

U.S. Departments of Education and Justice Release Joint Guidance Related to Transgender Students and Title IX

Title IX of the Education Amendments of 1972 forbids institutions that receive federal financial assistance to discriminate on the basis of sex.¹ On May 13, the U.S. Departments of Education (“ED”) and Justice (collectively, “the Departments”) released joint guidance (“Joint Guidance”) that addresses under Title IX discrimination based on a student’s gender identity, including transgender status. The Joint Guidance sets out the Departments’ interpretation of Title IX and federal student privacy law with respect to transgender students and offers examples of policies and practices.

This issue brief summarizes select aspects of the Joint Guidance. Although the materials speak broadly in terms of “schools” and focus on elementary and secondary schools, there is no doubt that the Departments consider the Joint Guidance applicable in the post-secondary education context. A footnote underscores that the Joint Guidance is directed to institutions “at all educational levels, including school districts, colleges, and universities.”²

The Joint Guidance package has two parts:

- An 8-page Dear Colleague Letter (“[Dear Colleague Letter](#)”) sets forth the Departments’ interpretation of Title IX and their beliefs about what Title IX requires of institutions with respect to transgender students. The Departments have designated the Dear Colleague Letter as “significant guidance”, which means it may reasonably be anticipated to raise novel legal or policy issues arising out of legal mandates or the President’s priorities.³ The Dear Colleague Letter states that the Departments’ interpretation is consistent with courts’ and other agencies’ interpretations of federal laws that prohibit sex discrimination.⁴ Case law related to discrimination against transgender students is limited and undeveloped. There may be challenges to the Departments’ interpretation of Title IX. In addition, whether, under what circumstances, when, and to what extent the federal government would move to terminate federal funding if one or more of the Departments’ Title IX interpretations are not followed are questions as yet unanswered.
- A 19-page companion [Examples of Policies and Emerging Practices](#) (“Policies and Practices”), authored by ED’s Office of Elementary and Secondary Education, sets forth some common questions on topics such as school records, student privacy, and use of terminology, and it explains how some state and school district policies have answered those questions. The Dear Colleague Letter encourages institutions to consult the Policies and Practices for practical ways to satisfy Title IX’s requirements; the Policies and Practices document states, however, that

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inclusion of a particular example does not constitute ED's endorsement of that policy or practice.⁵ Although many of the examples are derived from K-12 school districts, the Policies and Practices may be instructive to higher education institutions.

Terminology

The Joint Guidance provides definitions for a variety of commonly used terms.⁶ As used in the Dear Colleague Letter:

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

The Policies and Practices document provides examples of policies that define relevant terms, including terms used to account for the diverse ways in which individual students may wish to express their gender identity.⁷

The Departments’ Interpretation of Title IX Requirements With Respect to Transgender Students

The Departments treat a student’s gender identity as the student’s sex for purposes of Title IX. In other words, “a school must not treat a transgender student differently from the way it treats other students of the same gender identity.”⁸ For example, an institution must treat a transgender male (*i.e.*, someone who identifies as male and was assigned the sex of female at birth) the same as it treats other students with a male gender identity. In addition, the Dear Colleague Letter indicates that an institution must provide transgender students equal access to educational programs and activities even when other students, parents or community members object because “the desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students.”⁹

In the context of these general principles, the Dear Colleague Letter and the Policies and Practices document describe the Departments’ views about how Title IX applies to particular situations that involve transgender students. We present these views in the form of questions with the Departments’ position expressed as the answer.

- **To comply with Title IX, what responsibility does an institution have to provide a safe and nondiscriminatory environment for transgender students?** According to the Departments, harassment that targets a student based on gender identity, transgender status or gender transition is harassment based on sex. The Dear Colleague Letter explains that an institution that fails to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX.¹⁰
- **To comply with Title IX, when is an institution required to begin to treat a student consistent with the student's gender identity?** According to the Departments, when a student or student's parent or guardian notifies the administration that the student will assert a gender identity that differs from previous representations or records, the institution must begin to treat the student consistent with the student's stated gender identity.¹¹ The Policies and Practices document provides examples of policies that address how a parent or student might provide notice that the student has or will undergo gender transition.¹²
- **Is medical diagnosis or treatment required? Must a student's identification documents match the student's gender identity?** According to the Departments, the answer to both questions is "no". The Dear Colleague Letter indicates that Title IX does not require medical diagnosis or treatment in order for a student to be treated consistent with the student's gender identity, and an institution may violate Title IX if it requires a student to produce identification documents that reflect the student's gender identity because a student may be unable to obtain documentation.¹³ The Policies and Practices document provides examples of institutional policy on how to confirm a student's gender identity—generally, by relying on students' expression of their gender identity.¹⁴
- **How must an institution refer to a transgender student?** The Dear Colleague Letter together with the Policies and Procedures document seem to suggest that an institution must use pronouns (e.g., he/she/they) and names consistent with a transgender student's gender identity and related preferences, even if education records or identification documents indicate a different sex.¹⁵ The Departments view appropriate use of name and pronouns as a matter of privacy as well as of Title IX compliance.¹⁶ The Policies and Procedures document offers examples of policies to prepare staff and students to use a student's preferred pronouns and newly adopted name, if any.¹⁷
- **How must an institution provide access to sex-segregated facilities (e.g., restrooms and locker rooms) to transgender students?** According to the Departments, when an institution provides sex-segregated facilities and activities, transgender students must be allowed to participate in activities and access facilities consistent with their gender identity.¹⁸ For example, under the Dear Colleague Letter, an institution may not require transgender students to use restrooms and locker rooms inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. The Dear Colleague Letter indicates that an institution may make individual-user facilities available to all students who voluntarily seek privacy.¹⁹ Examples of institutional practices to protect the privacy rights of all students in restrooms and locker rooms are provided in the Policies and Practices document.²⁰

