



# TRANSGENDER ISSUES AFFECTING TITLE IX

Understanding the Current State of Transgender Issues in  
Education

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# Topics

- ▶ **What is Title IX?**
- ▶ **Non-Discrimination and the Courts – Title IX**
- ▶ **U.S Department of Education – Office of Civil Rights**
- ▶ **Students, Facilities and Programs**
- ▶ **Terminology**

# Title IX of the Education Amendments of 1972

- ▶ “No person in the United States shall, on the basis of sex, 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.”
- ▶ State and local educational agencies receiving federal funding may not discriminate based on sex in education programs or activities. 20 USC § 1681
- ▶ Applies to programs, facilities, athletics, extracurricular activities, etc.
- ▶ Enforced by US Department of Education, Office of Civil Rights
- ▶ Penalties include: loss of federal funding, loss of programs
- ▶ Students/parents may bring lawsuits to enforce Title IX for damages and attorneys fees

# Important Court Decisions

## ▶ Noted Discrimination Cases:

### ▶ **Brown v. Board of Education (U.S. Sup. Ct. 1954)**

- ▶ Ended racial segregation of students in schools
- ▶ “[Education] is a principal instrument in awakening the child to cultural values, in preparing [the child] for later professional training, and in helping [the child] to adjust normally to [her/his] environment.”
- ▶ “[Educational] opportunity ... is a right which must be available to all on equal terms.”

### ▶ **Mendez v. Westminster School Dist. Of Orange County (U.S.D.C. Cal. 1946)**

- ▶ Ended language-based segregation in schools
- ▶ “[English language deficiencies] do not justify the general and continuous segregation in separate schools of the children of Mexican ancestry from the rest of the elementary school population.”

### ▶ **Doe v. Regional School Unit 26 (Sup.Ct. Maine 2014)**

- ▶ Ended State of Maine transgender student segregated use of facilities
- ▶ State Human Rights Act violation to treat a student differently based on transgender status

# Recent Caselaw

- ▶ **Bostock v. Clayton County ( 590 U.S. 2020)**
  - ▶ The U.S. Supreme Court overturned the dismissal, and states that **Title VII of the Civil Rights Act encompasses discrimination based on an individual's sexual orientation or transgender status.**
  - ▶ When a person is discriminated against due to their sexual orientation or transgender status, that person is being treated differently due to their sex. Which is clearly prohibited by Title VII.
  - ▶ **Applies to Employees but how does it apply to students?**

# Recent Caselaw

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- ▶ **G.G. ex rel. Grimm v. Gloucester County School Board (Virginia)**
  - ▶ Mother of transgender teen sued under Title IX and Equal Protection Clause of the U.S. Constitution
  - ▶ School Board Policy: requiring students to use restroom consistent with birth-assigned sex
  - ▶ U.S. District Court: dismissed case
  - ▶ U.S. Court of Appeals (4<sup>th</sup> Circuit 2006): Department of Ed interpretation of its own regulations governs, **Title IX prohibits gender identity discrimination**
  - ▶ U.S. Supreme Court: Accepted the Case for hearing in 2017
  - ▶ Due to the Supreme Court's finding in Bostock the case was remanded back to the 4<sup>th</sup> Circuit who ruled in favor of the student and **stated that the student had suffered emotional harm from being forced to use the bathroom assigned to his biological sex.**

# Recent Case

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- ▶ **Whitaker v. Kenosha Unified School District No. 1 Board of Education (7<sup>th</sup> Cir., Wisconsin 2017) 858 F. 3d 1034**
  - ▶ Mother of transgender male student brought sex discrimination claim under Title IX and Equal Protection Clause
  - ▶ Sought injunction to allow use of boy's bathroom
  - ▶ Injunction granted by District Court
  - ▶ 7<sup>th</sup> Circuit Court of Appeals upheld the injunction:
    - ▶ Transgender students may bring sex-discrimination claims under Title IX
    - ▶ Heightened scrutiny, not rational basis, applied to equal protection claim
    - ▶ Student likely to succeed on claim of equal protection violation
- ▶ **District settled lawsuit for \$800,000 in 2018**

# U.S. Department of Ed Office of Civil Rights

- ▶ **May 12, 2016 Dear Colleague Letter:** Title IX prohibits “discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status”
  - ▶ Safe and non-discriminatory environment
  - ▶ Use names and pronouns consistent with gender identity
  - ▶ Access to sex-segregated activities and facilities (restrooms, classes, clubs, athletics, overnight accommodations)
  - ▶ Privacy and educational records – FERPA protects disclosure of status
  - ▶ Amendment/correction of Education Records
- ▶ **April 29, 2014 Q&A on Title IX and Sexual Violence**
  - ▶ Title IX prohibits sex discrimination based on gender identity and sexual orientation
  - ▶ Context: bullying and harassment

