

# THE NATIONAL LAW REVIEW

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## Departments of Education and Justice Release Guidance on Maintaining Nondiscriminatory Educational Communities for Transgender Students

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Friday, May 27, 2016

Title IX of the Education Amendments of 1972 (Title IX) generally prohibits sex discrimination in educational programs and activities conducted by institutions that receive federal funds.<sup>[1]</sup> Recently, the specific nature of that prohibition as it applies to transgender students has come under scrutiny.

On May 13, 2016, the Department of Education (ED) and the Department of Justice (DOJ); together, “the Departments”) released a Dear Colleague Letter summarizing a school’s obligations to its transgender students under Title IX and illustrating how the Departments will assess institutional compliance in the future. The full text of the Dear Colleague Letter is available [here](#).

Absent express authorization under Title IX or its implementing regulations, any educational institution receiving federal funds agrees, as a condition of receiving those funds, that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any student in its educational programs.

Under this Dear Colleague Letter with respect to Title IX, the Departments treat a student’s gender identity as a student’s sex. Moreover, “gender identity” means an individual’s internal sense of gender, which may differ from the sex designation on a student’s birth certificate. “Transgender” describes those students whose gender identity differs from the sex they were assigned at birth. That is, a transgender male identifies as male but was assigned the female sex at birth; a transgender female identifies as female but was assigned the male sex at birth. “Gender transition” is the period of time in which transgender individuals begin to express their gender identity. This process may occur over any period of time and has no minimum duration requirement.

Under Title IX, schools may not require any medical diagnosis or other professional intervention before treating a student in a manner consistent with his or her gender identity. Nor may schools require formal identification documents as a condition precedent to such treatment – doing so may violate Title IX when it effectively limits or denies a student equal access to an educational program.

### ***Key takeaways from this Dear Colleague Letter include:***

#### **Obligation to Provide a Safe, Nondiscriminatory Educational Environment**

Schools are responsible for providing an educational environment that is free from sexual harassment. Consistent with the Departments’ view of a student’s gender identity as constituting that student’s sex, any targeting of a student based on gender identity, gender transition, or transgender status is harassment based on sex. Schools may not permit the creation of a hostile environment based on such sex harassment, and must promptly act to curtail the harassment, to address its effects, and to prevent it from recurring.

#### **Use of Identification Documents, Names and Pronouns**

Transgender students must be treated consistently with their gender identity even if such identity conflicts with prior educational records or identification documents. This includes the use of sex-specific pronouns that are

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consonant with the student's gender identity, and notably encompasses contractors as well as all school staff.

### **Application to Sex-Segregated Activities and Facilities**

Title IX permits the segregation of certain educational activities and facilities by sex. Where such segregation is already permitted by Title IX, transgender students must be allowed to engage in those activities and make use of those facilities on the basis of their gender identity. For example, transgender students must be permitted to access restrooms, locker rooms, and housing options that accord with their gender identity. They may not be required to use individual-user facilities (or single-occupancy dormitory rooms) when other students are not required to do so. A school may, however, provide individualized facilities and make them available to all students seeking less communal spaces.

The admissions policies of certain educational institutions are exempt from Title IX. For example, a private undergraduate women's college may set and maintain a sex-based admissions policy. No aspect of Title IX would prohibit such an institution from admitting transgender women. Similarly, private fraternity and sorority membership standards are not implicated by the considerations of Title IX. Such organizations may set their own rules and practices regarding the gender identity of their members. Title IX does not prohibit a sorority from admitting a transgender woman, or a fraternity from admitting a transgender man, if that organization chooses to do so.

### **Maintenance of Privacy in Education Records**

The Departments' guidance should not be read to alter or diminish the obligations imposed on schools by the Family Educational Rights and Privacy Act (FERPA). Consistent with FERPA, any non-consensual disclosure of personally identifiable information (PII) may constitute a violation, and PII may include both a student's birth name and the sex assigned to that student at birth. Although FERPA generally permits disclosure of a student's PII and associated educational records to school personnel with a legitimate educational interest, the Departments explicitly indicate that schools may not rely on this general permission to inappropriately disclose such information to others in the school community. Such a broad disclosure may constitute a FERPA violation and, to the extent that such disclosure prevents a student from being treated in a manner consistent with their gender identity, may also be a violation of Title IX.

Schools may continue to designate and publish "directory information" (e.g. a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance) in a manner consistent with FERPA, but may not designate any student's sex or transgender status as directory information. Schools may update a transgender student's educational records to reflect that student's name and gender identity, and students may request that change. If a school denies such a request, the student is entitled to a hearing under FERPA and may also submit a complaint under the school's grievance procedures pursuant to Title IX.

To illustrate specific resolutions of various issues addressed in this Dear Colleague Letter, the Departments have directed educational institutions to guidance from ED's Office of Elementary and Secondary Education, Examples of Policies and Emerging Practices for Supporting Transgender Students, which is available [here](#). Although certain of the examples in that guidance are applicable exclusively in the elementary and secondary contexts, many are valuable demonstrations of the policies and procedures that ED and DOJ have determined to be appropriate in light of the requirements of Title IX.

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[1] Certain religiously affiliated institutions may apply for, and receive, an exemption from Title IX to the extent that compliance would be inconsistent with the tenets of the affiliated religious organization. A list of institutions that have successfully sought exemption from Title IX is available [here](#).

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