TOPIC:

GENDER IDENTITY AND GENDER EXPRESSION ON CAMPUS: IMPLEMENTATION IN AN UNCERTAIN LEGAL ATMOSPHERE

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INTRODUCTION:

For over a decade, issues related to transgender students and gender identity[3] have occupied an increasingly focused place in conversations at colleges and universities across the country.[4] In general, institutions regularly confront questions of how to support members of the transgender community in lawful and equitable ways that do not intrude upon the rights of others. More specifically, schools grapple with a host of issues, including bathroom and locker room access, housing arrangements, athletics participation, gender pronouns and record keeping, and other activities and rules.

Already complex issues to begin with, colleges and universities must respond to the many facets related to transgender students and gender identity amidst a messy, uncertain, and constantly shifting legal landscape. Laws regarding gender identity are unsettled, to say the least. Under the Obama administration, the approach of the United States Department of Education, Office for Civil Rights (“OCR”) followed a clear trajectory: providing detailed requirements designed to protect the transgender community from discrimination and harassment. The Obama administration advanced this policy initiative through sub-regulatory guidance, agency enforcement actions, and ultimately a stand-alone Dear Colleague Letter in 2016 devoted to transgender rights, including the right to be free from sex-based discrimination based on gender identity (“2016 DCL”).[5] But the 2016 DCL was promptly enjoined on a nationwide basis by a federal district judge in Texas.[6] On February 10, 2017, the Trump administration withdrew objections to the injunction, meaning the 2016 DCL will remain enjoined.
and signaling that the Trump administration’s approach to transgender issues will likely differ from that of the preceding administration.[7]

The situation in the federal courts is no more certain. Federal courts are divided on the question of whether civil rights laws, such as Title IX and Title VII, which prohibit discrimination based on sex at federally funded educational institutions, also prohibit discrimination and harassment on the basis of gender identity.

In addition to federal laws, institutions must also be mindful of state and local laws, which vary widely, and may impact institutional approaches to issues related to transgender students.

This NACUANOTE offers an overview of the regulatory and legal landscape at this unique moment in time. As highlighted throughout the Note, the state of law in this area is far from clear, and far from static. Yet higher education institutions do not have the luxury of waiting until the law is fully settled before addressing issues related to transgender and gender-nonconforming students and employees. Rather, campuses must address issues as they arise, and many campuses wish to proactively plan in this area. As such, this Note concludes by offering practical suggestions for consideration as institutions implement policies and procedures related to gender identity in numerous areas.

**DISCUSSION:**

I. **OCR Guidance Under the Obama Administration**

OCR’s approach with respect to transgender students and gender identity under the Obama administration followed a clear path of increasing protection for transgender and gender-ninconforming students.

A. **Guidance Prior to 2016**

In a Dear Colleague Letter from October 26, 2010 regarding bullying, OCR clearly stated that "Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination" and affirmed that harassment on the basis of LGBT status may also be a form of sex discrimination prohibited by Title IX.[8]

Six months later, OCR affirmed the applicability of Title IX to gender-based harassment in an April 4, 2011 Dear Colleague Letter regarding sexual violence,[9] and in its subsequent Questions and Answers on Title IX and Sexual Violence released in April 2014.[10] These guidance documents clearly prohibit "gender-based harassment,"[11] which may include expressions of "hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature."[12]

B. **2016 Dear Colleague Letter**

In May 2016, OCR and the U.S. Department of Justice, Civil Rights Division jointly issued the 2016 DCL to explain institutions' obligations under Title IX related to transgender students.[13] By reaffirming, consolidating, and elaborating on previous OCR guidance, the Departments gave a clear roadmap of how OCR would evaluate an institution's obligations in the area of gender identity. As mentioned above and discussed in more detail below, application of the
2016 DCL has been enjoined by a U.S. district court in Texas, and the Trump administration has withdrawn objections to the injunction. However, the approach taken in the letter may nevertheless provide guidance to universities as they address concerns raised by the transgender community and its allies.

The 2016 DCL stated that "the Departments treat a student's gender identity as the student's sex for purposes of Title IX."[14] To that end, the 2016 DCL advised institutions to provide a "safe and nondiscriminatory environment" for all students, including transgender students, and explained the various steps institutions must take to provide such an environment in several different areas.[15] The 2016 DCL introduced the consistent treatment principle, which interpreted Title IX as requiring colleges and universities to treat students equitably regardless of gender identity in terms of bathroom and locker room access, housing, athletics, and other activities. The DCL also interpreted Title IX as prohibiting harassment against the transgender community and affording various privacy protections to transgender students.

