Secretary Cardona and Acting Assistant Secretary Goldberg:

On behalf of associations within the Student Affairs Higher Education Consortium, please accept the attached written comments to the Title IX Public Hearings.

Sincerely,

Jill Dunlap

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The Honorable Miguel Cardona
Secretary
Department of Education
400 Maryland Avenue SW
SW
Washington, DC 20202

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue
Washington, DC 20202

Re: Written Comment for Title IX of the Education Amendments Act of 1972 Public Hearing

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

The higher education organizations responsible for these comments represent a broad range of student affairs professionals who do the bulk of the work related to Title IX compliance within institutions of higher education. As student support professionals, these groups represent student conduct administrators, housing staff, recreational sports staff, LGBT Center Directors, college union leaders and student activities personnel. All of these professionals regularly work with and support the needs of transgender and gender non-conforming students at institutions of higher education.

On behalf of the 9 undersigned student affairs higher educational organizations, we are submitting this written comment in response to the Department of Education’s notice of a virtual public hearing on the Title IX of the Education Amendments Act of 1972 [Title IX] to strongly encourage the Department to reinstate and in some cases strengthen protections for gender non-conforming and transgender college students.

Impact

While the importance of protections for LGBT youth is true throughout the educational experience, it is particularly important in the post-secondary environment. Title IX has been used by previous presidential administrations to protect the rights of LGBT and gender non-conforming students. A 2018 study conducted by the American Association of Universities found that 17% of college students identified as gay, lesbian, bisexual, asexual, queer, or questioning.¹ In the same survey, 1.7% of undergraduate and graduate students identified as trans, nonbinary, or questioning. Of those students, two in three reported experiencing sexual harassment, while twenty percent feared for the physical safety due to their gender identity.

Title IX protections for college students, based on gender identity have the potential to affect the academic pursuits of hundreds of thousands of college students.

Recent studies have found that LGBT students, but transgender students especially, face higher rates of discrimination within the college setting. A recent study by the Harvard Chan School, NPR, and the Robert Wood Johnson Foundation found that Among LGBTQ people who have

¹ https://pnpi.org/lgbtq-students-in-higher-education/
ever applied to or attended college, 20% say they have experienced discrimination while applying or at college because of their sexuality or gender identity.\(^2\)

There is significant evidence that forcing someone to live under a label incongruent with their identity — in sport or otherwise — is both inherently not inclusive and dangerous. Transgender and gender nonbinary individuals experience higher rates of mental health challenges with anxiety and depression experienced at nearly 10 times the rate of their cisgender peers.\(^3\) Restrictive policies have been shown to “segregate, isolate, and stigmatize,” negatively impact students’ health and wellbeing, and “create a climate of exclusion.”\(^4\)

Supportive environmental policies and practices, which confirm one’s gender identity and authentic self at each turn, are strongly correlated with reducing these mental health challenges, including suicidal behaviors.\(^5\)

Changes made to be more inclusive to the LGBTQ+ population also helps the campus community at large — a phenomenon recognized as the curb-cut effect. An excellent example of this is the growth of inclusive locker rooms on campuses. Not only do they allow trans and non-binary students private, safe spaces that facilitate their access to recreation opportunities, but they also provide spaces for families, students with disabilities, students with aides who may not be of the same sex, and faculty members who may not want to share locker room space with their undergraduate students.\(^6\)

In regard to collegiate sport participation — from intramurals to club sports to varsity athletics — inclusive practices are essential. “When a school or athletic organization denies transgender students the ability to participate equally in athletics because they are transgender, that condones, reinforces and affirms the transgender students’ social status as outsiders or misfits who deserve the hostility they experience from peers.”\(^7\)

For the past ten years, transgender athletes have been able to compete on teams at NCAA member colleges and universities consistent with their gender identity like all other student-athletes with no disruption to women’s collegiate sports (Hecox v Little - Carroll Declaration, 2020). Likewise, NIRSA, the association for campus recreation, developed an inclusive transgender participation policy for its NIRSA Championship Series tournaments in 2014. Through this policy NIRSA “empowers students to participate in intramural sports and sport club divisions based on their expressed gender identity” (NIRSA, 2014). NIRSA has not seen any disruptions to its tournaments since the introduction of this policy.

