

Transgender Students, Title IX and Affirmative Action in Higher Education

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Admissions Officers

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What does transgender mean?

- Umbrella term for individuals whose gender identity or gender expression differs from those typically associated with their assigned sex at birth
- Identity as a transgender person is not related to physical changes to the individual's body
 - Transgender persons may or may not hormonally or surgically alter their body

Definition from Top 5 Trans Issues for Colleges and Universities: Records, Housing, Bathrooms, Locker Rooms and Athletics, June 22, 2014 by Troy Perdue*

Federal law

- Transgender discrimination not specifically prohibited by federal law
- EEOC interprets Title VII to prohibit discrimination on the basis of gender identity
- Title VII prohibits discrimination based on failure to conform to applicable gender stereotypes
 - Circuit split on whether discrimination based on transgender status is unlawful sex stereotyping
 - 10th Circuit has not extended Title VII protection to individuals based on gender identity

Federal law

- Title IX protection or transgender individuals in education is unclear
- May 2016 guidance on Transgender Students issued jointly by Civil Rights Division of Department of Justice and Department of Education
 - Rescinded by Trump administration on February 22, 2017
 - Recension noted “withdrawal of these guidance documents 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.”

Federal law

- No new guidance on transgender issues put out by Trump administration
- October 21, 2018 - Trump administration considering defining gender as “a biological, immutable condition determined by genitalia at birth” (New York Times)
 - Department of Health and Human Services is “spearheading an effort to establish a legal definition of sex under Title IX”
 - “Sex means a person’s status as male or female based on immutable biological traits identifiable by or before birth.”
 - HHS has called on Department of Justice, Department of Education, and Department of Labor to adopt its definition in regulations

Oklahoma law

- No laws specific to transgender individuals
- No laws specific to changing gender on birth certificate
 - 63 Okla. Stat. § 1-321 allows a birth certificate to be amended with a certified copy of a court order changing a person's name
- BUT, landmark case in employment in Oklahoma
 - *Tudor v. Southeastern Oklahoma State University* (W.D. Okla. 2017)
 - Jury awarded \$1.1 million in damages to professor denied tenure status who claimed denial was based on transgender status
 - Department of Justice initially filed suit, but settled with SOSU and withdrew after Trump administration rescinded transgender guidance in 2017

Reporting Requirements

- All institutions receiving Title IV funds are required to complete Integrated Postsecondary Education Data System (IPEDS) surveys which require inclusion of gender
 - Two options: male or female
- If gender is unknown, up to institution to decide how to report
 - Per FAQs, most common method is to allocate based upon known proportion of men to women
- Gender **cannot** be designated as directory information under FERPA (20 U.S.C. 1232g(a)(5)(A))
- Students can request amendment to educational records under FERPA for a later change (i.e. court order changing gender or name)

Admissions Applications

- Institutional decision as to which options to include
- Beginning in 2016-2017, the Common Application updated “sex” field to “sex assigned” at birth
 - Applicants must select male or female
 - Additional text field is included to allow applicants to further describe their gender identity
- Institutions may consider a “preferred name” option that is then used for campus communications, class rosters, campus identification, etc.
- May also consider a “preferred pronoun” option

Title IX

- 2011 Dear Colleague Letter rescinded on September 22, 2017
- 2017 Q&A issued to supplement 2011 Revised Sexual Harassment Guide
 - <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>
- Proposed regulations opened for public comment in November 2018
- Comment period closed January 30, 2019
 - Approximately 10,000 commenters submitted nearly 100,000 comments
- Timeline for final rules unknown

Title IX

- Key Changes in Proposed Rules:
 - Accused has guaranteed right to cross-examine accuser
 - Institutions only required to investigate when there is a formal complaint and incident happened on campus or within educational program or activity
 - Narrower definition of sexual harassment
 - Time frame to complete investigation/proceeding depends on circumstances (no longer 60 days)
 - Institutions can choose standard of proof - preponderance of the evidence or clear and convincing
 - Informal resolutions might be appropriate
 - Resolution agreements do not set standards applicable to other schools (considered fact specific)

Affirmative Action

- Institutions have generally not been required to or prohibited from considering race in admissions
- July 2018 - Attorney General Jeff Sessions rescinded 24 guidance documents that were “unnecessary, outdated, inconsistent with existing law, or otherwise improper”
 - Included at least 7 related to affirmative action in admissions
- Oklahoma - State Question 759
 - Passed in 2012
 - Constitutional amendment prohibiting preferential treatment based on race, color or gender in public employment, education and contracts

Affirmative Action

- 2017 - New York Times examined racial and ethnic makeup of 100 highly selective institutions
 - African Americans make up 15% of college-age Americans, but only 6% of freshmen
 - Hispanics make up 22% of college-age Americans, but only 13% of freshmen
- *Fisher v. Texas* - 2016
 - Filed by white female student who was rejected
 - University of Texas considered race with regard to Texas students below the top 10% of their class
 - Supreme Court upheld race conscious admissions practice (4-3 decision)

Affirmative Action

- Harvard litigation
 - Students for Fair Admissions filed lawsuit against Harvard alleging discrimination against Asian-American applicants
 - Harvard uses a holistic admissions process
 - Allegations that Asian-Americans who perform well academically receive a lower “personal score” in the admissions process
 - No testimony given from any individual who was denied admission
 - Trial ended November 2, 2018 - no decision yet
 - Both sides plan to appeal if they lose

Affirmative Action

- The takeaway:
 - Institutions can generally use race as a factor in admissions as long as the methods used are narrowly tailored to achieve a level of diversity representative of the larger population
 - Workable race-neutral alternatives do not suffice
- In Oklahoma, only private institutions may consider race; public institutions prohibited because of State Question 759