1. Consistent Treatment Principle

The 2016 DCL was based on a simple premise: Title IX requires that "a school must not treat a transgender student differently from the way it treats other students of the same gender identity."[16] The letter stated that this obligation[17] "to ensure nondiscrimination" and "provide transgender students equal access" exists "even in circumstances in which other students, parents, or community members raise objections or concerns."[18] Stated differently, "the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students."[19]

The 2016 DCL provided that a school's obligation to treat a student consistent with the student's gender identity arises once a student "notifies the school administration that the student will assert a gender identity that differs from previous representations or records."[20] After it receives this notice, a school must treat the student "consistent with the student's gender identity" in all respects.[21] For example, a school must "use pronouns and names consistent with a…student's gender identity."[22]

Moreover, under the 2016 DCL, schools could not require a particular "medical diagnosis or treatment" before treating a student consistent with their gender identity.[23] Likewise, a school could not require "students to produce…identification documents in order to treat them consistent with their gender identity."[24] The 2016 DCL continued, "a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex."[25]

The 2016 DCL then offered detailed guidance about how to implement the consistent treatment principle in several specific areas that affect institutions of higher education.[26]

Restroom and Locker Room Access—"School[s] may provide separate facilities on the basis of sex." However, a school "must allow a transgender student access to such facilities consistent with their gender identity." A school may make "individual user-options available to all students who voluntarily seek additional privacy." It "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."[27]

Housing—Schools may "provide separate housing on the basis of sex." However, "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." Moreover, students may not be required "to disclose personal information when not required of other students" to obtain housing that is consistent with their stated gender identity.[28]

**Athletics**—Schools may have sex-segregated athletic programs so long as selection for the programs is "based upon competitive skill or when the activity involved is a contact sport." However, schools may not "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 (i.e., the same gender identity) or others' discomfort with transgender students."[29] More specifically, schools must adopt participation rules that are "age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge" and that are linked to "competitive fairness" or "physical safety."[30]

**Other Activities and Rules**—The 2016 DCL affirmed that Title IX and its regulations allow schools to segregate individuals by sex in certain specific situations, such as in single-sex schools and social fraternities and sororities.[31] However, the 2016 DCL made clear that "nothing in Title IX prohibits" institutions from allowing transgender students to participate consistent with their gender identity.[32] Moreover, the 2016 DCL clearly stated the Departments' position that schools may not "segregate or otherwise distinguish students on the basis of their sex, including gender identity" unless expressly authorized to do so by Title IX or its regulations.[33]

Although discussing gender identity generally, the consistent treatment principle is focused on issues related to transgender students who identify as "transgender male" and "transgender female."[34] However, experience reveals that students' assertion of their gender identity is often much more complex than this simple binary understanding. Students may identify as agender, bigender, pangender, or a variety of other identities.[35] In general, the consistent treatment principle does not address how a school might respond to students who present in a gender fluid or non-binary manner. As such, questions as to how the consistent treatment principle would apply to gender fluid students and students with non-binary gender identities may be an issue that requires further consideration moving forward.

### 2. Harassment

The 2016 DCL also reiterated that schools must provide an environment for all students, including transgender students, that is safe and free from discrimination and harassment on the basis of gender identity. To that end, it provided that schools "must take prompt and effective steps" to end, prevent the recurrence of, and, as appropriate, remedy harassment on the basis of gender identity.[36] As part of this obligation, schools must refrain from disciplining a student or otherwise excluding them from the benefits of the educational program "for appearing or behaving in a manner that is consistent with their gender identity or that does not conform to stereotypical notions of masculinity or femininity."[37]

### 3. Privacy Considerations

Finally, the 2016 DCL outlined several specific measures an institution must take to keep a student's gender identity confidential and private. The 2016 DCL asserted that "failing to take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth," could not only violate the Family Educational Rights and
Privacy Act (FERPA),[38] which is most commonly thought of as the federal law that addresses the privacy of student information, but could also violate Title IX, which is not commonly thought of as a law focused on the privacy of student information.[39]

First, the 2016 DCL required that schools be vigilant when determining which employees have a "legitimate educational interest" in information related to a student's gender identity, such that the information may be shared with the employee pursuant to FERPA.[40] This information could include, for example, a student's birth name or sex assigned at birth.

Second, the 2016 DCL stated that neither sex nor any other demographic information that could indicate a student's transgender status may be designated as "directory information" under FERPA (information that may be released without a student's consent unless the student affirmatively indicates otherwise).[41]

Third, the 2016 DCL urged institutions to allow students to amend their education records, pursuant to the process for making such an amendment under FERPA, in order to "protect privacy and ensure personnel consistently use appropriate names and pronouns."[42] The 2016 DCL did not explicitly require schools to allow for such amendment. Rather, the 2016 DCL simply indicated that "a school must respond to a request to amend information related to a student's transgender status consistent with its general practices for amending other students' records."[43]

C. 2016 Policies and Procedures Document

As a companion to the 2016 DCL, the Department of Education Office of Elementary and Secondary Education released a compilation of "emerging practices" that "contribute to successful outcomes" related to transgender students and addressing gender identity issues.[44]

It is unclear whether and how this document was intended to apply to higher education. The language focused on primary and secondary institutions, and the document was issued by the Office of Elementary and Secondary Education, which does not exert authority over institutions of higher education. Moreover, regardless of the office that released the document, the document contained clear language specifying that the emerging practices highlighted throughout the document did not "constitute an endorsement" by the Department of that policy.[45] Nonetheless, the document offers several helpful ideas that can be considered by institutions of higher education as further conversations proceed.[46]

II. OCR Enforcement Actions Under the Obama Administration

Many of the principles and practices referenced throughout various OCR guidance documents had been foreshadowed by resolution agreements and OCR findings related to transgender students and gender identity issues.

