



State of Illinois

## Non-Regulatory Guidance

# RELATING TO PROTECTION OF TRANSGENDER, NONBINARY, AND GENDER NONCONFORMING STUDENTS UNDER THE ILLINOIS HUMAN RIGHTS ACT

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ILLINOIS DEPARTMENT OF  
 **Human Rights**

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*This document is intended to provide non-regulatory guidance on the subject matter listed above.  
Please direct questions to the addresses identified in the document.*

# Non-Regulatory Guidance RELATING TO PROTECTION OF TRANSGENDER, NONBINARY, AND GENDER NONCONFORMING STUDENTS UNDER THE ILLINOIS HUMAN RIGHTS ACT<sup>1</sup>

## I. INTRODUCTION

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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.<sup>2</sup>

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.<sup>3</sup>

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.<sup>4</sup> The guidance is intended for school districts, students and their families and caregivers, to better understand their rights and responsibilities under the Act.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> These subjects are discussed below in the context of the protections afforded by the Act.

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<sup>1</sup> On June 30, 2019, Governor JB Pritzker issued Executive Order 2019-11, creating the Affirming and Inclusive Schools Task Force (“Task Force”). On January 10, 2020, the Task Force delivered the [Affirming and Inclusive Schools Task Force Report](#) (“Task Force Report”) to Governor Pritzker detailing recommended procedures and best practices for K-12 schools to support transgender, nonbinary, and gender nonconforming students. Among other recommendations, the Task Force recommended that the Department consider issuing guidance to school districts, with specific attention to the rights of transgender, nonbinary and gender nonconforming individuals under the Act.

<sup>2</sup> 775 ILCS 5/1-103(O) (definition of “Sex”); 775 ILCS 5/1-103(O-1)(definition of “Sexual Orientation”); 775 ILCS 5/5-102.2 (defining civil rights violations in “places of education”).

<sup>3</sup> 775 ILCS 5/6-101(A) (retaliation prohibited).

<sup>4</sup> 775 ILCS 5/5-101(A)(11) (defining “places of education” as public accommodations).

<sup>5</sup> This Guidance does not contain an exhaustive list of all forms of discrimination based on gender-related identity under the Act.

<sup>6</sup> In a school climate survey conducted by GLSEN (Gay, Lesbian and Straight Education Network), 62% of transgender, nonbinary and gender nonconforming students reported experiencing gender identity-related discriminatory policies or practices at their school. The [2017 National School Climate Survey](#), GLSEN, p. 19.

<sup>7</sup> The Illinois State Board of Education (“ISBE”) has also issued non-regulatory guidance on these and other issues which can be located on its website and at this link: [ISBE Guidance Supporting Transgender, Nonbinary, and Gender-Nonconforming Students dated March 1, 2020](#).

## II. BACKGROUND ON THE ACT'S PROTECTION FROM DISCRIMINATION BASED ON GENDER-RELATED IDENTITY

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On December 6, 1979, the Act was signed into law, providing for broad civil rights coverage for the people of Illinois.<sup>8</sup> 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.”<sup>9</sup> 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.<sup>10</sup>

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.

### 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.<sup>11</sup> Under the Act, the definition of “sexual orientation” specifically includes protection based on gender-related identity.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> That right extends to participation in school programs and activities.<sup>15</sup> 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.<sup>16</sup>

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<sup>8</sup> 775 ILCS 5/1 et seq. (providing that it is the public policy of the State to “secure for all individuals within Illinois the freedom from discrimination against any individual, because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.”). 775 ILCS 5/1-102(A)(emphasis added).

<sup>9</sup> 775 ILCS 5/1-103(O-1) (defining “Sexual Orientation”). See also Pub. Act 93-0668 (eff. Jan. 1, 2006) (adding “Sexual Orientation” as a protected category).

<sup>10</sup> State Laws, Regulations and Guidance that Affirm Nondiscrimination Protections for LGBTQ+ Students, <https://www.glsen.org/policy-maps> (last visited December 22, 2021).

<sup>11</sup> 775 ILCS 5/5-102.2 (listing civil rights violations in the educational context).

<sup>12</sup> The Act forbids discrimination on the basis of sexual orientation, which includes “actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person’s designated sex at birth.” 775 ILCS 5/1-103(O-1).