- **How must an institution provide access to sex-segregated athletic teams to transgender students?** The Dear Colleague Letter’s statements regarding athletics are opaque and leave much unanswered about the Departments’ expectations. According to the Departments, an institution with sex-segregated athletic teams may not “adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others’ discomfort with transgender students.”²¹ The Dear Colleague Letter also indicates that Title IX allows “age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students’ participation on the competitive fairness or physical safety of the sport.”²² How those two statements interact, and the extent to which an institution must allow a transgender student to compete on a sex-segregated athletic team based on the student’s gender identity, is unclear.
 - The Dear Colleague Letter notes that the National Collegiate Athletic Association (“NCAA”) “reported that in developing its [Policy on Transgender Student-Athlete Participation (“NCAA Policy”)] for participation by transgender students in college athletics, it consulted with medical experts, athletics officials, [and] affected students”.²³ However, the Departments do not address their interpretation of Title IX in terms of the NCAA Policy. The NCAA Policy sets forth policies regarding participation of (i) student-athletes undergoing hormonal treatment for gender transition, including different policies for transgender men and women, and (ii) transgender student-athletes not taking hormone treatment, including different policies for transgender men and women.²⁴
- **How must an institution assign housing and overnight accommodations for transgender students?** According to the Departments, if an institution provides separate housing on the basis of sex, it must allow transgender students to access housing consistent with their gender identity and may not require them to stay in single-occupancy housing if not required of other students. An institution may accommodate a transgender student’s request for single-occupancy housing, if it chooses to do so.²⁵
- **How must an institution approach other sex-specific activities and rules?** According to the Departments, an institution may not discipline students or exclude them from participating in activities because they present themselves or behave in a way consistent with their gender identity. For example, institutions must allow students to participate in yearbook photographs, at social activities, and at graduation events dressed in a way consistent with their gender identity.²⁶
- **How does Title IX’s application to transgender students apply to single-sex institutions?** The Dear Colleague Letter notes that “Title IX does not apply to the admissions policies” of a few types of educational institutions.²⁷ According to the Departments, “[t]hose schools are therefore permitted under Title IX to set their own sex-based admissions policies.”²⁸ The Dear Colleague Letter also states that “[n]othing in Title IX prohibits a private undergraduate women’s college from admitting transgender women if it chooses to do so.”²⁹

- **How does Title IX’s application to transgender students apply to social fraternities and sororities?** The Dear Colleague Letter notes that “Title IX does not apply to the membership practices of social fraternities and sororities.”³⁰ According to the Departments, “[t]hose organizations are therefore permitted under Title IX to set their own policies regarding the sex, including gender identity, of their members.”³¹ The Dear Colleague Letter also states that “[n]othing in Title IX prohibits a fraternity from admitting transgender men or a sorority from admitting transgender women if it so chooses.”³² The Dear Colleague Letter does not address the circumstances under which, and extent to which, an institution may have obligations with respect to social fraternities and sororities under the Departments’ interpretation of Title IX.