For example, the roots of the consistent treatment principle can clearly be seen in the July 2013 resolution agreement with Arcadia Unified School District.[47] In that Resolution Agreement, OCR required that Arcadia provide a student access to certain sex-specific facilities "consistent with his gender identity."[48]
Similarly, in a letter of findings involving Township High School District 211, OCR concluded that District 211 violated Title IX when it "singled out" a transgender student "for different treatment from that of her peers" with respect to use of a sex-specific locker room.\[49\]

The consistent treatment principle is also supported by OCR's letter of findings regarding the Broadalbin-Perth Central School District, in which it notes that a student's complaint regarding restroom access was resolved by an agreement in which Broadalbin-Perth, among other things, agreed to provide access in a manner consistent with the student's gender identity.\[50\]

Likewise, OCR explained the rationale for applying the consistent treatment principle to bathroom access in a letter of findings involving Central Piedmont Community College (CPCC).\[51\] In response to restrictions on sex-specific restroom access, the letter states that "students who do not conform to stereotypical notions of [masculinity or femininity] are protected from sex-based discrimination under Title IX."\[52\] The associated resolution agreement also required that institutional procedures state that "discrimination based on a student's gender identity, gender expression, gender transition, transgender status, or gender nonconformity" is sex-based discrimination.\[53\]

Although the above principles align with the 2016 DCL, certain other portions of resolution agreements are not included in the 2016 DCL. For example, in the Arcadia Unified School District resolution, OCR defined "gender identity" as one's gender that is both "consistently and uniformly asserted" and "sincerely held as part of a [person]'s core identity."\[54\] Many institutional policies use this concept to combat possible abuses of the policy, such as opportunistic voyeurism and practical jokes by disingenuous persons. In the 2016 DCL, however, the Departments define gender identity as "an individual's internal sense of gender,"\[55\] without mentioning the "consistently asserted" or "sincerely held" language.

Another example of a potential difference between enforcement activity and the guidance in the 2016 DCL is the 2016 DCL's approach to records. In the CPCC resolution, OCR required an institution to make a name or gender change after receiving court documentation.\[56\] The 2016 DCL required an institution to begin treating a student consistent with their gender identity as soon as it receives notice that a student will assert a gender identity different from previous representations or records.\[57\] Moreover, the 2016 DCL required that an institution make changes to student records (including legal name change or change in gender identification) upon request.\[58\] A student or parent may file a Title IX complaint if the student or parent is dissatisfied with the institution's handling of the request.\[59\]

Finally, in the Township High School District 211 letter of findings, OCR used a "totality of the circumstances" approach to balance the privacy interests of gender conforming students against the rights of the transgender community.\[60\] In that letter, OCR found the district's assertions regarding the privacy interests of other students "unavailing"\[61\] and ultimately accepted a compromise between the district and the transgender student by requiring the district to provide the transgender student and others a private changing area using privacy curtains within the girls' locker rooms. The 2016 DCL, however, did not recognize a "totality of circumstances" approach, but rather stated that institutions may make individual-user options available to all students on a voluntary basis.\[62\]

III. The Future of OCR Guidance and Enforcement

Although the details of some of the OCR's recent enforcement actions differ from the clear guidance offered in the 2016 DCL, OCR's general approach during the Obama administration to
issues of gender identity and the rights of transgender students followed a clear path: greater protection for transgender students and detailed requirements for addressing issues related to gender identity.

But the future of this approach is uncertain. As noted above, enforcement of the 2016 DCL has been enjoined as part of a lawsuit initiated by numerous states including Texas, Alabama, Wisconsin, West Virginia, Tennessee, Arizona, Maine, Oklahoma, Louisiana, Utah, and Georgia against DOJ and OCR (the “Texas Case”). In the Texas Case, the states asserted, inter alia, that the 2016 DCL contravenes the text and reasonable interpretation of Title IX, that OCR failed to properly engage in required rulemaking, and that the Departments have effectively changed the law and thus exceeded their authority under Title IX.

In August 2016, the district court issued a preliminary injunction against the Departments. The injunction enjoins the Departments from enforcing the 2016 DCL against the plaintiff-states and school districts, from using the 2016 DCL to argue that the definition of "sex" as it relates to intimate facilities includes gender identity, from "initiating, continuing or concluding any investigation" based on the Departments' interpretation that the Title IX definition of "sex" includes gender identity, and from asserting that the 2016 DCL carries weight in any litigation subsequent to the injunction.