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\(^3\) https://pubmed.ncbi.nlm.nih.gov/29661941/
\(^4\) https://journals.humankinetics.com/view/journals/kjr/7/4/article-p365.xml
\(^5\) https://www.trevoyparty.org/2019/05/30/research-brief-fostering-the-mental-health-of-lgbtq-youth/
\(^6\) https://www.psychologytoday.com/us/blog/political-minds/202003/trans-people-congruent-ids-may-have-better-mental-health
\(^7\) https://www.slate.com/human-interest/2017/06/uc-berkeleys-gym-plans-to-open-an-all-gender-locker-room-next-fall.html
Reinstating protections for gender non-conforming and transgender is especially important this year, given that 35 states have either proposed or passed 150 anti-transgender measures that limit the rights of these students to access resources and activities in alignment with their gender. 11 states have enacted such laws in 2021 alone. These students are being forced to play sports, be housed in facilities, and even access restrooms with the gender they were assigned at birth due to these state laws. The number of discriminatory measures considered at the state level targeting transgender and gender non-binary individuals has increased exponentially over the last several years, with measures considered in 2021 reflecting four times the frequency of those considered in 2019 (35 bills). There is a desperate need for federal regulations to codify LGBT students’ rights in order to combat these discriminatory laws. Below are some suggestions for the Department of Education to consider when revising current Title IX regulations.

Reinstate Application Process for Religious Exemption from Title IX and Publish List of Institutions with Exemptions

Since 1979, religious institutions have been allowed to request an exemption from compliance with Title IX if compliance is in conflict with the institution’s religious tenets. Prior to and during the Obama administration, applications for the exemption, which were obtained by institutions submitting a letter to the Department of Education (ED) requesting the exemption, were relatively rare. In 2014, Title IX protections were expanded to include protection for transgender students, which resulted in 232 schools requesting exemption from Title IX. In 2016, and largely thanks to the activism of trans and gender non-binary students and the Human Rights Campaign, the Department began publishing the list of institutions that had been granted the exemption. Fearing damage to their reputations, the publication of the list led to some institutions withdrawing their requests for exemption. The argument was that some schools were using religious exemptions to justify discriminating against trans and gender non-binary students, LGBTQIA students, and pregnant students. In April 2021, the Religious Exemption Accountability Project (REAP) filed a lawsuit against ED, under the grounds that the use of Title IX’s religious exemption clause is unconstitutional. The clause as stands, clearly contributes to the psychological harm of trans and gender non-binary students, and does not advance objectives brought forward in Executive Order 14021. The National Center for Transgender Equality and the Movement Advancement Project have provide more detail in their great timeline through 2018 of federal enforcement of LGBT rights under Title IX.

The current Title IX rule removed the requirement for institutions to submit a letter to request exemption under Title IX, which is even more concerning for pregnant students, gender non-binary students, transgender students and LGBTI1A-identified students, whose rights may be denied at exempt institutions. The Department states in the current rule that institutions that come under investigation for discrimination under Title IX can attest to their exemption as part of the complaint process, without having received prior approval from the Department of its exempt status. Currently, a student can bring a discrimination complaint against a school that can then use the exemption in its defense without ever having officially requested exemption. The organizations represented in these comments, request that the Department reinstate guidance through the informal rulemaking process that requires institutions to request and clearly state

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their exemption status to ensure students’ safety. The protections for students who face discrimination by religious institutions are very few under the current rule.

Promote May 2016 Department of Education Dear Colleague Letter on Transgender Students

The 2016 Dear Colleague Letter provided a list of inclusive practices that institutions can implement to promote inclusive environments for transgender students. We encourage the Department to re-emphasize those practices listed in the 2016 guidance document, which are outlined below along with some examples of institutions utilizing those practices.

These examples of inclusive practices for transgender students come in part from the Athletic Equality Index which was developed to measure LGBTQ inclusion policies and practices in collegiate athletics. Launched in 2017 and updated in 2019, this first-of-its-kind report provides a comprehensive look at how NCAA D-I institutions are supporting their LGBTQ student-athletes, coaches, administrators, staff, and fans.9

The report includes examples of institutions that are providing single-sex spaces including restrooms, locker rooms, and residence halls. This is in alignment with the May 2016 Dear Colleague Letter from the Department of Education, which stated, “A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity. A school 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.”10

- Providing a safe and non-discriminatory environment
- Providing identification documents, and honoring students’ preferred names and pronouns
- Allowing transgender students to access sex segregated activities and facilities in alignment with their gender, including:
  - Restrooms and locker rooms
  - Athletic teams
  - Single sex classes
  - Social fraternities and sororities
  - Housing and overnight accommodations
- Providing privacy for education records
- Providing privacy of personally identifiable information in education records
  - Allowing for directory records to match students’ gender identity
  - Amendment of educational records

