



Safeguard Your Federal Funding – Transgender Students And Title IX Compliance

Insights

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On May 13, 2016, the U.S. Department of Education and U.S. Department of Justice published a guidance document for elementary and secondary schools that reaffirmed its 2015 opinion letter on how Title IX's regulations apply to transgender students. This latest guidance includes a publication summarizing best practices on how to handle student transition, privacy, confidentiality, student records, sex-segregated activities and facilities, and various support issues.

Although the guidance is limited to K-12 schools, it is critical for all educational institutions that receive federal funding (colleges and universities included) to understand and comply with the guidance as soon as practicable.

Pay Attention: Your Federal Funding Is At Risk

It is no secret that compliance with Title IX of the Education Amendments of 1972 is required for educational institutions to receive federal financial assistance. For educational institutions that rely upon this federal funding to exist and operate, the transgender student must not be excluded, separated, denied benefits, or otherwise treated differently on the basis of sex.

This means that a transgender student must be treated the same way as other students of the same gender identity. "Gender identity" is defined as "an individual's internal sense of gender" which may be different or the same as that person's sex at birth.

Religious Freedom – Title IX Exemptions

An educational institution controlled by a religious organization may avail itself of the right to apply for and secure an exemption from any Title IX regulations that are inconsistent with the religious beliefs of the organization. It is important to understand that approval of these religious exemptions is not automatic.

Indeed, the Office for Civil Rights is reportedly examining these applications with greater diligence, requiring those institutions that seek the exemption to demonstrate how they qualify by providing proof of actual control by a religious organization. Religious educational institutions that do not have approved exemptions must comply with the May 13 Title IX guidance or risk loss of federal funding.

Status Report On Pending Litigation

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This area has been a hotbed of legal activity in recent times, with several significant pieces of litigation having been filed. Here is a brief status update on some of the higher-profile cases:

11-state lawsuit: In May 2016, a group of 11 states – Texas, Alabama, Arizona, Georgia, Louisiana, Maine, Oklahoma, Tennessee, Utah, West Virginia and Wisconsin – filed a lawsuit challenging the May 13 directive on how Title IX regulations must be interpreted regarding transgender students. That lawsuit is currently pending.

Virginia: In a case filed in 2015, *G.G. v. Gloucester County School Board*, the U.S. Court of Appeals for the 4th Circuit reversed a district court’s decision to dismiss Title IX claims brought by a transgender high school boy against the school that prohibited him from using the boys’ restrooms. Just recently, the 4th Circuit denied the school board’s motion to stay pending its appeal to the U.S. Supreme Court.

Ohio: On June 11, 2016, a federal lawsuit was filed by a local public school district against the U.S. Department of Education challenging the May 13 directive.

At this time, there is no final court order rejecting the May 13 Title IX guidance and its interpretations regarding transgender students. Consequently, all educational institutions who have not secured a Title IX exemption regarding transgender students must comply with the May 13 guidance in order to remain compliant and preserve federal funding.

Takeaways From The Transgender Guidance – Eliminating Gender Barriers

For those who have not yet examined the May 13 guidance, here is a brief summary of the key points and takeaways.

How to determine a person’s gender identity

Confirming a person’s gender identity does not require medical or mental health diagnosis or treatment. Rather, we look at two things – what a person says and does. Each person knows his or her gender identity because it is only that person’s internal sense of gender that counts. We take each person at his or her word regarding gender identity and observe whether the person acts in a manner that confirms the asserted gender identity.

Privacy is required

Various federal and state privacy laws require a student’s transgender status to remain confidential. Navigating privacy and confidentiality for a transgender student becomes more challenging when the student is not open about his or her transgender status in all circles of life. Within the school, the transgender status is on a need-to-know basis where there is a legitimate educational or safety interest.

Access to restrooms and locker rooms

Schools must allow every student to use the restroom and locker room that is consistent with the individual’s gender identity. Transgender students cannot be forced to use alternative facilities. Easier said than done, right?

The guidance explains that the privacy rights of all students in restrooms and locker rooms must be protected. So, any student who wants increased privacy may request it. If there is an alternative facility (e.g. unisex bathroom or separate changing area), then the student who requests the increased privacy may use it.

The key is for the students who are uncomfortable with the integrated space to request to remove themselves. If alternative facilities do not exist, then the school should review how to modify the area to provide the required privacy needed to make the uncomfortable student comfortable (for example, in a locker room, creating changing schedules, etc.).

Athletics

Transgender students should be allowed to participate in athletics consistent with their gender identity. In most states, athletic leagues or associations are charged with implementing these eligibility determinations. The guidance also addresses overnight accommodations for athletic trips and field trips, and confirms the student's gender identity should be used in making assignments with consideration given to the student's safety.

Summer 2016 Action Steps

For those institutions without a Title IX exemption regarding transgender students, we recommend you use this summer to implement action steps to ensure Title IX compliance and to prevent any compromise to your federal funding.

Schools, colleges, and universities should first revise their Title IX policies to squarely address the transgender guidance. They should next implement practical training for school administrators to equip them with the skills that will help them support transgender students and understand what protocols should be followed.

Schools, colleges, and universities should also evaluate all gender-based policies, rules, and practices and maintain only those that have clear and sound pedagogical purpose. Finally, they should identify, by building, all gender-based policies, rules, and practices to identify whether any should remain, and have them reviewed to ensure compliance with Title IX requirements.

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