

POLICY SERVICES

ALERTS

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Policy AlertsACB, Nondiscrimination and Gender Identity (Optional Policy); BGE-E, Policy Communication/Feedback; CFD, School-Based Management (School Councils); JL-RB, Student Wellness; Overtime/FLSA

POLICY ALERTS

ACB, Nondiscrimination and Gender Identity

The policy that follows this discussion is *optional* at the discretion of the Governing Board. This policy will not carry an ASBA copyright symbol.

On May 13, 2016, the U.S. Departments of Education and Justice released a document entitled *Dear Colleague Letter on Transgender Students*. In response to inquiries from member school districts regarding this federal guidance, ASBA releases this policy alert to highlight the contents of the letter and to assist those districts that may want to adopt a policy specific to the treatment of transgender students. The letter does not add any new requirements to applicable law, therefore the adoption of such a policy is not legally required and any policies on this topic will not carry ASBA copyright.

As explained in the letter, the information it provides is done so pursuant to the Departments' enforcement authority under Title IX of the Education Amendments of 1972. It does not disclose anything new about Title IX, rather it seeks to settle critical points in the law that may not be fully understood. It is intended to provide "significant guidance" to schools "to ensure that transgender students enjoy a supportive and nondiscriminatory school environment." For further clarity, some definitions are provided in the letter. Transgender describes those individuals whose gender identity is different from the sex they were assigned at birth; gender identity refers to an individual's internal sense of gender. The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations, meaning that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.

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Following that transgender may be included under the classification of sex, it is our belief that existing ASBA model policies concerning nondiscrimination fall within the parameters of the guidance. However, local school boards may find a specific policy on transgender students to be helpful in clarifying the board's position on this issue and providing guidance to school personnel. A sample policy is included that closely adheres to the federal guidance and may be adopted in whole or in part should it be deemed helpful to provide a safe, supportive, and nondiscriminatory learning environment for all students.

Further guidance may be found in the following documents.

DOE and DOJ *Dear Colleague Letter on Transgender Students*

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

Examples of Policies and Emerging Practices for Supporting Transgender Students

<http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>

NSBA's *2016 Transgender Students in Schools: Frequently Asked Questions and Answers for Public School Boards and Staff*

[https://cdn-files.nsba.org/s3fs-public/reports/10711-4559-Transgender Guide V3 Final.pdf?homSpe0I5cqEQ9P66Rov2zwwjrQGRixPa](https://cdn-files.nsba.org/s3fs-public/reports/10711-4559-Transgender%20Guide%20V3%20Final.pdf?homSpe0I5cqEQ9P66Rov2zwwjrQGRixPa)

OPTIONAL POLICY

ACB NONDISCRIMINATION AND GENDER IDENTITY

The Board believes in fostering a safe educational environment in which every student has equal access to all school programs and activities. To that end, the Board is committed to a policy of nondiscrimination in regard to gender identity. This policy will prevail in all matters concerning staff members, students, the public, educational programs and services, and individuals with whom the Board does business.

In order to ensure a safe school environment, schools must respond promptly and effectively to harassment of all students, including harassment based on a student's actual or perceived gender identity, transgender status, or gender transition. Discrimination, harassment, bullying, or sexual harassment complaints involving transgender students shall be handled in the same manner as other discrimination, harassment, bullying, and sexual harassment complaints.

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Definitions

Gender identity: 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: the sex designation recorded on an infant's birth certificate should such a record be provided at birth.

Transgender: 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: 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.

Sexual orientation: an individual's physical or emotional attraction to the same and/or the opposite gender. Gay, lesbian, bisexual, and straight are all examples of sexual orientations. A person's sexual orientation is distinct from a person's gender identity and expression.

Gender expression: how a person manifests their gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerisms. It is usually an extension of their gender identity.

Gender nonconforming: a term for people whose gender expression differs from stereotypical expectations, such as "feminine" boys, "masculine" girls, and those who are perceived as androgynous. Other terms that can have similar meanings are gender diverse or gender expansive.

Communication

When the school administration is notified by a student or the student's parent or guardian that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity. A school may not require transgender students to have a medical diagnosis, undergo any medical treatment, or produce a birth certificate or other identification document before treating them consistent with their gender identity. Every student has the right to be addressed by a name and pronoun that corresponds to the student's gender identity.

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Activities and Facilities

When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity. This includes, but is not limited to, restrooms, locker rooms, shower facilities, housing, and single-sex classes. A school may make individual-user options available to all students who voluntarily seek additional privacy. It may not, however, require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so.

Privacy

Schools must make a reasonable effort to protect information such as a transgender student's birth name or sex assigned at birth in order to protect that student's privacy. While this information may be kept on record, every attempt must be made to keep these records confidential so as to not harm the student in any way. If a student requests that changes be made to their official institutional records in relation to their gender identity, the request for amendment must be handled the same way it would be for any other student.

School staff shall not disclose information that may reveal a student's transgender status to others. Transgender and gender nonconforming students have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how much to share private information. This does not authorize school staff to disclose other medical information about the student.

Adopted: date of Manual adoption

CROSS REF:

AC - Nondiscrimination/Equal Opportunity
ACA - Sexual Harassment
GBA - Equal Employment Opportunity
GCF - Professional Staff Hiring
GDF - Support Staff Hiring
JB - Equal Educational Opportunities
JI - Student Rights and Responsibilities
JICK - Student Violence/Harassment/Intimidation/Bullying
JICL – Dating Abuse
JII - Student Concerns, Complaints and Grievances
JK - Student Discipline
JR - Student Records
KB - Parental Involvement in Education

LEGAL REF:

20 U.S.C. 1681, Education Amendments of 1972, Title IX
Family Education Rights and Privacy Act (FERPA)
(20 U.S.C. § 1232g; 34 CFR Part 99)

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BGE-E, Policy Communication/Feedback

Policy Services promotes accessing policy documents in the Policy Manual through technological services and, therefore, encourages districts and schools to provide such access in order to avoid the outdated and time-consuming paper search process. Exhibit BGE-E has been deleted from the manual as it merely gives direction to policy documents requiring replacement or deletion.

