

The Letter ... DOE and DOJ Warn School Districts Regarding Transgender Students

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Practice Area: School Law

On May 13, 2016, the U.S. Department of Education and U.S. Department of Justice issued a joint "Dear Colleague" Letter, summarizing what the Departments deem to be a school district's obligations to transgender students under Title IX. Both the DOE and the DOJ interpret Title IX's prohibition against "sex discrimination" to encompass discrimination based on a student's gender identity and transgender status. To comply with the Letter's guidance, a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The DOE's and DOJ's interpretation of Title IX is consistent with agency treatment of gender identity under both Title VII and Title IX, but it is important to note that the Seventh Circuit Court of Appeals (of which Wisconsin is a part) has not yet provided definitive guidance relating to the interpretation of these federal laws.

The Letter was sent to every public school district in the nation and provides a variety of compliance guidelines to ensure equal treatment of transgender students. The below chart summarizes the guidance provided and recommendations for compliance:

The Letter...	Compliance Recommendations
What Do I Do When Notified of a Change in Gender Identity?	
Honor a student's expressed gender identity when the student or his or her parent or guardian notifies the school district that the student will assert a gender identity that differs from previous representations or records.	<p>Upon notification by a student OR his or her parent/guardian, a district should allow the student to assert the expressed gender identity.</p> <p>A district should exercise caution in contacting parents/guardians without first discussing such contact with the student, as appropriate depending on the age of the student, in light of concerns that a student may not have already addressed the matter with his/her parents/guardians.</p>

	<p>It is important for a district to have an official process in place for dealing with a notification of transgender status. The process should involve discussion and evaluation among district professionals with the background and expertise necessary to appropriately evaluate the student's situation and the district's response.</p>
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What Do I Call A Student?

<p>Use names and pronouns consistent with a student's expressed gender identity.</p>	<p>Allow a student to dictate how she/he will be addressed in school and reinforce use of the preferred name and pronouns. A district may run afoul of Title IX if employees intentionally refer to a student by a name and pronouns other than that requested.</p> <p>If your school would allow "Matthew" to be called "Matt," the school should allow "Matthew" to be called "Mia."</p>
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How Do I Confirm Genuineness of Declaration?

<p>Prohibited from requesting verification of a student's gender identity.</p>	<p>Engage in a discussion with the student and/or his or her parent/guardian to determine sincerity of gender identity declaration.</p>
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What About Restrooms/Locker Rooms/Changing Facilities?

<p>Cannot require transgender students to use facilities inconsistent with their expressed gender identity or status, nor can school districts require them to use single-user facilities where other students are not required to do so.</p>	<p><u>Options:</u></p> <ol style="list-style-type: none"> 1. Develop a policy to conform to the guidance issued by the DOJ and DOE. 2. Develop internal processes for addressing transitioning students on a case-by-case basis, including discussion as to facility use.
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How Do I Address Complaints Regarding Facilities?

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<p>Schools may make individual-user options available to all students who voluntarily seek additional privacy.</p>	<p><u>Options:</u></p> <ol style="list-style-type: none"> 1. Identify individual-user options and make individual-user facilities available to all students who seek additional privacy. 2. Retrofit your district with facility options that ensure individual privacy in all facilities.
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Are There Special Requirements With Respect to Athletics?

<p>School may operate or sponsor sex-segregated athletics teams but may not adopt requirements that rely on stereotypes between transgender students and other students of the same sex.</p>	<p>Allow participation consistent with WIAA policy. Be cautious of the DOE and DOJ guidance in implementation of WIAA policy.</p>
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What about "Other" School Activities?

<p>Schools may not distinguish students on the basis of sex, including gender identity, in any school activities or the application of a school rule and may not exclude students from participating in activities for appearing or behaving in a manner inconsistent with traditional gender stereotypes (e.g., yearbook photographs, school dances, graduation, etc.).</p>	<p>Apply district policy equally to all students.</p> <p>For example, if you would discipline a female student for violation of school dress code, you may discipline a female transgender student for a violation in the same manner.</p>
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How Do I Maintain Student Records?

<p>Schools are encouraged to update a transgender student's education records to make the records consistent with the student's gender identity, but may do so only in accordance with its general practices for amending other students' records.</p>	<p>Adopt a policy with respect to official records that requires legal documentation to change a student's information in the official district record.</p> <p>As to day-to-day documents and assignments, the policy should reflect the district practice of utilizing and reinforcing use of a student's chosen name.</p>
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Is a Student's Gender Considered "Directory Information" under FERPA?

