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Beyond Bathrooms: New Guidance Regarding Transgender Students Addresses FERPA Requirements

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The U.S. Department of Education and Department of Justice recently weighed in on the obligations of school districts, colleges and universities to provide civil rights protections for transgender students. On May 13, the departments issued a Dear Colleague Letter that summarizes the responsibilities of school districts, colleges and universities that receive federal financial assistance under the departments' interpretation of federal law, including Title IX of the Education Amendments of 1972 and the Family Education Rights and Privacy Act. Here, we focus on the DCL's guidance pertinent to compliance with FERPA.

While the DCL addressed topics related to sex-segregated activities and facilities, it also provided guidance regarding the maintenance of student privacy. The DCL clarifies the responsibilities of school districts, colleges and universities regarding privacy and education records under FERPA and Title IX. The DCL does not reflect a revision of ED's regulations implementing FERPA; rather, it provides guidance on how the departments will interpret and enforce Title IX and FERPA moving forward.

FERPA is a federal statute that defines the extent to which school districts, colleges and universities are responsible for keeping student data private. Generally, FERPA requires

that school districts, colleges and universities maintain the confidentiality of student records and prevent any nonconsensual disclosure of personally identifiable information. FERPA also allows a parent or eligible student (i.e., a student age 18 or over, or in college) to ask that education records relating to the student be amended if the records contain information that is inaccurate, misleading or in violation of the student's privacy.

The DCL addresses a number of topics related to the protection of transgender students' privacy under FERPA. For example:

- The DCL makes clear that the departments may find a Title IX violation when a school district, college or university fails to take reasonable steps to protect students' privacy related to their transgender status (e.g., birth name or sex assigned at birth) and it also states that nonconsensual disclosure of PII, such as a student's birth name or sex assigned at birth, could be a violation of FERPA.
- School districts, colleges and universities may receive a request to amend a student's education records to make them consistent with the student's gender identity. This could include a request to reflect the student's gender identity and a new name to help protect the student's privacy and to ensure personnel consistently use the student's preferred name and appropriate pronouns. Under FERPA, a school district, college or university must consider the request of an eligible student (if the student is age 18 or older, or if the student is in college) or a parent (if the student is under age 18 or not in college) to amend information in the student's education records that is inaccurate, misleading or in violation of the student's privacy rights. If the school district, college or university does not amend the record, it must inform the requestor of its decision and of the right to a hearing under FERPA. In addition, according to the DCL, the departments interpret Title IX to require that a school district, college or university respond to a request to amend information related to a student's transgender status consistent with its general practices on student record amendment. In other words, transgender students and their families should not face unique hurdles in attempting to update records. If a student or parent complains about the handling of such a request, the school district, college or university must resolve the complaint using its Title IX grievance procedures.
- FERPA also contains restrictions on who may have access to PII within a student's

education records, such as a student's birth name or sex assigned at birth, without written consent of the eligible student or parent. Under an existing exception to FERPA, a school district, college or university may disclose without consent PII from a student's education records to individual school officials with a legitimate educational interest in that information. The DCL, however, states that, even when a student disclosed the student's transgender status to some members of the school community, the school official exception does not automatically allow school officials to share that information with other school personnel who do not have a legitimate educational interest in the information.

- Under FERPA, another exception to the disclosure prohibition normally applies to "directory information," which is information that would not generally be considered an invasion of privacy if disclosed. This may include the student's name, address, phone number, place of birth, honors and awards, and dates of attendance. The DCL specifies that a student's sex, transgender status and gender identity cannot be deemed directory information.

School districts, colleges and universities should review the DCL to learn more about the how the departments interpret and plan to enforce Title IX and FERPA with regard to the privacy rights of transgender students.

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