10 https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf
Align Title IX protections for LGBT, Trans and Gender Non-conforming Students with Supreme Court and Lower Court Decisions

In 2020, the Supreme Court ruled that the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 extends to discrimination based on sexual orientation and gender identity. Subsequent guidance issued by the Department of Education indicating that transgender students’ rights are not covered by Title IX created a conflict for institutions in terms of compliance. Institutions were told that certain civil protections include sexual orientation and gender identity while other civil rights protections such as access to education do not. This conflict is compounded by the fact that in many instances individuals at institutions are both students and employees of the college or university. In addition, prior to that decision, there were 23 states and 3 territories in which federal appeals court decisions held that federal law prohibits discrimination based on gender identity as a form of sex discrimination. In addition, there were six states in which federal appeals court decision holding that federal law prohibits discrimination based on sexual orientation as a form of sex discrimination. Again, this creates a patchwork approach to protections for LGBT and gender non-conforming students that can create confusion for both institutions and students themselves. Having the Department of Education guarantee rights and protections for these students within Title IX would serve to align the Bostock decision and previous appeals court rulings that did the same.

We appreciate the opportunity to provide comment on the Title IX regulations and anticipated revisions. We hope that our associations and members, who have significant responsibility for implementing Title IX regulations, can continue to be a resource to you in this work moving forward.

Collectively, we represent a consortium of associations representing professionals and students in various student affairs roles on college and university campuses, including on-campus housing, student conduct, recreation and wellness, and many areas in between.

American College Health Association (ACHA)
ACHA has served as the voice of student health and wellness since 1920. Membership: 800 institutions of higher education and 5,500 individual college health and wellness professionals and leaders of all disciplines. Membership base: College health and wellness professionals.

ACPA — College Student Educators International
ACPA is the leading comprehensive student affairs association that advances student affairs and engages students for a lifetime of learning and discovery. Membership: 6,000+ from 1,200 public and private institutions internationally Membership base: Graduate and undergraduate students enrolled in student affairs/higher education administration programs, faculty, and student affairs educators

12 https://www.lgbtmap.org/equality-maps/federal_court_decisions
13 Ibid.
Association of College and University Housing Officers – International (ACUHO-I)
ACUHO-I is the leading organization of choice for campus housing and residence life professionals.
Membership: Over 17,000 campus housing professionals who work at more than 1,000 campuses around the globe, as well as more than 250 companies and organizations whose products and services support the profession's needs.
Membership base: Campus housing and residence life professionals

Association of College Unions, International (ACUI)
ACUI is the professional home to campus community builders who focus on the work within the college unions and student activities field. The Association strives to provide an inclusive, welcoming community for all those who choose to belong.
Membership: Thousands of College Union and Student Activities professionals and hundreds of institutional members, globally
Membership base: College Unions and Student Activities professionals

Association for Student Conduct Administration (ASCA)
ASCA is the leading voice for student conduct in higher education.
Membership: 3,000+ higher education student conduct administrators at approximately 1,200 colleges and universities in all 50 states
Membership base: Highly trained practitioners who work with student disciplinary concerns at the post-secondary level, including cases of alcohol or drug misuse, theft, physical assault, hazing, harassment, and sexual misconduct

National Association for Campus Activities (NACA)
NACA empowers members to amplify the campus experience through inclusive learning, meaningful connections, and engaging entertainment that transforms college communities. NACA’s vision is to create college communities where everyone belongs.
Membership: 700+ colleges and universities, 200+ talent agencies, organizations and companies doing business in the collegiate market
Membership base: 15,000+ students, campus professionals, performers, artists, speakers, agents, and businesses.

NASPA – Student Affairs Administrators in Higher Education
NASPA is the leading association for the advancement, health, and sustainability of the student affairs profession.
Membership: 15,000+ in all 50 states, 25 countries, and 8 U.S. Territories
Membership base: Students and professionals working in student affairs

NIRSA: Leaders in Collegiate Recreation
NIRSA comprises and supports higher education professionals in recreation and wellbeing. Membership: 4,500 members in all 50 states and Canada
Membership base: Students, professionals, colleges/institutions and companies that seek to serve the field of campus recreation and wellbeing
NODA - Association for Orientation, Transition, and Retention in Higher Education
NODA brings together professionals, faculty, students, and other constituents interested in the orientation, transition, and retention of college students. Membership: Thousands of orientation, transition, and retention focused professionals around the country. Membership base: Professionals, faculty, students interested in the orientation, transition, and retention of college students.

Signatories:

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