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<p>School districts must treat a student's birth name and sex assigned at birth as personally identifiable information that is protected from disclosure.</p>	<p>Birth name and sex assigned at birth should be protected from disclosure and thus may not be designated as "directory information" under FERPA.</p>
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What About Disclosure to School Personnel?

<p>Schools may not rely upon the exception allowing for the disclosure of such information to school personnel with a legitimate educational interest as a means to disclose information to other school personnel who do not have a legitimate educational interest in the information.</p>	<p>Schools must protect a student's birth name and sex assigned at birth – and must protect that information from others at the school who do not have a legitimate educational interest in the student.</p>
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How Do We Respond To Student, Parent, and Community Concerns?

<p>The DOE and DOJ note that a school's Title IX obligation to ensure nondiscrimination on the basis of sex is paramount – even in situations where other students, parents, or community members raise objections or concerns. The desire to accommodate others' discomfort or displeasure cannot justify a policy that discriminates against a particular class of students.</p>	<p>As with any other issue with which you may personally disagree (<i>e.g.</i>, religion, sports, politics), school employees are professionals and expected to give others the utmost respect and courtesy.</p> <p>Schools must be mindful of their obligations to protect the privacy interests of all students within the parameters of Title IX's prohibition on sex discrimination.</p>
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What are Policy Requirements?

<p>School districts must treat harassment based on gender identity, transgender status, or gender transition the same as harassment based on other protected traits (<i>e.g.</i>, race, disability), and must take steps to end the harassment, prevent its recurrence, and remedy its effects.</p>	<p>Educational institutions should review existing policies, procedures, and practices that affect the participation of transgender students in programs and activities to ensure compliance with the DOE's latest guidance in this area.</p> <p>While schools are not required to develop a policy, best practices suggest schools begin to put into place, at the very least, an official internal process for responding to a student decision to transition.</p>
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* Note that the Letter constitutes "significant guidance" by the DOJ and DOE and does not have the force of law.

DOE and DOJ Guidance is Consistent with Legal Trends

The Letter is consistent with a recent decision from the Fourth Circuit Court of Appeals, *G.G. v. Gloucester County Sch. Bd.*, No. 15-2056, 2015 WL 1567467 (4th Cir. Apr. 19, 2019), whereby the court found that Title IX extends to protect the rights of transgender students to use the bathroom that corresponds with the student's gender identity. The DOE Office of Civil Rights in Chicago – the regional office encompassing Wisconsin and having jurisdiction over all Title IX complaints filed against Wisconsin schools with the DOE – has opined that school districts must provide full locker room access to transgender students. *See In re Township High Sch. Dist. 211, Illinois*, OCR Case No. 05-14-1055 (Dec. 2, 2015). There, OCR found that a district must provide a transgender student with unfettered access to the facilities of the gender in which the student identifies in order to comply with Title IX's mandate against sex discrimination.

Further, the guidance issued is consistent with how several courts across the nation have treated gender identity and transgender employee discrimination cases under Title VII.

Final Considerations

Note that the Letter does not add requirements to applicable law, nor is it considered the law; rather the DOE and DOJ deem the letter to be "significant guidance," which is important considering that the DOE's Office of Civil Rights is responsible for investigating complaints of Title IX violations, and enforcing compliance with the statute, which may include restricting or removing a school district's access to federal funding. The Letter signals the DOE's willingness to take enforcement action to ensure compliance with Title IX, including with regard to transgender students. Given the DOJ's and DOE's stances that Title IX prohibits discrimination based on gender identity and transgender status, school districts must be mindful of the compliance guidelines set forth in the Letter or risk subjecting themselves to an OCR complaint.

The Letter was accompanied by a separate document from the DOE titled *Examples of Policies and Emerging Practices for Supporting Transgender Students*. The document identifies major areas of concern, and provides examples of policies from across the nation (including Wisconsin's Shorewood School District) that are intended to ensure transgender students enjoy a supportive and nondiscriminatory school environment. School districts may wish to utilize these examples in developing policies and procedures for use in their districts.

As of Wednesday, May 25, the State of Wisconsin has joined 10 other states in suing the federal government over the DOE's and DOJ's guidance. The state has indicated that the guidance conflicts with both federal and state law in that Wisconsin law does not prohibit discrimination based on gender identity. Additionally, Wisconsin legislators have indicated their intent to reintroduce a bathroom bill that would require school boards to designate restrooms and locker rooms for use by one gender exclusively, with "reasonable accommodations" for a transgender student to use a single-occupancy changing room or restroom. This area of the law has become especially volatile in recent months and that trend looks to continue through the rest of 2016. We will continue to keep you apprised as new developments unfold.

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