

## Discriminating on the basis of gender-identity violates Title IX: The U.S. Departments of Education and Justice Dear Colleague Letter on the civil rights of transgender students

May 16, 2016

The U.S. Department of Education's Office for Civil Rights (OCR) has previously signaled its position on the rights of and protections for transgender students under Title IX in complaint resolutions, court filings and guidance documents. On [May 13, 2016](#), the U.S. Departments of Education (ED) and Justice (DOJ) provided more definitive guidance for schools and colleges in the form of a [Dear Colleague letter](#).

While Dear Colleague letters do not add requirements to existing law, they are helpful in understanding how an agency interprets the law. And in this letter, ED and DOJ make clear how they will evaluate a school's compliance with Title IX on issues concerning transgender students: a student's gender identity will be treated as the student's sex.

Title IX prohibits discrimination on the basis of sex in educational programs and activities that receive federal financial assistance, and, according to the guidance issued on May 13, excluding, separating, denying benefits to or otherwise treating a student differently based on the student's gender identity or transgender status is unlawful sex-based discrimination. <sup>1</sup>

The guidance points out that this obligation applies regardless of objections or concerns that may be raised by other students, parents or community members, because "[a]s is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students."

Such community objections and concerns have received a lot of attention in the news media recently, especially on the issue of who may use which restroom. However, in schools receiving federal funding, ED and DOJ have stated in no uncertain terms that transgender students must be allowed to use restrooms or locker rooms consistent with their gender identity. Schools can accommodate the needs of those who raise privacy concerns by offering individual-user restrooms or other privacy options that any student can use, but transgender students must not be required to use them if other students are not subject to the same requirement.

Below is an overview of the topics addressed in the guidance letter.

### Key Terms

The guidance includes a definition of four key terms: *gender identity*, *sex assigned at birth*, *transgender* and *gender transition*.

1. *Gender identity* – an individual's internal sense of gender; may be different from sex assigned at birth
2. *Sex assigned at birth* – the sex designation recorded on an infant's birth certificate
3. *Transgender* – individuals whose gender identity is different from the sex they were assigned at birth
4. *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

Complying with Title IX: The ED/DOJ Joint Guidance

When a student (or parent/guardian) provides notification that the student will assert a different gender identity...

#### *Schools must NOT*

- Require the transgender student to have a medical diagnosis or undergo medical treatment.
- Require the transgender student to produce a birth certificate before treating the student consistent with his or her gender identity.
- Require transgender students to use facilities such as restrooms or locker rooms inconsistent with their gender identity.
- Require transgender students to use individual-user facilities when other students are not required to do so.
- Discipline or exclude students for behaving in a manner consistent with their gender identity or that does not conform to sex-based stereotypes. (This could come up in connection with yearbook photographs, school dances, graduation ceremonies, etc.)

#### *Schools must*

- Treat the student consistent with his or her gender identity. Failing to do so may create or contribute to a hostile environment in violation of Title IX.
- Respond to harassment that targets a student based on gender identity, transgender status or gender transition. The guidance indicates that this is harassment based on sex under Title IX.
- Use names and pronouns consistent with a transgender student's gender identity.
- Protect transgender students' privacy. While schools may maintain a student's birth name or sex assigned at birth, nonconsensual disclosure can violate Title IX (and FERPA). Also note that schools may not designate students' sex (which includes transgender status) as directory information.
- Respond to a transgender student's request to amend education records consistent with the school's practice for amending other students' records. Complaints about the handling of such requests must be resolved under the school's Title IX grievance procedure.
- Allow students access to housing consistent with their gender identity. Schools cannot require transgender students to stay in single-occupancy accommodations (but may honor a student's voluntary request), nor can schools require transgender students to disclose personal information that is not required of other students.

#### *Schools may*

- Operate sex-segregated athletics teams (for contact sports<sup>2</sup> or when team selection is based upon competitive skill).<sup>3</sup>
- Operate single-sex classes (under certain circumstances). Note however that transgender students must be allowed to participate consistent with their gender identity.
- Operate single-sex schools (under certain circumstances) with sex-based admission policies.
- Have social fraternities or sororities – Title IX does not apply to their membership practices.

In connection with the guidance letter, ED also issued a compilation of [example policies and emerging practices](#) that other schools have adopted in addressing these issues. While the examples are not departmental requirements, they could be helpful to districts as they work to meet the needs of transgender students.

#### **Continued Litigation May Create Contrasting Case Law**

While OCR's new guidance creates clarity on how it intends to enforce Title IX, the courts are still deciding whether and how to treat OCR's expanding guidance when deciding particular cases. For example:

- In North Carolina, both the [State](#) and the [DOJ](#) have filed lawsuits in connection with a law passed by North Carolina that mandates public agencies, including the University of North Carolina, require transgender people to use restrooms that correspond to the sex on their birth certificate.
- On May 4, 2016, the group "Students and Parents for Privacy" filed suit to block a [Resolution Agreement](#) entered into between the U.S. Department of Education and Township High School District 211 that permitted a student to use the

locker room that was consistent with her gender identity. (1:16-cv-04945, U.S. Dist. Ct. N.D. Illinois)

- In Virginia, a transgender student challenged a local school board policy banning him from the boys' restroom. A three-judge panel of the U.S. Court of Appeals for the Fourth Circuit ruled that the U.S. Department of Education's interpretation of its regulations as it relates to restroom access by transgender individuals was entitled to deference. (A petition for rehearing *en banc* was filed on May 3, 2016.) (*G. G. v. Gloucester Cnty. Sch. Bd.*, 2016 U.S. App. LEXIS 7026 (4th Cir. Va. Apr. 19, 2016))
- In *Johnston v. University of Pittsburgh*, 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015), the Court held that a university did not discriminate against a transgender male student in prohibiting him from using sex-segregated facilities, as Title IX protects against discrimination on the basis of sex and not on the basis of gender identity. The Court interpreted "on the basis of sex" only to mean the traditional concept consistent with one's birth or biological sex.

While the courts work through these issues, however, schools and colleges that do not comply with this guidance could be subject to an OCR investigation, monitoring and loss of federal funding for failure to comply with OCR guidance. Schools should review their policies and procedures and consider how best to ensure that they are protecting the rights of transgender students.

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<sup>1</sup> This prohibition applies unless there is a specific exception under Title IX or its implementing regulations. See 34 CFR § 106.31(a).

<sup>2</sup> Contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact. 34 CFR §106.41(b).

<sup>3</sup> The National Collegiate Athletic Association (NCAA) and the Ohio High School Athletic Association (OHSAA) have adopted policies regarding the inclusion of transgender athletes. Note that compliance with any rule or regulation of any organization, club, athletic or other league does not obviate the requirement to comply with Title IX and its implementing regulations. 34 CFR §106.6(c).

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