<sup>13</sup> See 775 ILCS 5/1-103(O-1) (defining “sexual orientation” as inclusive of gender-related identity).

<sup>14</sup> See *Hobby Lobby Stores, Inc. v. Meggan Somerville*, 2021 IL App (2d) 190362, p. 7. The court held that barring a transgender woman from using the women’s restroom, while allowing women whose “designated sex at birth” is female to use the women’s restroom “falls squarely within the definition of unlawful discrimination under the Act” in the context of employment and public accommodations. *Id.* at 12.

<sup>15</sup> See 775 ILCS 5/5-102.2 (listing civil rights violations in the educational context).

<sup>16</sup> See *Hobby Lobby Stores, Inc.*, 2021 IL App (2d) 190362.

## BACKGROUND ON THE ACT'S PROTECTION FROM DISCRIMINATION BASED ON GENDER-RELATED IDENTITY

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.<sup>17</sup> 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.<sup>18</sup>

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.”<sup>19</sup> 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.”<sup>20</sup> The “status” of being male or female is not an “immutable condition” that is eternally fixed.<sup>21</sup> A student’s gender-related identity is one of the factors that may be used to determine a student’s sex.<sup>22</sup>



### 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.<sup>23</sup> In 2007, the Act’s list of places of public accommodation was expanded to include “non-sectarian” (non-religious) schools.<sup>24</sup> 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.”<sup>25</sup>

<sup>17</sup> 775 ILCS 5/5-102.2 (prohibiting “severe or pervasive harassment” when a school “fails to take corrective action to stop the [harassment].”).

<sup>18</sup> *Id.*

<sup>19</sup> 775 ILCS 5/1-103(0) (defining “sex”).

<sup>20</sup> See *Hobby Lobby Stores, Inc.*, 2021 IL App (2d) 190362, p. 7 (stating that the “status of being a male or a female” means that the designation is not immutable and may be subject to change).

<sup>21</sup> *Id.*

<sup>22</sup> See *Hobby Lobby Stores, Inc.*, 2021 IL App (2d) 190362, p. 9; see also *Bostock v. Clayton County, Georgia*, 590 U.S. \_\_\_, \_\_\_, 140 S.Ct. 1731, 1741-42 (2020) (finding under Title VII, discrimination “because of sex” encompasses discrimination based on transgender status.).

<sup>23</sup> 775 ILCS 5/5-101, 102 (defining places of public accommodation).

<sup>24</sup> See Pub. Act 95-0668 (eff. Oct. 10, 2007). Article 5 of the Act is applicable to all schools – both public and private – with the exception of sectarian (religious) schools. Note, however, that Article 5A of the Act protects all elementary, secondary and higher education students against sexual harassment, in both public and private schools, regardless of religious affiliation. 775 ILCS 5/5A-101.

<sup>25</sup> 775 ILCS 5/5-101(11) (defining educational institutions).

## BACKGROUND ON THE ACT'S PROTECTION FROM DISCRIMINATION BASED ON GENDER-RELATED IDENTITY

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.”<sup>26</sup>

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.<sup>27</sup> Under federal law, discrimination on the basis of gender identity is a form of sex discrimination.<sup>28</sup>

### 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.<sup>29</sup>

**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.<sup>30</sup>

**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;”<sup>31</sup> and (3) a school “fails to take corrective action to stop the severe or pervasive harassment.”<sup>32</sup> It is important to note that sexual harassment of students in schools is also prohibited by a different article of the Act.<sup>33</sup>

**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.”<sup>34</sup>

<sup>26</sup> 775 ILCS 5/5-102.2 (defining civil rights violations in the educational context).

<sup>27</sup> Under Federal law, discrimination against transgender, nonbinary, and gender nonconforming students is considered a form of sex discrimination in violation of Title IX of the Education Amendments of 1972 of the Civil Rights Act, (“Title IX”). The United States Court of Appeals for the Seventh Circuit, the federal appellate court with jurisdiction over Illinois, has agreed with this interpretation, ruling that discrimination on the basis of gender identity is a form of sex discrimination prohibited under Title IX. See *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034, 1046-51 (7th Cir. 2017). Another federal law that protects students regardless of their sexual orientation or gender-related identity is the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution which prohibits treating people differently (unequally) on the basis of sex without a compelling reason. U.S. Const. amend. XIV, §1.

