



June 11, 2021

Via Email.

Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Written Comment - Title IX Public Hearing - Protecting Privacy Rights and Ensuring Equitable Algorithmic Systems for Transgender and Gender Non-Conforming Students

The Center for Democracy & Technology (CDT) is a nonprofit advocacy organization that champions civil rights and civil liberties in the digital age. Building on its 25-year history, CDT is committed to advancing these goals by shaping technology policy and architecture, including in education.¹ CDT's Equity in Civic Technology Project engages with educators, school administrators, and policymakers at all levels to ensure that schools can best serve families and their students while also protecting their privacy. That engagement includes ensuring that student data is used equitably and ethically.

CDT supports efforts by the U.S. Department of Education (ED) to address discrimination based on sexual orientation and gender identity in educational environments and to protect all students' right to an equitable education.² We encourage ED to use this opportunity to protect transgender and gender non-conforming (TGNC)³ students' civil rights to privacy and the ethical, responsible use of their data. In particular, ED should clarify that mandating the disclosure of a student's TGNC status violates Title IX and also begin efforts to address the discriminatory effects of some algorithmic systems on lesbian, gay, bisexual, transgender, and gender non-conforming (LGBT) students.

Mandatory Disclosure of a Student's Transgender or Gender Non-Conforming Status Violates Title IX Privacy, autonomy, and self-determination are central pillars of civil rights in the United States.⁴ Despite the centrality of those rights, legislators in some states have proposed bills that would require school personnel to disclose students' TGNC status without the students' consent. For example, a bill in North

¹ For more about CDT's policy priorities, please see our vision for the Biden Administration and the 117th Congress at <https://cdt.org/insights/cdt-recommendations-to-the-biden-administration-and-117th-congress-to-advance-civil-rights-civil-liberties-in-the-digital-age/>.

² Announcement of Public Hearing; Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27429 (May 20, 2020), available at <https://www.federalregister.gov/documents/2021/05/20/2021-10629/announcement-of-public-hearing-title-ix-of-the-education-amendments-of-1972>.

³ Bex Montz, *Acronyms Explained*, OutRight Action International (Aug. 12, 2019), <https://outrightinternational.org/content/acronyms-explained>. "Gender non-conforming" refers "to someone who does not conform to prevailing cultural and social expectations about what is appropriate gender expression for their perceived gender." *Id.*

⁴ See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Silverman v. United States*, 365 U.S. 505, 511 (1961).

Carolina would have required educators to disclose a student’s “gender nonconformity” or “desire to be treated in a manner incongruent with the minor’s sex.”⁵ ED should clarify that Title IX’s protections preclude a state or other body from requiring educational institutions and their staff to disclose a student’s TGNC status.

Title IX’s protections are broad and extend to transgender and gender non-conforming students. It prohibits any person in the United States from being “excluded from participation in,” “denied the benefits of,” or “subjected to discrimination under any education program or activity receiving Federal financial assistance” on “the basis of sex.”⁶ Regulations under Title IX extend that prohibition to subjecting “any person to separate or different rules of behavior, sanctions, or other treatment”⁷ or limiting “any person in the enjoyment of any right, privilege, advantage, or opportunity.”⁸ The Courts of Appeals⁹ and the U.S. Department of Justice¹⁰ have recognized that Title IX’s protections extend to TGNC students.

Mandatory disclosure of a student’s TGNC status would violate Title IX, for at least three reasons:

- Such practices deny students the benefits of an education program and subject them to discrimination under the statute. As the Supreme Court has observed in a related context, “The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender.”¹¹ The denial may occur where conditions are “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”¹² Requiring educators and other trusted adults to disclose students’ TGNC status can “limit their

⁵ See S.B. 514, N.C. Gen. Assemb., 2021 Sess., sec. 1.(a), § 90-21.143(c) (N.C. 2021), available at <https://ncleg.gov/Sessions/2021/Bills/Senate/PDF/S514v0.pdf>. H.B. 1, Ala. Legis., 2021 Reg. Sess., sec. 5(2) (Ala. 2021), available at <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2021RS/PrintFiles/HB1-int.pdf>; S.B. 10, Ala. Legis., 2021 Reg. Sess., sec. 4(2) (Ala. 2021), available at <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2021RS/PrintFiles/SB10-int.pdf>;

⁶ 20 U.S.C. § 1681(a).

⁷ 34 CFR § 106.31(b)(4).

⁸ 34 CFR § 106.31(b)(7).

⁹ Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020), reh’g en banc denied, 976 F.3d 399 (4th Cir. 2020), petition for cert. filed, No. 20-1163 (Feb. 24, 2021); Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1305 (11th Cir. 2020), petition for reh’g en banc pending, No. 18-13592 (Aug. 28, 2020).

