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Transgender Issues 2.0: Best Practices for Working with Transgender Students

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I. The Basics

All public school students are protected from discrimination by federal civil rights statutes and the U.S. Constitution. However, at the federal level, the law does not expressly protect an individual against discrimination on the basis of his/her transgender status. Rather, the protections afforded to transgender students have been derived from Title IX of the Education Amendments of 1972 (Title IX).¹

Title IX does not identify transgender status as a protected category, but rather this law has been interpreted to prohibit gender-based discrimination and harassment in schools that is based on gender stereotypes (or a failure to conform to gender stereotypes). The U.S. Department of Education's Office for Civil Rights (OCR) began recognizing gender-based harassment as a "form of sex discrimination to which a school must respond" as early as 2001.² The OCR clarified its position on Title IX and "gender-based" harassment in 2010 in a *Dear Colleague* letter for school districts stating that sex discrimination can occur "if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity or femininity." The letter further advised that "Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target."

The OCR has since reiterated its position through a 2014 publication entitled, *Questions and Answers on Title IX and Sexual Violence* stating "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and the OCR accepts such complaints for investigation."³ On May 13, 2016, the OCR issued further guidance for schools on transgender students through its joint issuance of a *Dear Colleague Letter on Transgender Students* and a document entitled

¹ 20 U.S.C. § 1681.

² Office for Civil Rights, U.S. Department of Education, Revised Sexual Harassment Guidance, Section III (Jan. 2001).

³ U.S. Dep't of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* at 5 (Apr. 29, 2014).

Examples of Policies and Emerging Practices for Supporting Transgender Students with the Civil Rights Division of the U.S. Department of Justice.⁴

The May 2016 *Dear Colleague* letter summarized the DOJ and OCR's guidance regarding Title IX and their evaluation of a school district's obligations to transgender students. Within this guidance, it was expressly stated that when a school district "provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." The guidance further adds that a school "may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so."⁵

The *Examples of Policies and Emerging Practices for Supporting Transgender Students*, issued by the U.S. Department of Education in May 2016, includes sample policies and practices for supporting transgender students, as well as questions and answers regarding the policies. The question and answer portion of the document addresses transgender access to sex-segregated facilities consistent with gender identity.⁶

The Controversy

Texas v. United States

On May 17, 2016, in response to the May 13, 2016 *Dear Colleague* letter, the attorneys general of Oklahoma, Texas and West Virginia sent a letter to the OCR and DOJ seeking "clarification" on the intended effect of the *Dear Colleague* letter and requesting a response "no later than close of business on May 24, 2016."⁷ On May 25, 2016 a lawsuit⁸ was filed in the U.S. District Court in the Northern District of Texas by ten states (including Texas), the Harrold Independent School District (in Texas), the Arizona Department of Education, and the Heber-Overgaard Unified School District (in Arizona) against the U.S. Departments of Education, Justice, and Labor and the U.S. Equal Employment Opportunity Commission and their lead officials regarding their conspiracy to "turn workplaces and educational settings across the country into laboratories for a massive social experiment, flouting democratic process, and running roughshod over commonsense policies protecting children and basic privacy rights." The

⁴ *Dear Colleague Letter*, U.S. Dep't of Educ., Office for Civil Rights, and U.S. Dep't of Justice, Civil Rights Division (May 13, 2016) located at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

⁵ *Id.* Page 3.

⁶ *Examples of Policies and Emerging Practices for Supporting Transgender Students*, U.S. Dep't. of Educ., Office of Elementary and Secondary Education (May 2016) located at <https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>.

⁷ Letter from E. Scott Pruitt, Attorney General of Oklahoma, Ken Paxton Attorney General of Texas, and Patrick Morrisey, Attorney General of West Virginia to Catherine E. Lhamon, Assistant Secretary for Civil Rights, U.S. Department of Education and Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights, U.S. Department of Justice (May 17, 2016) located at <https://www.texasattorneygeneral.gov/files/epress/files/2016/lettertoDOEandDOJreclarification.pdf>.

⁸ *Texas v. United States of America*, Civil Action No. 7:16-cv-00054-O (N.D. Tex. May 25, 2016).

Also available as part of the eCourse

[Student Rights in 2017: Transgender Students, Special Education, Cameras in the Classroom, and More](#)

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