<sup>28</sup> *Whitaker*, 858 F.3d at 1046-51.

<sup>29</sup> 775 ILCS 5/5-102.2(1).

<sup>30</sup> 775 ILCS 5/5-102.2(2).

<sup>31</sup> 775 ILCS 5/2-101(E-1) (defining harassment). Bullying can also be a form of harassment; however, not all bullying is considered harassment under the Act.

<sup>32</sup> 775 ILCS 5/5-102.2(3) (listing harassment as a violation in the educational context).

<sup>33</sup> 775 ILCS 5/5A-101(E) (defining sexual harassment as a civil rights violation in the education context).

<sup>34</sup> 775 ILCS 5/6-101(A) (defining “retaliation”).

## BACKGROUND ON THE ACT'S PROTECTION FROM DISCRIMINATION BASED ON GENDER-RELATED IDENTITY

**Sex** – Defined in the Act as “the status of being male or female.”<sup>35</sup> 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.<sup>36</sup>

**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.”<sup>37</sup>

**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 [.]”<sup>38</sup>

**Places of Public Accommodation** – Defined in the Act to include a non-sectarian nursery school, daycare, elementary school, junior high, and high school.<sup>39</sup>



<sup>35</sup> 775 ILCS 5/1-103(0). See also *Hobby Lobby Stores, Inc.*, 2021 IL App (2d) 190362, p. 9 (stating, “[t]he statutory definition of ‘sex’ cannot be construed to include any requirement related to reproductive organs or anatomy”).

<sup>36</sup> *Id.* at 8-9. (stating, “[t]he phrasing of this definition is broad: it does not draw distinctions based on genitalia, the sex marker used on a birth certificate, or genetic information. Moreover, it uses the word ‘status.’” At law, a “status” is a state of being that may be subject to change.” ... “There is simply no basis in the Act for treating the “status” of being male or female as externally fixed”).

<sup>37</sup> 775 ILCS 5/1-103(0-1) (defining “sexual orientation”).

<sup>38</sup> 775 ILCS 5/1-103(1)(4) and (5) (defining “disability”).

<sup>39</sup> 775 ILCS 5/5-101(A)(11) (defining types of schools).

### III. HOW THE HUMAN RIGHTS ACT PROTECTS STUDENTS OF ALL GENDER-RELATED IDENTITIES IN SCHOOL SETTINGS

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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.<sup>40</sup> A school is further prohibited from retaliating or taking an adverse action against a student when that student asserts their rights under the Act.<sup>41</sup> The sections below will explain protections under the Act and identify steps to consider for schools, school officials, students and their families and caregivers.

#### 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.<sup>42</sup>

#### 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.<sup>43</sup> 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.<sup>44</sup>

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

##### 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.<sup>45</sup> A student must be permitted to access restrooms or bathrooms,<sup>46</sup> locker rooms<sup>47</sup> and changing rooms that align with their gender-related identity and without having to provide documentation or other proof of gender.<sup>48</sup>

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<sup>40</sup> 775 ILCS 5/5-102.2 (defining civil rights violations in the educational context).

<sup>41</sup> 775 ILCS 5/6-101(A) (defining “retaliation”).

<sup>42</sup> 775 ILCS 5/5-102.2(1) (providing “failure to enroll” as a violation in the educational context).

<sup>43</sup> 775 ILCS 5/5-102.2(2) (providing denial of access to facilities, goods or services as a violation in the educational context).

<sup>44</sup> See *Tracy Yates*, Ill. Hum. Rts. Comm’n No 2016CP2172 (Jul. 15, 2019) (finding that requiring a transgender student to use a privacy curtain when changing clothes in the boys’ locker room subjected him to different terms and conditions than similarly-situated non-transgender males); see also *Maday v. Township High Sch. Dist. 211*, No. 17-CH-15791, (Cook County Circuit Court, Ill. September 12, 2019), Hearing on Motion to Dismiss, Tr. 32-33 (finding school’s requirement that a transgender female student change behind a privacy stall in the girls locker room constitutes unlawful denial of “full and equal enjoyment” of the facility, in addition to denial of mere “access” to the facility).