Possibly the most interesting aspect of the court's ruling is its declaration that the injunction against the Departments applies nationwide, and not only to the Departments' enforcement actions against the plaintiffs. The national application of the injunction was reasserted and clarified in an order on October 18, 2016. These orders, and their scope, were initially appealed to the 5th Circuit Court of Appeals by the Departments. In their brief filed with the Court of Appeals, the Departments contested the nationwide application of the district court's preliminary injunction, but did not specifically appeal the interpretation of Title IX as applied to gender identity. Rather, the Departments asked the 5th Circuit to defer the question of whether the Departments' Title IX interpretation is correct because the U.S. Supreme Court is taking up that question in a pending case, discussed below. On February 10, 2017, the Departments withdrew their objections to the nationwide injunction, stating they were “considering how best to proceed in the appeal.” As of the date of this NACUANOTE, the district court's order and injunction are still controlling authority.

Notwithstanding the prohibitions against the Departments, the district court recognized that educational institutions could define "sex" to include gender identity. The court noted that the applicable Title IX regulations are permissive, and states may authorize institutions to define "sex" to include gender identity in the provision of restrooms, locker rooms, and other intimate facilities. The injunction has no effect on states, only on the Departments enforcing their interpretation of the Title IX regulations on states (and governmental subdivisions) "whose laws direct separation" based on birth sex or anatomy.

Other states are also challenging the Departments' ability to issue the 2016 DCL. In July 2016, the states of Nebraska, Kansas, Arkansas, Montana, North Dakota, Ohio, South Carolina, South Dakota, and Wyoming also sued the Departments for failure to engage in proper rulemaking in the issuance of the 2016 DCL and for exceeding their authority. As in the Texas case, the Departments have requested a stay from any determination of the Departments' authority to include protection of gender identity under Title IX. This stay has been granted pending resolution of the case currently before the Supreme Court.
Finally, on October 28, 2016, the U.S. Supreme Court agreed to hear an appeal from a decision of the 4th Circuit Court of Appeals requiring a school district to comply with the Department of Education's interpretation and enforcement of the 2016 DCL. Specifically, the Supreme Court agreed to hear arguments on whether courts should give deference to the 2016 DCL, as an unpublished agency letter that does not carry the force of law, and whether the Departments' specific interpretation (that "sex" under Title IX includes gender identity) should be given effect. While not specifically addressing whether the Departments had the ability to issue the 2016 DCL in the first instance, a decision regarding the weight that courts must give the guidance could significantly impact the relevancy of guidance moving forward.

Apart from challenges to the 2016 DCL itself, OCR's approach generally has also been called into question through lawsuits raised by individuals who have been directly affected by OCR resolution agreements. For example, multiple lawsuits by private persons against the Departments assert claims related to privacy. Some state attorneys general and education boards have issued guidance and recommendations for institutions during the pendency of the current lawsuits.

Finally, in addition to these direct challenges to the 2016 DCL and the principles detailed in the enforcement actions, the change in administration at the Department of Education is likely to significantly influence OCR's future approach. The administration has already withdrawn its objections to the existing nationwide injunction in the Texas Case, thus leaving the injunction in place. Some speculate that this decision signals a departure from the approach of the Obama administration, although at this point, all that is known is that the new administration is weighing its options on appeal. A change in approach could manifest in other ways too. OCR could simply change its enforcement approach and signal a shift through individual enforcement actions. OCR could also choose to "archive" the 2016 DCL or previous guidance, or could simply decline to rely on the guidance in enforcement actions. More drastically, OCR could repeal existing guidance, and potentially replace it with new guidance that requires a different approach.

Even if a nationwide injunction remains in place indefinitely, if the 2016 DCL is archived, or if the new administration deprioritizes enforcement, the guidance and the approach of the Obama administration, as evidenced through resolution agreements, offers a useful framework for campuses that desire to build more inclusive spaces for transgender students. Such efforts, though, must be undertaken with careful attention to competing legal interests that emerge, whether through state laws, federal judicial decisions, or new sub-regulatory guidance. In light of the unsettled state of federal guidance, practitioners will be well advised to closely monitor pending legal challenges and consider how state laws in their respective jurisdictions may impact an institution’s particular circumstances.

IV. Current Title VII and Title IX Case Law on Gender Identity

Federal courts are far from uniform in how they approach gender identity under Title VII and Title IX.

Many courts have concluded that gender identity is a sufficient basis to establish an action under Title VII or Title IX. For example, the federal appellate courts for the Sixth and Ninth circuits have each held that gender identity is a protected status as sex discrimination under Title VII. In Smith v. City of Salem, a transgender firefighter sued under Title VII for sex discrimination based on gender stereotyping. The Sixth Circuit held that "sex discrimination" encompasses discrimination because of gender non-conforming conduct, including birth males...
presenting as females. The Sixth Circuit reaffirmed that transgender persons are a protected class under Title VII in a case where a gender non-conforming police officer was demoted for failure to appear masculine. In Schwenk v. Harford, the Ninth Circuit held that Title VII prohibits discrimination "based on gender as well as sex," thus discrimination based on biology as well as self-identified gender is impermissible under Title VII.