¹⁰ U.S. Dep’t Justice, *Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972* (Mar. 26, 2021), available at <https://www.justice.gov/crt/page/file/1383026/download?cid=db&source=ams&sourceId=5139545>.

¹¹ Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 650 (1999).

¹² *Id.* The Supreme Court articulated the “severe, pervasive, and objectively offensive” standard for private suits for money damages under Title IX; in 2020, ED adapted that standard for administrative enforcement as well, replacing prior articulations of the standard. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026, 30034-36 (May 19, 2020) [hereinafter 2020 Rules]. CDT takes no position here on whether the “severe, pervasive, and objectively offensive” standard adopted in the 2020 Rules is appropriate for administrative enforcement of Title IX.

ability to access health care or be treated with dignity and respect”¹³ and subject them to anxiety, bullying, harassment, and risk of physical harm.¹⁴ Further, standards such as “gender nonconformity” and “incongruent with the minor's sex” are vague and subjective, making it impossible for students to know what activities, expression, or confidences will make them subject to mandatory disclosure. This environment denies students the benefits of an education.¹⁵

- Singling out TGNC students for different treatment under state law violates Title IX’s prohibition on subjecting a person to “separate or different rules” based on sex.
- Mandatory disclosure violates the regulatory prohibition on limiting “the enjoyment of any right, privilege, advantage, or opportunity.” Various state and federal laws such as the Family Educational Rights and Privacy Act¹⁶ (FERPA) recognize schools’ vital role as stewards of students’ information and consequently limit their ability to disclose it. Bills mandating disclosure of students’ TGNC status have not included exceptions for disclosures prohibited by FERPA or other laws and consequently limit TGNC students’ rights under those laws. For example, FERPA generally prohibits disclosures of “personally identifiable information from [a] student's education records”¹⁷ without parental consent; proposed mandatory disclosure laws have not included exceptions for disclosures from students’ education records and would thus limit TGNC students’ rights.

For these reasons, ED should clarify in rulemaking that Title IX prohibits the mandatory disclosure of students’ TGNC status.

Clarifying the breadth of Title IX’s protections is vitally important not only to protect TGNC students’ rights under privacy laws but also to address gaps that may occur in those laws. Because FERPA only applies to disclosures of “personally identifiable information from the student's education records,” it does not reach disclosures based on school personnel’s “personal knowledge or observations.”¹⁸ Even if mandatory disclosure of a student’s TGNC status were to fall outside the scope of FERPA, ED should make clear that such disclosure runs afoul of Title IX’s protections.

¹³ Caroline Brehman, *N.C. Bill Would Ban Treatment for Trans People Under 21*, NBC News (Apr. 6, 2021), <https://www.nbcnews.com/feature/nbc-out/n-c-bill-would-ban-treatment-trans-people-under-21-n1263146>.

¹⁴ See T. Keung Hui, *NC Transgender Students Worried About Being Outed Online During COVID-19 Pandemic*, The News & Observer (Apr. 10, 2020), <https://www.newsobserver.com/news/local/education/article241914151.html>.

¹⁵ See U.S. Dep’t Ed. & U.S. Dep’t of Justice, *Dear Colleague Letter on Transgender Students* (May 13, 2016), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (“The Departments may find a Title IX violation when a school limits students’ educational rights or opportunities by failing to take reasonable steps to protect students’ privacy related to their transgender status, including their birth name or sex assigned at birth.”) (formally rescinded).

¹⁶ 20 U.S.C. 1232g; 34 CFR, part 99.

¹⁷ 34 CFR § 33.30(a).

¹⁸ Student Privacy Policy Office, U.S. Dep’t Ed., *Does FERPA Permit School Officials to Release Information That They Personally Observed or of Which They Have Personal Knowledge?*, Protecting Student Privacy, <https://studentprivacy.ed.gov/fag/does-ferpa-permit-school-officials-release-information-they-personally-observed-or-which-they> (last visited June 4, 2021).

ED Should Address the Use of Discriminatory Algorithmic Systems

ED should also begin to address the discriminatory effects of some algorithmic systems on students who identify as lesbian, gay, bisexual, transgender, and gender non-conforming. An algorithm is a process performed by a computer to answer a question or carry out a task, such as sorting students into schools, analyzing social media posts, or flagging students at risk for dropping out.¹⁹ Algorithmic systems, however, are not neutral decision-makers. Subjective human judgments dictate the purpose, design, and function of an algorithm and influence its outcomes. Moreover, data used to train algorithms may itself implicitly embed biases. Consequently, algorithmic systems must still be vetted for discriminatory effects, including on LGBT students.