# Previous Guidance - 2/22/17

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## OCR-DOJ letter

### ▶ February 22, 2017 Dear Colleague Letter:

- ▶ DOJ and DoEd “withdrawing the statements of policy and guidance” in May 12, 2016 letter and January 7, 2015 letter (restroom access), but not April 12, 2014 Q&A
- ▶ “Withdrawal ... 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”
- ▶ OCR “will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms”
- ▶ Does not create any prohibitions
- ▶ Agencies defer to states and school districts

# NEW: 3/29/21 – Executive Order

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- ▶ Includes discrimination based on Sexual Orientation and/or Gender Identity to the list of prohibited actions under TITLE IX.
- ▶ Requires the new Secretary of Education to issue updated guidance on this executive action as soon as practical.
- ▶ Requests the Sec. of Education to take additional enforcement action against all forms of sexual harassment and sexual violence.
  - ▶ Cites that students who are LGBTQ+ are suffer sexual violence at schools at significant rates.
- ▶ DOE will also take further steps to ensure that “school procedures are fair and equitable for all.”

# Students

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- ▶ **Goal: Cultivate a safe and positive learning environment for all students**
- ▶ **School Board Policies – Non-Discrimination**
  - ▶ Courts/OCR - Gender identity protected under sex discrimination
- ▶ **School Board Policies – Bullying, harassment and hazing**
  - ▶ OCR – includes bullying, harassment, hazing, or intimidating based on gender identification
- ▶ **Gender identification/transgender discrimination concerns:**
  - ▶ Preferred name and proper pronoun use – including student records and diplomas
  - ▶ Access to facilities - consistent with gender identity, with gender neutral options for all students
  - ▶ Site staff training - add to current sex discrimination training

# NM School Athletics Equity Act (2009)

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- ▶ Applies to each public school with an athletics program for grades 7 - 12. NMSA 1978, § 22-31-2
- ▶ Each public school shall operate its program in a manner that does not discriminate against students or staff on the basis of gender. NMSA 1978, § 22-31-2
- ▶ By August 31 each year, each school shall submit an assurance of compliance with Title IX to its local school board and NMPED

# Facilities and programs

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- ▶ **General Rule: Equal access to facilities and programs**
- ▶ **Facilities: Equal Alternatives (not “separate but equal”)**
  - ▶ Bathrooms: single user, multiple user, nurse’s office
  - ▶ Changing rooms/locker rooms: same or alternate schedules
  - ▶ New construction and renovations
    - ▶ Partitions, separate shower stalls, more single user restrooms
- ▶ **Programs including athletics**
  - ▶ NMAA
  - ▶ NCAA
  - ▶ Travel

# Understanding terminology

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- ▶ **Gender identity**: one's internal sense of gender, consistently asserted, which may differ from sex assigned at birth
  - ▶ **Sex assigned at birth**: gender listed on one's original birth certificate
- ▶ **Gender expression**: External cues communicating one's gender to others (e.g. clothing, behavior, mannerisms)
- ▶ **Gender transition**: the duration of the experience of moving from living as one's assigned sex to living and identifying consistent with one's gender identity
- ▶ **Transgender**: describes a person whose gender identity is different from the individual's sex assigned at birth
  - ▶ Transgender male: assigned female at birth, has male gender identity
  - ▶ Transgender female: assigned male at birth, has female gender identity

**\*\*Terms not dependent on completion of medical treatments or procedures\*\***

# More Terminology

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- ▶ **Gender non-conforming**: expression, characteristics, and/or identity do not conform to gender stereotypes
- ▶ **Intersex**: a person born with reproductive or sexual anatomy and/or a chromosome pattern that can't be classified as typically male or female
- ▶ **Preferred name**: the requested name that corresponds with one's gender identity
- ▶ **Pronouns**: the pronouns corresponding to one's gender identity (she/her/hers - he/him/his – they/them)
- ▶ **Official governmental records**: reflect the legal name of the individual (birth certificates, social security cards, some school records) either from birth or as name and/or gender is legally changed (typically court orders or other government documentation)
- ▶ **2019 SB 20 – Amended Birth Certificates**

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# Other Resources

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- ▶ Students: US Dept. of Ed. Office of Safe and Healthy Students
  - ▶ May 2016 – Examples of Policies and Emerging practices for supporting transgender students  
<http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>
- ▶ Students: US Dept. of Ed. Office for Civil Rights
  - ▶ Resources for Transgender and Gender-Nonconforming Students  
<http://www2.ed.gov/about/offices/list/ocr/lgbt.html>
- ▶ Employees:
  - ▶ **2015 EEOC ruling Lusardi v. McHugh**: disparate treatment and harassment to deny common restroom access and misuse pronouns
  - ▶ **US Dept. of Labor**: OSHA Guide to Restroom Access for Transgender Workers  
<https://www.osha.gov/Publications/OSHA3795.pdf>

# Transgender Issues - Other

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# Questions?

- ▶ Non-Discrimination Laws/Rulings
- ▶ Students, Facilities, Programs
- ▶ Terminology

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