<sup>45</sup> *Michael S.*, Ill. Hum. Rts. Comm’n No. 2015CP3418, 2019 WL 7494510 (Sep. 11, 2019) (finding school’s denial of use of the boys’ communal restroom to a transgender student violated the Act).

<sup>46</sup> *Id.*

<sup>47</sup> *Yates*, Ill. Hum. Rts. Comm’n No 2016CP2172 (Jul. 15, 2019) (finding that students have a right to full and equal access when changing in a locker room).

<sup>48</sup> *Hobby Lobby Stores, Inc.*, 2021 IL App (2d) 190362 at 9 (stating “[B]y defining ‘sex’ broadly as a status, without any reference to anatomy, birth certificates, or genetics, the Act allows for the consideration of gender identity as one of the factors that may be used to determine sex.”).

## HOW THE HUMAN RIGHTS ACT PROTECTS STUDENTS OF ALL GENDER-RELATED IDENTITIES IN SCHOOL SETTINGS

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.<sup>49</sup> 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."<sup>50</sup> "[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."<sup>51</sup>

### 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.<sup>52</sup>
- Denying a transgender female student the use of the girls' restrooms and instead offering her use of a unisex restroom.<sup>53</sup>
- Requiring a transgender male student to use a privacy curtain to change clothes while using the boys' locker room.<sup>54</sup>

#### 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.

<sup>49</sup> *Id.* at 14 (finding that providing to all employees and customers a unisex bathroom as well as bathrooms that corresponded to their sex, but requiring a transgender woman to only use the use the unisex bathroom, was unlawful discrimination.)

<sup>50</sup> *Yates* Ill. Hum. Rts. Comm'n No 2016CP2172 (Jul. 15, 2019), p. 15, citing Eric Sprinkle, Ill. Hum. Rts. Comm'n No 1997SF0536, 2000 ILHUM Lexis 126 (August 7, 2000) (examining the Act's exception for "Facilities Distinctly Private" which pertains to facilities such as "restrooms, shower rooms, bath houses health clubs and other similar facilities."); see 775 ILCS 5/5-103(B). In *Yates*, the Commission concluded that while the Act permits schools to maintain facilities separated by sex, this language does not change the requirement that each student is guaranteed full and equal use of the restroom and locker room that corresponds with their gender identity. See p. 15.

<sup>51</sup> *Yates*, Ill. Hum. Rts. Comm'n No 2016CP2172 (Jul. 15, 2019), p. 15; see also *Students & Parents for Privacy v. United States Dep't of Educ.*, 16-CV-4945, 2017 WL 6629520, at \*5 (N.D. Ill. Dec. 29, 2017) (noting that the presence of a transgender student in a locker room does not "implicate the constitutional privacy rights of others with whom such facilities are shared.").

<sup>52</sup> Such a policy not only violates the Illinois Human Rights Act, it violates Federal law. See Footnote 27.

<sup>53</sup> See *Michael S.*, Ill. Hum. Rts. Comm'n No. 2015CP3418, 2019 WL7494510 (Sep. 11, 2019), p. 15.

<sup>54</sup> See *Yates*, Ill. Hum. Rts. Comm'n No 2016CP2172 (Jul. 15, 2019), p. 3 (finding a violation of the Act's guarantee of "full and equal enjoyment" of the school's facilities because non-transgender students were not required to change behind a privacy curtain).

## HOW THE HUMAN RIGHTS ACT PROTECTS STUDENTS OF ALL GENDER-RELATED IDENTITIES IN SCHOOL SETTINGS

### TIPS for STUDENTS-FAMILIES

#### EXAMPLES OF SOLUTIONS FOR STUDENTS AND 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.

### 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.<sup>55</sup>

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.<sup>56</sup> 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.<sup>57</sup> 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.

### TIPS for STUDENTS-FAMILIES

#### EXAMPLES OF SOLUTIONS FOR STUDENTS AND 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.

<sup>55</sup> 775 ILCS 5/5-102(A)(defining civil rights violations in places of public accommodation).

<sup>56</sup> See *Whitaker*, 858 F.3d 1034, 1046-51 (7th Cir. 2017) (interpreting Title IX to require providing transgender students with sex-segregated spaces that align with their gender identity); see also *Michael S.*, IHRC, ALS No. 16-0003, Charge No. 2015CP3418, 2019 WL 7494510 (Sept. 11, 2019) (interpreting the Act to require providing transgender student with access to restroom that aligned with the student's gender identity).

