintaining birth certificate, health records or similar “original” documents with birth sex/ name apart from cumulative records

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May Parents/Student Request to Amend Records?

- Regardless of birth name/birth sex, guidance suggests that chosen name should be reflected on student records and schools should not circulate records with assigned birth name.
- In lieu of amendment, consider maintaining records using assigned birth name in separate confidential file.
- Standard for amendment under FERPA is if record is inaccurate, misleading or otherwise an invasion of privacy.

*MA DOE has a procedure to update name changes and gender markers in its student information system.

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Examples

- School nurse started new file with student's chosen name, using prior medical information and created separate, confidential folder that contained student's past information and birth name.
- Principal kept student's birth certificate in separate file accessible only to principal, and put note in file saying that principal had viewed birth certificate.

(MA Guidance, p. 7)

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What about “gender markers”?

- Gender marker is the designation on records indicating what student's gender is (M/F).
- Documented gender marker should reflect student's gender identity.

Q: May a district amend records to change a gender marker and if so, what documentation is required?

Q: Can/should you amend original birth certificate?

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What restroom should students use?

- Guidelines consistently provide that students should have access to restroom that corresponds to their gender identity
- If there is reason or desire for privacy or safety, for whatever reason, any student (not just transgendered student) should be provided access to reasonable alternative (i.e. single stall unisex restroom or health office restroom).
- May not require student to use restroom inconsistent with asserted gender identity.

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Same advice for locker rooms...

- Students should have access to locker room that corresponds to asserted gender identity
- If a transgendered student is uncomfortable using the facility consistent with gender identity, school should provide safe and “non-stigmatizing” alternative:
 - ▶ Private area within locker room
 - ▶ Bathroom stall with door
 - ▶ Separate changing schedule
 - ▶ Nearby restroom or nurse’s office

Q: Any alternatives for non-transgendered students?

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Examples

- Transgendered 2nd grader transitioned from female to male; principal informed staff and for rest of year, he used nurse’s bathroom and decided that toward end of year they would review issue in consultation with family.
- Middle school male-to-female transgendered 6th grader socially transitioned after spring break. Used nurse’s restroom for rest of year and other unisex restrooms; starting in 7th grade, used girls’ restroom.

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MA Guidance

- Recognizes that restrooms/changing facilities most challenging issues
- Advocates for case-by-case approach and dialogue with students/parents
- Recommends having sufficient gender neutral restrooms/changing facilities appropriate for size of building
- Discomfort of others is not, in and of itself, reason to deny access to facilities which correspond to student’s asserted gender identity.

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Physical Education Classes

- Should permit transgendered students to participate in any sex-segregated activity based on gender identity
- Most classes generally co-educational

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Athletics

- CT Guidance specifically notes that physical education, like school athletic teams are “educational opportunities.”
- Further notes that even with competitive activities, there is “no empirical reason to believe transgendered students have any particular athletic advantage because of their ability to participate based on their gender identity rather than on their assigned birth sex.”

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MA Guidance is More Direct on Athletics

- All students must be permitted to participate “in a manner consistent with their gender identity”
- MIAA: will rely on gender determinations made by student’s district and will not make its own gender identity determinations
 - Compare with CIAC current bylaws

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Example

- Transgendered girl joins girls' cheerleading with support of school. Team was going to regional competition. There was concern that squad would have to compete as co-ed team, rather than all-girls team. With student's permission, the principal wrote letter that she gave to coach explaining that student was transgendered, member of the team since [date] and according to state law must be permitted to participate as a girl on the girls' cheerleading team.
(MA Guidance, p. 9)

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Other Considerations

- Review dress codes (including for ceremonies like NHS)
- Eliminate gender based sorting (i.e. boys line up here) in favor of alternatives like order of birthdays, alphabetically etc.
- Review gender-distinct policies (i.e. blue graduation gowns for boys; white for girls)
- Education and training
- Intervene to prevent and address bullying/harassment

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QUESTIONS????

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