Courts have reached similar results under Title IX. In Montgomery v. Independent School District No. 709, a district court held that harassment because of sexual orientation was unlawful discrimination based on gender stereotyping (about how males should act), and thus unlawful discrimination under Title IX. Likewise, in Miles v. New York University, the court held that "because of sex" means the same thing in the Title IX context as in the Title VII context, thus applying the Price Waterhouse "sex stereotyping" line of reasoning to a Title IX case.

But this position is not a settled issue. In multiple jurisdictions, for example, birth sex (sex assigned at birth) or anatomical sex, rather than gender identity, has been established as the legitimate determinant of "sex" under Title VII, and courts have upheld employers' use of various sex-based measures such as restrictions on clothing and restroom usage. In Etsitty v. Utah Transit Authority, a trans female bus driver was fired because she did not use public restrooms consistent with her birth sex. The court held that Title VII did not apply to transgender persons, as a class, and the employee was not required to do anything inconsistent with what was required of other biological males. In another case, Hispanic Aids Forum v. Estate of Bruno, a New York appellate court held that there was no discrimination in requiring persons to use a restroom consistent with their biological sex.

In the Title IX context, at least one court has found that restrictions based on birth sex, and not gender identity, are permissible. In Johnston v. University of Pittsburgh, a federal district court ruled that an institution could require a court order before changing gender on a student's record and before allowing a transgender student to use locker rooms associated with his gender identity.

Complicating matters further, as noted, the 9th Circuit has held that Title VII prohibits discrimination based on both birth sex and gender identity. However, under both Title VII and Title IX, the court subsequently accepted a community college's requirement that individuals establish their medical transition before being allowed to use restrooms consistent with their gender identity, and accepted an institutional analysis that included assertions of "safety" concerns.

Given this clear split in authority between circuits, colleges and universities should carefully consider the applicable law in their jurisdiction when making determinations about how to approach issues related to gender identity.

V. State and Local Law Considerations

Campus practitioners must take into account state and local laws when formulating an approach to gender identity.

First, schools should be aware of whether their state or local civil rights laws include gender identity, transgender individuals, or other related characteristics as protected classifications. For example, in Illinois, the Illinois Human Rights Act defines sexual orientation to include "gender-related identity," and prohibits discrimination and harassment in numerous areas on that basis. Similarly, in Connecticut, the state's human rights statutes prohibit discrimination
based on sexual orientation, gender identity, and gender expression in employment, housing, and public accommodations. [98] Other states have similar state laws. [99]

In addition to general inclusion of gender identity in anti-discrimination laws, specific state or local laws may also require additional protections or rights regarding specific issues related to gender identity. For example, Chicago municipal law explicitly prohibits asking an individual for proof of gender identity for use of various “distinctly private” gender-specific spaces, such as bathrooms and locker rooms. [100] A Fort Worth local ordinance also generally prohibits exclusion from public accommodations based on an “identification requirement.” [101] Similarly, Philadelphia municipal law grants all private employees the right to “dress in accordance” with their gender identity, and requires employers to change an individual’s gender on “any forms or records under the control of that employer.” [102]

However, institutions should be aware of instances in which specific state laws might conflict with approaches that permit, or require, various protections based on gender identity. For example, North Carolina sued the DOJ and OCR asserting that the 2016 DCL conflicted with state law. [103] Commonly referred to as HB2, the North Carolina statute requires that public restrooms and changing facilities, including those at educational institutions, be segregated based on “biological sex,” and single occupancy facilities be provided as accommodations to transgender or gender non-conforming individuals and others seeking personal privacy. [104] The State of Texas is considering a similar bill in its upcoming session, whereby access and use of restrooms, locker rooms, and showers in public facilities would be determined by users’ sex assigned at birth. [105]

Finally, criminal laws of nearly every state related to public indecency, public nudity, and child endangerment should be carefully considered. For example, a transgender male with breasts traditionally associated with being female could be subject to public indecency laws in many states for failing to wear a top or other covering at the campus swimming facilities. [106] Similarly, child endangerment statutes may apply if a transgender female, who has not undergone sexual reassignment surgery, exposes her penis in the presence of minors at campus facilities. [107]

As such, schools should also carefully examine the requirements of state and local laws when making determinations about their obligations and options with respect to transgender students and gender identity.

VI. Practical Considerations

While the state of the legal landscape regarding transgender students and gender identity issues is far from settled, colleges and universities are already successfully taking numerous steps to accommodate students with varying gender identities to protect them from harassment, and to generally create a more inclusive community, while still being respectful of student privacy and mindful of their own traditions and missions. This section offers some practical considerations for addressing various issues related to gender identity and transgender students, drawing in part on successful practices at many colleges and universities.