<sup>57</sup> See *Yates*, Ill. Hum. Rts. Comm'n No 2016CP2172 (Jul. 15, 2019), p. 3 (finding a violation of the Act's guarantee of “full and equal enjoyment” of the school's facilities because non-transgender students were not required to change behind a privacy stall).

## HOW THE HUMAN RIGHTS ACT PROTECTS STUDENTS OF ALL GENDER-RELATED IDENTITIES IN SCHOOL SETTINGS

### 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.<sup>58</sup>

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.<sup>59</sup> 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.<sup>60</sup>

#### 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.

### 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.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> In addition to protection from "harassment" under the Act, the Illinois School Code also prohibits "bullying" of students.<sup>64</sup>

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.<sup>65</sup> 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.<sup>66</sup>

<sup>58</sup> See *Whitaker*, 858 F.3d at pp. 1046-51 (allowing a transgender student to bring a sex discrimination claim based on a theory of sex stereotyping), citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>59</sup> See *Whitaker*, 858 F.3d at 1046-51 (reasoning that "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance.>").

<sup>60</sup> *Id.*, citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding that discriminating against an individual because they fail to conform to gender stereotypes is a violation of federal law).

<sup>61</sup> 775 ILCS 5/2-101(E-1) (defining "harassment").

<sup>62</sup> *Brummett v. Ill. Human Rights Comm'n*, 2021 Ill. App. Unpub. LEXIS 1364, citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (stating, "[w]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances, including 'the frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with... performance.'")

<sup>63</sup> *Id.*

<sup>64</sup> The definition of "bullying" in the Illinois School Code includes (among other categories) bullying on "the basis of actual or perceived... sex...sexual orientation...[and/or] gender-related identity or expression[.]" 105 ILCS 5/27-23.7(a).

<sup>65</sup> *Id.*

<sup>66</sup> 775 ILCS 5/5-102.2(3) (A school can be held liable for the "severe or pervasive harassment of an individual when the [school] fails to take corrective action to stop the severe or pervasive harassment.").

## HOW THE HUMAN RIGHTS ACT PROTECTS STUDENTS OF ALL GENDER-RELATED IDENTITIES IN SCHOOL SETTINGS

### 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:<sup>67</sup>

- 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.

### TIPS for STUDENTS-FAMILIES

### EXAMPLES OF SOLUTIONS FOR STUDENTS AND 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.



<sup>67</sup> Schools should also understand the importance of confidentiality of student records, which includes a student's gender identity, to protect student privacy. For more information, consult ISBE's Guidance. [ISBE Guidance Supporting Transgender, Nonbinary, and Gender-Nonconforming Students, March 1, 2020.](#)

## HOW THE HUMAN RIGHTS ACT PROTECTS STUDENTS OF ALL GENDER-RELATED IDENTITIES IN SCHOOL SETTINGS

### D. Retaliation

#### PROTECTED ACTIVITY UNDER THE ACT

Students are protected from retaliation for asserting the available protections from discrimination and harassment under the Act.<sup>68</sup> 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;<sup>69</sup>
- Filing a charge of unlawful discrimination or sexual harassment with the Department<sup>70</sup>; or
- Filing a lawsuit in court alleging a violation of the Act.<sup>71</sup>

#### 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 retaliation under the Act.

#### TIPS for STUDENTS-FAMILIES

#### EXAMPLES OF SOLUTIONS FOR STUDENTS AND 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.

<sup>68</sup> 775 ILCS 5/6-101(A) (defining “retaliation”).

<sup>69</sup> See Loretta Brown, Ill. Hum. Rts. Comm’n No. 2017CF2807, 2019 WL 4189989 (Aug. 13, 2019) (holding that a Parole Officer did not engage in protected activity when she reported to a Deputy that her Commander was harassing her because she did not complain that she was sexually harassed or harassed based on a protected category under the IHRA); see also Dennis Henry, Ill. Hum. Rts. Comm’n No. 2014SF0444, 2018 WL 6625596 (Nov. 21, 2018) (holding that employee did not engage in protected activity when he filed an internal complaint against his supervisor, because in his complaint, employee did not allege that his supervisor engaged in unlawful discrimination).

