



Written by [Michael Tennant](#) on June 22, 2017

## Calling Transgender Student Wrong Pronoun Could Trigger Federal Investigation

The Department of Education's Office of Civil Rights (OCR) recently issued an [internal memo](#) indicating that the office would start investigating educational institutions for failing to use a transgender student's "preferred name or pronoun." What's more, the document could also be used to reinstate the Obama administration's transgender bathroom policy, according to some who favor that policy.



The three-page memo authored by Acting Assistant Secretary for Civil Rights Candice Jackson was intended to clear up confusion regarding enforcement of Title IX vis-à-vis transgender students in the wake of the Trump administration's [overturning the Obama bathroom policy](#), which proclaimed that schools receiving federal funding must allow transgender students to use the restroom, locker room, and other sex-segregated facilities of their choice.

"It was very important to the secretary and to myself that our investigators not make the mistake of assuming that just because that particular guidance has been rescinded, that all complaints filed by transgender students are going to be dismissed," Jackson told the [Washington Post](#). "We wanted to very carefully explain in written format to our field that every investigator assigned to one of these cases needs to go through and individually examine every complaint, and actively search for ways that OCR can retain jurisdiction over the complaint."

The memo points out that although the Obama guidance was rescinded, the letter rescinding the policy also stated that "withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment." Instead, OCR will rely on Title IX, related regulations, and guidance documents that are still in effect when determining whether to pursue sex-discrimination complaints.

"OCR may assert subject matter jurisdiction over and open for investigation" allegations of sex discrimination against transgender students, Jackson wrote. Among the specific allegations she listed was "gender-based harassment ... such as refusing to use a transgender student's preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward people who do not conform to sex stereotypes."

Thus, if a school or school employee persisted in referring to a male student as "John Smith" or "he" even after the student decided he was female and should be referred to as "Jane Smith" or "she," the federal government could investigate the matter (if the student issued a formal complaint) and possibly charge the school or employee with violations of Title IX.

Contrary to the assertions of proponents of transgender "rights," Title IX does not demand that transgender students be allowed to use whichever bathroom they want or be addressed by the name or pronoun of their choice. In fact, that 1972 law says nothing about transgender students whatsoever for



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the simple reason that no one had yet invented the notion that a person can declare himself male or female regardless of his biological makeup.

“Title IX does not require a school district or teacher to call students by false gender pronouns,” Mat Staver, founder and chairman of the religious-liberty organization Liberty Counsel, said in a [statement](#). “Title IX is silent regarding the use of pronouns, and it cannot be a violation to refer to students by pronouns consistent with their actual sex. Requiring false pronoun usage by teachers is a compelled speech violation for teachers and compelling students to participate in a lie violates their right to free speech.”

The [Washington Blade](#), an LGBT newspaper, claimed that Jackson’s memo “suggest[s] the Department of Education is repositioning itself in the Trump administration against anti-trans discrimination in schools.” There seems to be little doubt about that. In keeping with her previously quoted remarks to the *Post*, Jackson instructed OCR staff to consider each allegation in a complaint, “searching for a permissible jurisdictional basis for OCR to retain and pursue the complaint.”

The only real doubt concerns whether OCR believes its jurisdiction extends to bathrooms and locker rooms given the February letter. “It is permissible, for example, for one allegation in a complaint (such as harassment based on gender stereotypes) to go forward while another allegation (such as denial of access to restrooms based on gender identity) is dismissed,” wrote Jackson. But she also stated that allegations of “different treatment based on sex stereotyping” could trigger an investigation.

Pro-transgender organizations have for the most part condemned Jackson’s guidelines as “unclear” or worse, reported the *Blade*. Mara Keisling, executive director of the National Center for Transgender Equality, told the paper, “It seems that what they are saying is that they will enforce the law for some students and not others. That is never acceptable. Using the bathroom is a significant and necessary part of being a student. If a student can’t use the right bathroom at school, they simply can’t go to school. So if a student is kept from using the right bathroom, it is illegal Title IX sex discrimination.”

Other supporters of transgender “rights” see the ambiguity in the memo as a positive, according to the *Post*:

One OCR employee, who was not authorized to speak to media and spoke on condition of anonymity, said the memo was a “green light” to move forward with discrimination complaints from transgender students — including those concerning bathroom access. A student who cannot use the bathroom that matches their gender identity is almost certainly the victim of prohibited sex stereotyping or a hostile environment, the employee said. “The presumption here should be it’s business as usual, and not that OCR is abdicating its role as a protector of civil rights for transgender students.”

Anurima Bhargava, who served in the Obama administration’s Justice Department and believes transgender students have a right to use bathrooms that match their gender identity, agreed that the memo is written in a way that gives federal officials room to pursue complaints from students who are denied bathroom access. “It is saying proceed in accordance with the law, and the law is moving in the right direction,” Bhargava said.

The law, of course, has not changed. Title IX still makes no reference to transgender students, and the Constitution, the supreme law of the land, does not permit the federal government to dictate policy to local schools, colleges, and universities. Of course, when leftists say “the law is moving in the right direction” even though Congress has taken no action, they mean [activist courts](#) are issuing decisions



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that have the effect of unconstitutionally modifying the law — and, indeed, the Seventh Circuit Court of Appeals recently [did just that](#) in ruling that Title IX does guarantee transgender students the right to use the bathroom of their choice.

Meanwhile, with this memo, the Trump administration is engaging in its own bit of activism — to the detriment of schools, students, and federalism.



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