A. Records

At many institutions a student’s record forms the foundation of many aspects of a student’s experience. For example, decisions about housing, restroom access, athletics, transcripts and
diplomas, and routine communications from faculty and the university are all often dependent on the information in a student's record.

Even if an institution is not able to process an official or legal name or gender change, schools may want to consider adopting "preferred name" or "preferred gender" policies that will allow a student to consistently be referred to by an appropriate name, pronoun, and otherwise treated consistently with their gender in all campus activities.[108]

Schools may also want to consider whether to recognize a student's gender identity as a result of less formal notifications from the student regarding their gender identity. This could include, for example, a student's consistent presentation of a particular gender identity or a student's informal indication to a particular campus office that the student will be asserting a particular gender identity.

Finally, given the importance of student privacy and the possibility that disclosing certain student record information may identify a student as transgender, an institution might consider:

- Reviewing the information that is designated as "Directory Information" in an Annual FERPA Notification and ensuring that "sex," or any demographic information that could reveal a student's transgender status (such as "gender" or "gender identity") are not included.

- Reviewing the various employees that have access to particular information in a student's education records related to a student's gender identity or transgender status. (For example, a discrepancy in name or gender between a legal record and the gender a student has asserted to the institution could disclose a student's transgender status.) As needed, modify access designations so that only individuals who have a legitimate educational interest in particular aspects of education records have access to the information.

- Reviewing the process for requesting an amendment to an education record under FERPA and ensuring that those who implement the process understand that requests for record changes related to a student's transgender status or gender identity should be treated in a manner "consistent with [the] general principle for amending other students' records."[109]

B. Restroom and Locker Room Access

An institution may consider a policy that would allow a transgender student to use facilities consistent with the student's gender identity, as opposed to a policy that would require a transgender student to use individual-user facilities if other students are not required to do so.[110] As detailed above, however, federal laws as interpreted in certain jurisdictions, and state and local laws may also permit, require, or prohibit this approach. To be sure, this remains one area in which significant uncertainty about legal requirements and options remain.

At a minimum, schools may wish to consider making "individual-user options available to all students who voluntarily seek additional privacy."[111]

To facilitate this option, schools may undertake a climate and feasibility study to assess the need and potential for individual-user options such as single-stall restrooms, single-use changing stalls and showers, and privacy curtains. Simultaneously, in order to make the
campus community aware of existing options, a school may want to consider taking inventory of existing individual-user facilities and making this information publicly available to the campus community via a map or other document that is readily accessible to the public such as on an institutional webpage.\[112\]

C. Housing

Campus housing is another area in which gender identity issues can often arise.

On a practical level, many issues related to housing assignments and gender identity could be efficiently addressed by designating a portion of campus housing as "gender neutral." In gender neutral housing, students choose to live in a community in which roommates are assigned without respect to gender. This creates a simple and straightforward way to offer an environment in which a student's gender simply does not enter into the housing equation.

Most campuses, however, will continue to designate at least some portion of their housing options by gender. In these situations, or in situations in which a student does not wish to live in a gender neutral space, institutions could consider developing processes for ensuring that students are appropriately housed according to their stated gender identity. This approach aligns with the guidance set forth in the 2016 DCL.

Because each transgender person's experience is unique, this will necessarily involve developing a customized approach, appropriate for the student's specific situation and circumstances.\[113\] Determinations could be made by taking into the account the consistent treatment principle as well as the overall goal of ensuring a safe and equitable opportunity for all students to participate in the housing experience free from discrimination and harassment. Individualized options may include offering a student priority room placement in a single room, or offering priority regarding roommate requests.

In the instance of student privacy, institutions may wish to publish a confidentiality statement on the housing application, so that students are aware that the information they share as part of the process of determining appropriate housing accommodations will be kept in confidence and only shared according to the student's wishes.\[114\]

Alternatively, if a student wishes to disclose gender identity or status as a transgender student, or permits the institution to make such a disclosure, these conversations may help institutions anticipate and mitigate concerns that arise. For example, a student may ask that a potential roommate be informed of their status as a transgender student in order to identify a roommate that will be a good fit. Likewise, prospective roommates may be asked generally about their willingness to room with individuals of varied gender identities on housing applications, thus creating a pool of potentially safe and supportive roommates. Handling such disclosures in a legally appropriate and student-centered way requires that the professionals handling these decisions be carefully trained.