CFD, School-Based Management (School Councils)

The duties and membership of school councils shall be as specified in A.R.S. 15-351, except as provided in A.R.S. 15-352. There must be an equal number of teachers and parents of pupils enrolled in the school on the council and they shall constitute a majority of the council members. The principal will serve as chairperson of the school council unless another person is elected by a majority of the school council members. The numbers in each category of membership listed in CFD have been removed from the model document.

JL-RB — Student Wellness

Recess policies in A.R.S. 15-108 were repealed by Laws 2011, 1st Regular Session, Chapter 344, Section 3, and effective July 20, 2011. The related provisions in this regulation are not mandatory. However, districts may maintain recess requirements at the discretion of the Governing Board.

Overtime/FLSA

The Fair Labor Standards Act (FLSA) is addressed or referenced in documents GCCC-EE, Professional/Support Staff Leaves of Absence Without Pay; GDBC, Support Staff Supplementary Pay/Overtime; GDL, Support Staff Workload; and GDL-R, Support Staff Workload (Fair Labor Standards Act: Overtime Compensation).

The United States Department of Labor has recently issued the following pertaining to overtime:

Final Rule: Overtime

In 2014, President Obama directed the Secretary of Labor to update the overtime regulations to reflect the original intent of the Fair Labor Standards Act, and to simplify and modernize the rules so they're easier for workers and businesses to understand and apply. The department has issued a final rule that will put more money in the pockets of middle class workers – or give them more free time. (<https://www.dol.gov/featured/overtime>)

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The Department published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on July 6, 2015 ([80 FR 38515](#)) and invited interested parties to submit written comments on the proposed rule at www.regulations.gov by September 4, 2015. The Department received over 270,000 comments in response to the NPRM from a variety of interested stakeholders. The feedback the Department received helped shape the Final Rule.

On May 18, 2016, President Obama and Secretary Perez announced the publication of the Department of Labor's final rule updating the overtime regulations, which will automatically extend overtime pay protections to over 4 million workers within the first year of implementation. (<https://www.dol.gov/whd/overtime/final2016/>)

Key Provisions of the Final Rule

The Final Rule focuses primarily on updating the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt. Specifically, the Final Rule:

- 1. Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South (\$913 per week; \$47,476 annually for a full-year worker);*
- 2. Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally (\$134,004); and*
- 3. Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption.*

Additionally, the Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level.

The effective date of the final rule is December 1, 2016. *The initial increases to the standard salary level (from \$455 to \$913 per week) and HCE total annual compensation requirement (from \$100,000 to \$134,004 per year) will be effective on that date. Future automatic updates to those thresholds will occur every three years, beginning on January 1, 2020.*

The final rule does not make any changes to the duties test for executive, administrative and professional employees.

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In response to the new overtime rule, employers can

- A. Pay time-and-a-half for overtime work,,*
- B. Raise workers' salaries above the new threshold,*
- C. Limit workers' hours to be 40 per week,*
- D. Some combination of the above.*

The United States Department of Labor, Wage and Hour Division, website provides answers to many questions pertaining to overtime pay.

<https://www.dol.gov/whd/overtime/final2016/faq.htm#8>

One such question under the heading *GENERAL* asks if there is an exemption for schools and institutions of higher education from either the FLSA (Fair Labor Standards Act) or the Department's overtime regulations governing white collar workers?

The verbatim answer is that *Schools and institutions of higher education are generally covered by the FLSA's minimum wage and overtime provisions. Several provisions apply, however, to many employees at these institutions that exempt them from the Final Rule. **Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing. "Teachers" include, for example, regular academic teachers, kindergarten or nursery school teachers, teachers of gifted or disabled children, professors, adjunct instructors, teachers of skilled and semi-skilled trades and occupations, home economics teachers, vocal or instrument music teachers, and under certain circumstances, athletic coaches and assistant coaches.** Although a preschool may engage in some educational activities, **preschool employees whose primary duty is to care for the physical needs of the facility's children would not meet the requirements for the exemption as a bona fide teacher.** Generally, the Department views graduate and undergraduate students who are engaged in research under a faculty member's supervision in the course of obtaining a degree to be in an educational relationship and not an employment relationship with the school or with a grantor. As such, the Department will not assert such workers are entitled to overtime. In addition, the administrative personnel that help run higher education institutions and interact with students outside the classroom, such as department heads, academic counselors and advisors, intervention specialists and others with similar responsibilities are subject to a special salary threshold that does not apply to white-collar employees outside of higher education. Instead, they are not eligible for overtime if they are paid at least as much as the entrance salary for teachers at their institution. Finally, public universities or colleges that qualify as a "public agency" under the FLSA may compensate overtime-eligible employees through the use of compensatory time off in lieu of cash overtime premiums.*

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This Final Rule updates the regulations for determining whether white collar salaried employees are exempt from the Fair Labor Standards Act's minimum wage and overtime pay protections. They are exempt if they are employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the Department of Labor's regulations at 29 CFR part 541. This exemption from the FLSA is sometimes referred to as the "white collar" or "EAP" exemption.

<https://www.dol.gov/featured/overtime>

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