

Trump Administration Rescinds Guidance on Transgender Rights under Title IX

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The Trump Administration has announced that the Department of Education (DOE) and the Department of Justice (DOJ) rescinded the Obama Administration's May 2016 Dear Colleague Letter directing that schools "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations."

The Obama Administration's Dear Colleague Letter ("Dear Colleague Letter") offered guidance on a range of issues, including access to restrooms, locker rooms, and similar facilities, equal participation in educational programs and activities, and recordkeeping and privacy. (See our article, [U.S. Departments of Justice and Education Issue 'Significant Guidance' on Transgender Rights under Title IX](#).) Since its issuance, the Dear Colleague Letter has been the subject of significant litigation challenging the enforceability of its protections providing access to restrooms and other facilities that match a student's gender identity.

Rescinding the Dear Colleague Letter on February 22, 2017, the DOE and the DOJ explained that the guidance did not "contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did [the Obama Administration] undergo any formal public process." (See [February 22, 2017, Dear Colleague Letter](#).) In their 2017 letter, the DOE and the DOJ referred to the contradicting litigation that has surrounded the issuance of the Dear Colleague Letter. Further, they explained that "due regard" must be given to the role of state governments and local school districts in establishing "educational policy." The Departments stated that the revocation of the Dear Colleague Letter "does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment." Critically, the Departments appear to indicate that further guidance will be provided on Title IX's coverage of gender identity in the future.

Reports say that the issue of how to address the Dear Colleague Letter, particularly as to the bathroom access provisions, have created a rift within the Trump Administration. President Donald Trump reportedly sided with Attorney General Jeff Sessions, overriding concerns raised by [Education Secretary Betsy DeVos](#) that rolling back the Dear Colleague Letter could cause potential harm to transgender students. Secretary DeVos said in a strongly worded statement issued with the

recession of the Dear Colleague Letter that she has “dedicated her career to advocating for and fighting on behalf of students, and as Secretary of Education, [she] consider[s] protecting all students, including LGBTQ students, not only a key priority in the Department, but for every school in America.” It is unclear how the DOE’s Office of Civil Rights will respond to this revised guidance.

On February 10, the Trump Administration foreshadowed the revocation of the Dear Colleague Letter when it signaled that it would not defend the guidance provided in that document.

The Trump Administration’s actions come just weeks before the U.S. Supreme Court is scheduled to hear argument in *Gloucester County School Board v. G.G.* on March 28, 2017. (See our article, [U.S. Supreme Court to Hear Transgender Student Case](#).) Notably, both parties to the Supreme Court case have indicated they want the Court to decide the case. In deciding the hear the case, the Court certified not only the question of what weight to give to the Departments’ interpretation, but also whether a policy requiring students to use the bathroom corresponding with the gender that they were assigned at birth is consistent with Title IX. It is unclear what effect, if any, the revocation of the Dear Colleague Letter might have, both on this case and the enforcement of Title IX generally.

Despite the Departments’ latest actions, schools remain free to voluntarily allow transgender students to access the bathroom matching their gender identity. The Dear Colleague Letter was merely guidance indicating how the Departments would interpret Title IX as to transgender students. The Dear Colleague Letter did not have the force of law.

There is significant uncertainty surrounding how the Supreme Court will address the application of Title IX to transgender students. Accordingly, schools, colleges, and universities should continue to review and, as appropriate, update their harassment and transgender policies to ensure compliance with state and local LGBT discrimination protections. Schools, colleges, and universities also should train school administrators, human resources, and faculty on how best to comply with transgender student rights. In addition, and equally important, is the necessity to consider Title VII of the Civil Rights Act on the employment policies for schools, colleges and universities. At this point, the [Equal Employment Opportunity Commission](#) has taken the position that gender identity and sexual orientation are covered under the post-*Price Waterhouse* sex stereotyping line of cases. It has also issued a Fact Sheet (dated May 3, 2016) on Transgender Restroom Access and, to date, these Guidelines remain in effect.

Schools, colleges, and universities should consider carefully whether to change course in light of the Trump Administration’s actions, until the Supreme Court has weighed in on the issue.

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