An increasing amount of evidence suggests that some algorithmic systems are having discriminatory effects on LGBT students:

- One algorithmic software product used by schools to scan students' messages and documents for signs of self-harm or bullying disproportionately flags words related to LGBT students for review, exposing LGBT students to increased scrutiny and surveillance.²⁰
- A remote proctoring software program verifies students' identities by comparing the image captured by their webcam with their government identification, posing obstacles for transgender or gender non-conforming students who have not — or cannot — acquire a government ID aligned with their gender identity.²¹
- Schools are increasingly using facial recognition technology, which relies on algorithmic software, with the hope of protecting student safety, monitoring unusual behavior, or even enforcing health and safety measures such as social distancing.²² Facial recognition technology disproportionately misidentifies transgender or gender non-conforming people²³ and may further marginalize them by subjecting them to increased interactions with police and school disciplinary systems.²⁴

¹⁹ Hannah Quay-de la Vallee & Natasha Duarte, Center for Democracy & Technology, *Algorithmic Systems in Education* 6 (2019), available at

<https://cdt.org/insights/algorithmic-systems-in-education-incorporating-equity-and-fairness-when-using-student-data/>.

²⁰ Caroline Haskins, *Gaggle Knows Everything About Teens And Kids In School*, BuzzFeed News (Nov. 1, 2019), <https://www.buzzfeednews.com/article/carolinehaskins1/gaggle-school-surveillance-technology-education>.

²¹ Mary Retta, *Exam Surveillance Tools Monitor, Record Students During Tests*, Teen Vogue (Oct. 26, 2020), <https://www.teenvogue.com/story/exam-surveillance-tools-remote-learning>; *Students*, Honorlock, <https://honorlock.com/students/> (last visited June 2, 2021) (“[W]e’ll have you verify your identity by taking a picture of both yourself and your photo ID with your webcam.”).

²² Rebecca Heilweil, *The Dystopian Tech That Companies Are Selling to Help Schools Reopen Sooner*, Recode (Aug 14, 2020), <https://www.vox.com/recode/2020/8/14/21365300/artificial-intelligence-ai-school-reopening-technology-covid-19>; Alfred Ng, *Facial Recognition in Schools: Even Supporters Say It Won't Stop Shootings*, CNET (Jan. 24, 2020), <https://www.cnet.com/features/facial-recognition-in-schools-even-supporters-say-it-wont-stop-shootings>; Emily Tate, *Safety in Mind, Schools Turn to Facial Recognition Technology. But at What Cost?*, EdSurge (Jan. 31, 2019), <https://www.edsurge.com/news/2019-01-31-with-safety-in-mind-schools-turn-to-facial-recognition-technology-but-at-what-cost>.

²³ Matthew Gault, *Facial Recognition Software Regularly Misgenders Trans People*, Vice (Feb. 19, 2019), <https://www.vice.com/en/article/7xnwed/facial-recognition-software-regularly-misgenders-trans-people>.

²⁴ Shobita Parthasarathy et al., University of Michigan, *Cameras in the Classroom* 32, 44 (2021), available at <http://stpp.fordschool.umich.edu/technology-assessment>.

Those harms can run afoul of Title IX’s protections. As noted above, Title IX prohibits any person in the United States from being “excluded from participation in,” “denied the benefits of,” or “subjected to discrimination under any education program or activity receiving Federal financial assistance” on “the basis of sex.”²⁵ Disproportionately flagging LGBT students’ messages and documents for review, creating unnecessary barriers to accessing exams and educational resources, or increasing interactions with disciplinary systems all threaten to exclude LGBT students from the benefits of their education programs.

Given these harms, ED should begin to address the impact of algorithmic systems in its efforts to protect LGBT students from discrimination along two dimensions:

- Efforts to address algorithmic bias should be rooted in research and factfinding. Because algorithmic systems are used extensively throughout education and often provide benefits for students and families, it is important that ED understand which algorithmic systems have had disparate impacts on LGBT students. Thus, research and factfinding will be essential components of ED’s efforts. ED’s Office of Educational Technology leads research and guidance on the impact of artificial intelligence on teaching and learning, which may support ED’s efforts to bolster protections under Title IX.
- Based on its research and factfinding, ED should provide resources for schools, create guidance, and/or engage in rulemaking to help detect, mitigate, and avoid algorithmic bias on LGBT students and other marginalized groups and avoid the potentially discriminatory effects of algorithmic systems. Because algorithmic systems are essential tools throughout education, it is important that the scope of the guidance or rules — if any — is appropriately tailored to the harms algorithmic systems pose.

CDT supports ED’s efforts to protect the rights of students based on their gender identity or sexual orientation. We urge ED to adopt measures to protect student privacy, prevent discrimination, and ensure responsible, ethical data practices as an integral part of those efforts.

Sincerely,

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²⁵ 20 U.S.C. § 1681(a).