D. Athletics

Federal guidance and federal and state law provide limited guidance about gender identity and athletics. As such, many aspects of intercollegiate sports are informed by the guidance issued by the various governing bodies applicable to particular sports and campuses. This includes, for example, guidance or best practices set forth by associations such as the National Collegiate
Athletics Association (NCAA),[115] the National Association of Intercollegiate Athletics (NAIA),[116] and the National Intramural-Recreational Sports Association (NIRSA).[117]

If institutions offer athletic experiences outside the scope of these associations, they may consider tailoring participation requirements "based on sound, current, and research-based medical knowledge" and linked to "competitive fairness or physical safety."[118]

E. Awareness & Training

Regardless of the particular aspect of campus activities, it is critically important that appropriate individuals on campus be well-trained on issues of gender identity. This training could include training on policy and process development, training on responding to questions or concerns from transgender students and their families, and training on how to respond to questions or concerns from other members of the campus community. Training could be conducted by internal experts, perhaps using a "train the trainer" model, or could be supplemented by external training resources.

Information on considerations related to gender identity could be broadly distributed to the entire campus community as a part of Title IX outreach and training. Given the complexity of these issues, one approach may be to use an embedded resource model in which particular individuals in key units receive more extensive training and then are designated as resources for transgender students and others.

CONCLUSION:

While the legal landscape regarding gender identity and transgender issues is uncertain, identity politics centered around gender identity and issues regarding the inclusion and treatment of transgender students, continues to be a salient issue on many campuses.

The 2016 DCL, as a culmination and extension of a series of statements in previous guidance documents, resolution agreements, and OCR findings, offers a useful framework for thinking about how colleges and universities might address various issues related to transgender students and employees. And, in many respects the 2016 DCL aligns with a trajectory regarding the scope of Title VII and Title IX in several jurisdictions, and with various state laws.

Yet the future validity of the 2016 DCL and OCR's future approach is uncertain, whether as a result of the current injunction, the input of the Supreme Court, or as a result of a shift in approach under the new presidential administration. Moreover, even as currently articulated, OCR's approach does not align with the understanding of Title IX and Title VII in all jurisdictions, or with all state and local laws.

Future administrative clarification or a pronouncement from the Supreme Court could certainly provide clarity regarding some of these issues, but given the complicated patchwork of jurisprudential interpretations on various issues, federal guidance, and state laws, it is unlikely that all the issues related to gender identity and transgender students in higher education will be neatly resolved in the near future.

In the meantime, campuses must grapple with these issues with an eye to both legal requirements and institutional mission. Practical realities of individual situations can be
complex, and developing nuanced policies and procedures will certainly continue to involve ongoing conversations at many levels. These conversations sometimes press against deeply held societal beliefs regarding social mores, personal autonomy, and community safety. Perhaps, however, this uncertain moment in the legal conversation offers institutions opportunities to implement proactive and individualized approaches so as to ensure a safe and nondiscriminatory environment for all students.

RESOURCES:


NCAA Inclusion of Transgender Student-Athletes (August 2011).


Resolution Agreement, In re Arcadia Unified. Sch. Dist., CA, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, (July 24, 2013).

U.S. Dep't of Educ. and U.S. Dep't of Justice, "Dear Colleague Letter on Transgender Students" (May 13, 2016).

U.S. Dep't of Educ., "Dear Colleague Letter [on Bullying]," (Oct. 26, 2010).

Voluntary Resolution Agreement, Central Piedmont Community College (Aug. 13, 2015).

Campuspride.org

ENDNOTES:

[1] Marla Morgen is Senior Associate General Counsel for DePaul University. In her position, Marla provides legal counsel on a wide-variety of areas such as student conduct, sexual and relationship violence/Title IX, speech and expression issues, campus safety, student activities, housing, disability issues, student welfare/mental health, academic integrity, international programs, admissions, employment, diversity, public relations, and experiential education.

[2] Troy J. Perdue is Deputy General Counsel at East Tennessee State University. Like many attorneys in higher education, he provides counsel on a wide range of legal matters, primarily focusing in the areas of free speech and expression, student conduct, international programs, employment, and complex
transactions. He has presented on various legal issues in higher education, including employment discrimination, sex discrimination and harassment, and commercial transactions.¹

³ Throughout this NACUANOTE the term "gender identity" will be used to mean both gender identity and gender expression.


⁵ U.S. Dep.'t of Educ. Office for Civil Rights, "Dear Colleague" Letter on Transgender Students ("2016 Dear Colleague Letter on Transgender Students" or "2016 DCL") (May 13, 2016).


⁷ Id.

⁸ U.S. Dep.'t of Educ. Office for Civil Rights, "Dear Colleague" Letter on Harassment and Bullying (Oct. 26, 2010).


¹⁰ U.S. Dep.'t of Educ. Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence ("2014 Q&A on Title IX and Sexual Violence") (Apr. 29, 2014), at 5 (B-1 & B-2).

¹¹ 2011 Dear Colleague Letter on Sexual Violence at 3, n.9; Cf. 2014 Q&A on Title IX and Sexual Violence, at 5 (B-1 & B-2) (clarifying that Title IX protects transgender students from sexual violence).

¹² 2011 DCL on Sexual Violence, at 3, n.9.

¹³ 2016 Dear Colleague Letter on Transgender Students.

¹⁴ Id. at 2.

