



U.S. Department of Education and U.S. Department of Justice Issue Dear Colleague Letter Addressing Protections for Transgender Students

May 19, 2016

On May 13, 2016, the U.S. Department of Justice and the U.S. Department of Education issued a [Dear Colleague Letter](#) (the “Letter”) addressing civil rights protections for transgender students under Title IX. The Letter is meant to be “significant guidance” to schools and “provides information and examples to inform recipients about how the Departments evaluate whether [schools] are complying with their legal obligations.” The “significant guidance” does not carry with it the force of law, however, in light of the Department of Education’s ability to withhold federal funding from institutions, institutions are advised to treat this “significant guidance” as formal law for implementation purposes.

By way of background, Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.* (“Title IX”) is a federal law that prohibits discrimination on the basis of sex in any federally funded education program or activity. Title IX, enacted in 1972 as a portion of the United States Education Amendments, stipulates that individuals may not “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

Recently, Title IX’s application to transgender students has been publicly debated amidst the emergence of controversial legislation in North Carolina. The legislation, the Public Facilities and Security Act, commonly known as House Bill 2 or HB2, states that individuals in North Carolina may only use public restrooms that correspond to the sex that appears on their birth certificates. It demands that transgender individuals alter the sex on their birth certificates to use a public bathroom consistent with their gender identity.

The legislation has been widely and publicly criticized. Five states and several counties and cities issued travel bans to North Carolina, barring government employees from non-essential travel to the state. Numerous sports organization reconsidered plans to host tournaments in the state. Musicians and other entertainers have also canceled shows. In addition to these condemnations, House Bill 2 has been challenged both politically and legally. First, President Obama has publicly condemned the bill in an official statement, calling for it to be repealed. Additionally, the Attorney General of North Carolina, Roy Cooper, has stated that he will not defend the bill in court, claiming that it is unconstitutional. Further, three days after House Bill 2 was passed, the American Civil Liberties Union and others filed a lawsuit challenging the law in federal court in North Carolina, arguing that it violates the Equal Protection and Due Process Clauses.

With that backdrop and in further support of the outcry against House Bill 2, the Letter provides clarification on the federal government's application of Title IX to transgender students. As indicated in the Letter, both the U.S. Department of Justice and the U.S. Department of Education treat a student's gender identity (one's concept of self as male or female) as the student's sex for purposes of enforcing Title IX. To be clear, institutions must treat a student in accordance with his or her gender identity, using gender pronouns as requested; noting the difficulty that transgender students would have if forced to obtain altered birth certificates matching their gender identity. The Letter also indicates that a school may not require transgender students to have a medical diagnosis, undergo any medical treatment, or produce a birth certificate or other identification documents prior to treating them consistent with their gender identity.

The Letter goes on to discuss traditionally sex-segregated activities and facilities. Specifically, in accordance with the Letter, institutions must accommodate transgender students in school restrooms and locker rooms. Students must be permitted to access facilities consistent with their gender identity and may not be required to use facilities inconsistent with their gender identity. In other words, if a student is biologically female but identifies as male, the school must allow the student to use the male bathroom if the student so desires. With regard to neutral bathrooms, the Letter also reiterates the idea that schools can provide "additional privacy options to any student for any reason." However, a school may not direct all transgender students to utilize a gender-neutral bathroom when other students are not required to do so.

The same holds true for single-sex classes, sex-specific activities and rules, and housing and overnight accommodations. With regard to housing, "a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students." Schools may adopt rules or regulations that prohibit transgender students from participating in an athletic activity with the sex corresponding to their gender identities only if the requirements are based on "sound, current, and research-based medical knowledge" regarding competitive fairness or physical safety. Schools may not, however, "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."

Finally, the Letter lays out specific parameters through which schools may or may not disclose information regarding students' gender identity. Indeed, if a school fails to provide sufficient privacy for a student with respect to his or her gender identity, the school may be in violation of federal law. Moreover, a school must take the necessary steps to accommodate a student's request to change his or her records to reflect the appropriate gender identity.

The topic of whether an individual has a right to use a facility corresponding to his or her gender identity has initiated the filing of multiple lawsuits throughout the country. Institutions are advised to pay close attention to this area of the law, as it has the potential to have significant practical as well as legal implications. Student and employee handbooks should also be reviewed and if necessary, revised in order to ensure compliance with Title IX.

If you or your institution has any questions or concerns regarding employment or education-related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

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