<sup>70</sup> 775 ILCS 5/6-101(A) (It is a civil rights violation to retaliate against a person “because [a person] has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act, or because [a person] has requested, attempted to request, used or attempted to use a reasonable accommodation as allowed by this Act.”).

<sup>71</sup> *Id.*

## HOW THE HUMAN RIGHTS ACT PROTECTS STUDENTS OF ALL GENDER-RELATED IDENTITIES IN SCHOOL SETTINGS

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### E. Additional Legal Protection on the Basis of Disability

The Act also prohibits discriminatory practices in schools because of an individual’s disability.<sup>72</sup> 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.<sup>73</sup> In addition to prohibiting discrimination, the Act requires schools to reasonably accommodate a student’s disability.<sup>74</sup>



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<sup>72</sup> 775 ILCS 5/1-102(A) (defining “unlawful discrimination” as including discrimination against a person based on their “disability”); 775 ILCS 5/5-102.2 (defining civil rights violations in context of educational institutions).

<sup>73</sup> *Michael S.*, Ill. Hum. Rts. Comm’n No. 2015CP3418, 2019 WL7494510 (Sep. 11, 2019), p. 18 (finding that gender dysphoria is a “disability” under the Act). “It is understood, the term ‘disability’ may have an overly harsh and derisive connotation. There are many people who are in the protected class [gender-related identity] who do not want to think of themselves as ‘disabled.’ Nevertheless, the legal term which is used to define those individuals qualified for protection is ‘disability.’”). *Id.*

<sup>74</sup> *Id.* at 20 (finding that school failed to accommodate student’s gender dysphoria when it refused to engage in interactive process and discussion about restroom use).

## IV. ENFORCEMENT AND ADJUDICATION OF GENDER-RELATED IDENTITY PROTECTIONS

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Violations of the Act are investigated by the Department and adjudicated by the Illinois Human Rights Commission (“Commission”).<sup>75</sup> 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.

### A. Department Procedures<sup>76</sup>

#### 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; however, at the time of publication of this Guidance, due to the Covid-related pandemic, the Department is not currently accepting in person charges. Please check for updates on the Department’s website at: <https://www2.illinois.gov/dhr/Pages/default.aspx>.

#### 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.<sup>77</sup>
- 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.

More detailed information on this process can be found at <https://www2.illinois.gov/dhr/FilingCharge/Pages/default.aspx>. 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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<sup>75</sup> In addition to the Act, protections from discrimination and harassment in the educational context exist under other Illinois statutes. For more information and resources, see [ISBE Guidance Supporting Transgender, Nonbinary, and Gender-Nonconforming Students, dated March 1, 2020](#).

<sup>76</sup> 56 Ill. Adm. Code Ch. II, §2520 (Procedures of the Department of Human Rights).

<sup>77</sup> 775 ILCS 7A-102(D)(3).

## ENFORCEMENT AND ADJUDICATION OF GENDER-RELATED IDENTITY PROTECTIONS

### B. Commission Procedures<sup>78</sup>

#### 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.

#### 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://www2.illinois.gov/sites/ihrc/process/Pages/default.aspx>.

### 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.<sup>79</sup> 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.<sup>80</sup>
- In Michael S. v. Komarek Sch. Dist. 94, a school district denied a transgender male student access to the school’s boys’ communal restrooms.<sup>81</sup> 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.<sup>82</sup>

<sup>78</sup> 56 Ill. Adm. Code Ch. XI, §5300 (Procedures of the Illinois Human Rights Commission).

<sup>79</sup> Hobby Lobby Stores, Inc., 2021 IL App (2d) 190362.

<sup>80</sup> Id.

<sup>81</sup> Michael S., Ill. Hum. Rts. Comm’n No. 2015CP3418, 2019 WL7494510 (Sep. 11, 2019).

<sup>82</sup> Id.

## 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.



### 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.

To obtain details on IDHR services and programs, call IDHR at 312-814-6200. Visit IDHR online at [www.illinois.gov/dhr](http://www.illinois.gov/dhr).

ILLINOIS DEPARTMENT OF  
**Human Rights**

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