Privacy Considerations

The Departments may find a Title IX violation when an institution limits students’ educational rights or opportunities by “failing to take reasonable steps to protect students’ privacy related to their transgender status, including their birth name or sex assigned at birth.”³³ According to the Departments, an institution may maintain records with that information, but such records must be kept confidential.³⁴ The Dear Colleague Letter explains that nonconsensual disclosure of a student’s birth name or sex assigned at birth may violate the Family Educational Rights and Privacy Act (“FERPA”),³⁵ which generally prohibits nonconsensual disclosure of education records and personally identifiable information derived from such records (“PII”).³⁶

- **May an institution share a student’s transgender status, and personally identifiable information related to such status (e.g., student’s birth name or sex assigned at birth), with institutional personnel?** With respect to this question, the Dear Colleague Letter focuses on FERPA’s “school official” exception, which allows nonconsensual disclosure of PII to institutional personnel who have a legitimate educational interest in such PII. The Dear Colleague Letter emphasizes that institutional personnel must have a legitimate educational interest in PII pertinent to a student’s transgender status in order for such PII to be disclosed to such personnel, even when a student has disclosed the student’s transgender status to other members of the institutional community.³⁷ The Policies and Practices document offers examples of how institutions protect internally transgender students’ privacy regarding their transgender status.³⁸
- **May an institution designate students’ sex as directory information under FERPA?** According to the Dear Colleague Letter, no. FERPA allows institutions to designate certain information as “directory information” and to disclose that information without consent, if such disclosure would not generally be harmful and a student has not opted out of disclosure.³⁹ The Dear Colleague Letter indicates that institutions may not designate students’ sex, including transgender status, as directory information “because doing so could be harmful or an invasion of privacy.”⁴⁰
- **How must an institution handle a request to amend or correct education records to make the records consistent with a student’s gender identity?** The Dear Colleague Letter indicates that an institution must handle such a request consistent with FERPA’s record

amendment requirements and the institution’s policies related to record amendments. Updating a student’s records “will help protect privacy and ensure personnel consistently use appropriate names and pronouns.”⁴¹ The Policies and Practices document offers examples of policies and procedures for responding to students’ requests to change their education records.⁴²

¹ Title IX does not apply to an educational institution that is controlled by a religious organization to the extent that application of Title IX would be inconsistent with the religious tenets of the organization. A chart listing all institutions that currently hold a religious exemption or have a religious exemption request pending with the U.S. Department of Education Office for Civil Rights (“OCR”) is available at <http://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/rel-exempt-pr.html>. The Joint Guidance that is the subject of this issue brief does not address the religious exemption available under Title IX or its scope as applied to discrimination against transgender students. OCR has granted exemptions from Title IX to religious institutions based on religious tenets regarding gender identity, including transgender status.

² U.S. Department of Justice and U.S. Department of Education, Dear Colleague Letter on Transgender Students 1 n.1 (May 13, 2016), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (hereinafter, “Dear Colleague Letter”).

³ Dear Colleague Letter at 1; *see* Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at* www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf.

⁴ Dear Colleague Letter at 2.

⁵ *Id.* at 1; U.S. Department of Education, Office of Elementary and Secondary Education, Office of Safe and Healthy Students, Examples of Policies and Emerging Practices for Supporting Transgender Students ii (May 2016), *available at* <http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf> (hereinafter, “Policies and Practices”).

⁶ Dear Colleague Letter at 1-2; Policies and Practices at 14-15.

⁷ Policies and Practices at 14-15.

⁸ Dear Colleague Letter at 2; *see also* ED OCR, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (Apr. 2014), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf> (“All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX.”).

⁹ Dear Colleague Letter at 2.

¹⁰ *Id.* at 2-3.

¹¹ *Id.* at 2.

¹² Policies and Practices at 1.

¹³ Dear Colleague Letter at 2.

¹⁴ Policies and Practices at 1-2.

¹⁵ *See* Dear Colleague Letter at 3 and Policies and Practices at 4-5.

¹⁶ Policies and Practices at 4-5.

¹⁷ *Id.*

¹⁸ Dear Colleague Letter at 3.

¹⁹ *Id.*

²⁰ Policies and Practices at 7-8.

²¹ Dear Colleague Letter at 3.

²² *Id.*

23 Dear Colleague Letter at 3 n.18.

24 NCAA Office of Inclusion, NCAA Inclusion of Transgender Student Athletes 13 (Aug. 2011), *available at* https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

25 Dear Colleague Letter at 4.

26 Id.

27 Id. at 3 (emphasis added); *see also* 34 C.F.R. § 106.15(d). ED's Title IX regulations provide in pertinent part that "[n]o person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission". 34 C.F.R. § 106.21(a). ED's Title IX regulations also effectively provide that such prohibition does not apply to a few types of institutions.

28 Id. at 3-4.

29 Id. at 4.

30 Id.

31 Id.

32 Id.

33 Id.

34 Id.

35 Id.

36 *See* 20 U.S.C. § 1232g(b)(1)-(2); 34 C.F.R. pt. 99, subpt. D.

37 Dear Colleague Letter at 4.

38 Policies and Practices at 4.

39 *See* 20 U.S.C. § 1232g(a)(5); *id.* § 1232g(b)(1); 34 C.F.R. § 99.3; *id.* § 99.37.

40 Dear Colleague Letter at 5.

41 Id.

42 Policies and Practices at 6.