¹⁵ Id. at 2-3.

¹⁶ Id. at 2.

¹⁷ There is ongoing disagreement about the extent to which sub-regulatory guidance obligates colleges and universities to adopt various policies and procedures. To many, sub-regulatory guidance does not have the force of law in the same way that a statute or a regulation does. Yet, sub-regulatory guidance evidences the Executive Branch's intent to enforce what it believes to be a reasonable interpretation of a statute or regulation, with the ever present threat of loss of federal funds for those institutions that do not to comply. For the purpose of this NACUANOTE, the authors treat "must" and "should" in the 2016 DCL as if they were obligations, recognizing that others may have been more inclined to interpret such provisions as suggestions.

¹⁸ 2016 Dear Colleague Letter on Transgender Students, at 2.

¹⁹ Id.
Title IX applies to both students and employees of educational institutions that receive federal funding. *Northhaven Bd. of Ed. v. Bell*, 456 U.S. 512 (1982). This Note focuses on student issues and uses student-focused language. However, to the extent applicable, there is no reason why the principles set forth in federal guidance or enforcement, or various laws will not apply equally to employees of educational institutions.

2016 Dear Colleague Letter on Transgender Students, at 3.


2016 Dear Colleague Letter on Transgender Students, at 3.

2016 Dear Colleague Letter on Transgender Students, at 1.


2016 Dear Colleague Letter on Transgender Students, at 4. This is important for two reasons. First, OCR does not have jurisdiction over FERPA complaints. A different division of the Department of Education, the Office of the Chief Privacy Officer (formerly, the Family Policy Compliance Office), resolves complaints related to FERPA. By stating that privacy concerns may, by themselves, raise Title IX concerns, OCR is extending its jurisdiction over this issue. Additionally, individuals do not have a private right of action under FERPA, whereas they do under Title IX. *Gonzaga University v. Doe*, 536 U.S. 273, 290 (2002).

In 1991, the Department of Education determined that the FERPA right to amend does not apply to a situation in which a student asks to correct their records to reflect a change in name or gender as a result of transitioning. Letter from LeRoy Rooker to Great Falls School District of Nov. 13, 1991. This view has not been formally reconsidered. However, the guidance in the opinion letter is difficult to square with the 2016 DCL.


See also American Council on Education, "U.S. Departments of Education and Justice Issue Joint Guidance Related to Transgender Students and Title IX" (Issue Brief, May 2016).

Arcadia School District Resolution Agreement ("Arcadia Resolution Agreement"), Case No. 09-12-1020m (July 24, 2013).

Id. at 3.


Id. at 2.

Central Piedmont Community College Resolution Agreement (“CPCC Resolution Agreement”), Case No. 11-14-2265 (Aug. 13, 2015), at 1.

Arcadia Resolution Agreement, supra note Error! Bookmark not defined., at 2.

2016 Dear Colleague Letter on Transgender Students, at 1.

CPCC Resolution Agreement, supra note Error! Bookmark not defined. at 2.

2016 Dear Colleague Letter on Transgender Students, at 5.

Id. at 2, 5.

Id.

Township High Letter of Findings, supra note Error! Bookmark not defined., at 13.

Id. In response to the district's concerns that an amended policy might "expose female students to being observed in a state of undress by a biologically male," and young female students viewing a naked male "in a state of undress," and exposing female students "as young as fifteen years of age to a biologically male body", OCR found "the concerns unavailing." Id. at 11.

2016 Dear Colleague Letter on Transgender Students, at 3.

[64] Id. at 19-30.


[66] Id. at 37.

[67] Id. at 36.


[73] Id. at 37.


[78] Id.


[81] This section examines select court cases in order to provide a snapshot of current approaches. For a more thorough examination of the sources see Chicora Martin, Marla Morgen, and Josh Whitlock, "Navigating Legal Issues Involving Transgender Students," (NACUA Annual Conference, June 28, 2016); Troy J. Perdue, "Top 5 Trans* Issues for Colleges and Universities" (June 22, 2014); Troy J. Perdue,

[82] See 2016 Dear Colleague Letter on Transgender Students, at n. 5.

[83] Adding to the matrix of laws limiting gender discrimination, in Glenn v. Brumby, the Eleventh Circuit held that termination of an employee because of her transition from male to female was impermissible discrimination under equal protection principles. Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011).

[84] Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2000).

[85] Id. at 573.


[87] Schwenck v. Hartford, 204 F.3d 1187 (9th Cir. 2000).

[88] Id. at 16.


[95] Schwenck v. Hartford, 204 F.3d 1187 (9th Cir. 2000).


[97] 775 ILCS 5/1-103(O-1).


[100] Chicago Municipal Law Chapter 2-160-070(e) ("Each person determines his or her own gender identity: no proof shall be required except his or her expression of his or her gender.")


[110] Id. at 3.

[111] Id. at 3.


[118] 2016 Dear Colleague Letter on Transgender Students

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