IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS;	§	
HARROLD INDEPENDENT	§	
SCHOOL DISTRICT (TX);	§	
STATE OF ALABAMA;	§	
STATE OF WISCONSIN;	§	
STATE OF WEST VIRGINIA;	§	
STATE OF TENNESSEE;	§	
ARIZONA DEPARTMENT	§	
OF EDUCATION;	§	
HEBER-OVERGAARD	§	
UNIFIED SCHOOL DISTRICT (AZ);	§	
PAUL LePAGE, Governor of the	§	
State of Maine;	§	
STATE OF OKLAHOMA;	§	
STATE OF LOUISIANA;	§	
STATE OF UTAH;	§	
STATE OF GEORGIA;	§	
STATE OF MISSISSIPPI,	§	
by and through Governor Phil Bryant;	§	
COMMONWEALTH OF KENTUCKY,	§	
by and through	§	
Governor Matthew G. Bevin,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 7:16-cv-00054-O
	§	
UNITED STATES OF AMERICA;	§	
UNITED STATES DEPARTMENT	§	
OF EDUCATION; JOHN B. KING,	§	
JR., in his Official Capacity as United	§	
States Secretary of Education; UNITED	§	
STATES DEPARTMENT OF JUSTICE;	§	
LORETTA E. LYNCH, in her Official	§	
Capacity as Attorney General of the	§	
United States; VANITA GUPTA, in her	§	
Official Capacity as Principal Deputy	§	
Assistant Attorney General;	§	
UNITED STATES EQUAL	§	
EMPLOYMENT OPPORTUNITY	§	

COMMISSION; JENNY R. YANG, in her Official Capacity as Chair of the United States Equal Employment Opportunity Commission; UNITED STATES DEPARTMENT OF LABOR; THOMAS E. PEREZ, in his Official Capacity as United States Secretary of Labor; DAVID MICHAELS, in his Official Capacity as the Assistant Secretary of Labor for the Occupational Safety and Health Administration,	§
Defendants.	§

PLAINTIFFS' FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The State of Texas, the Harrold Independent School District (Texas), the State of Alabama, the State of Wisconsin, the State of West Virginia, the State of Tennessee, the Arizona Department of Education, the Heber-Overgaard Unified School District (Arizona), Paul LePage, Governor of the State of Maine, the State of Oklahoma, the State of Louisiana, the State of Utah, the State of Georgia, the State of Mississippi, by and through Governor Phil Bryant, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin (collectively, "Plaintiffs") seek declaratory and other relief against the United States of America, the United States Department of Education, John B. King, Jr., in his Official Capacity as United States Secretary of Education, the United States Department of Justice, Loretta E. Lynch, in her Official Capacity as Attorney General of the United States, Vanita Gupta, in her Official Capacity as Principal Deputy Assistant Attorney General, the United States Equal Employment Opportunity Commission, Jenny R. Yang, in her Official

Capacity as Chair of the United States Equal Employment Opportunity Commission, the United States Department of Labor, Thomas E. Perez, in his Official Capacity as United States Secretary of Labor, and David Michaels, in his Official Capacity as the Assistant Secretary of Labor for the Occupational Safety and Health Administration.

Plaintiffs include a diverse coalition of States, top State officials, and local school districts, spanning from the Gulf Coast to the Great Lakes, and from the Grand Canyon to the Grand Isle, that believe that the solemn duty of the executive branch is to enforce the law of the land, and not rewrite it by administrative fiat.

Defendants have conspired to turn workplaces and educational settings across the country into laboratories for a massive social experiment, flouting the democratic process, and running roughshod over commonsense policies protecting children and basic privacy rights. Defendants' rewriting of Title VII and Title IX is wholly incompatible with Congressional text. Defendants cannot foist these radical changes on the nation.

I. PARTIES

1. Plaintiff State of Texas is subject to Title VII as the employer of hundreds of thousands through its constituent agencies. The State of Texas also oversees and controls several agencies that receive federal funding subject to Title IX. For example, the School for the Blind and Visually Impaired ("SBVI") and School for the Deaf ("SD") are statutorily created, independent state agencies. Tex. Educ. Code § 30.001 *et seq*. Both are governed by nine-member boards, appointed by the governor and confirmed by the senate, and both have superintendents appointed by

the boards and "carry out the functions and purposes of [each] school according to any general policy the board[s] prescribe[]." *Id.* §§ 30.023(e) (SBVI); 30.053(e) (SD). Currently, SBVI has a total budget of $24,522,116, of which $4,789,974 is identified as federal funds, and SD has a total budget of $28,699,653, of which $1,957,075 is identified as federal funds. As another example, the Texas Juvenile Justice Department ("TJJD") is a state agency, subject to Title VII and Title IX, responsible for overseeing youth correction facilities in the State of Texas. TJJD's current budget is $314,856,698, which includes $9,594,137 in federal funding.

2. Plaintiff Harrold Independent School District ("Harrold ISD") is an independent public school district based in Harrold, Wilbarger County, Texas. Additional information about Harrold ISD can be found *infra*.

3. The Plaintiff States of Alabama, Wisconsin, West Virginia, Tennessee, Oklahoma, Louisiana, Utah, and Georgia are similarly situated to the State of Texas in that one or more of the following circumstances is present: (1) they are employers covered by Title VII, (2) their agencies and departments are subject to Title IX, (3) their agencies and departments receive other federal grant funding that requires, as a condition of the grant, compliance with the Title IX provisions at issue in this lawsuit, or (4) they are suing on behalf of public educational institutions, departments, or agencies in their State that are subject to Title IX.

4. Plaintiff Arizona Department of Education is the state agency responsible for "[t]he general conduct and supervision of the public school system" in Arizona. ARIZ. CONST. art. XI, § 2; A.R.S. § 15-231.

5. Plaintiff Heber-Overgaard Unified School District is a public school district with its principal office located in Heber, Navajo County, Arizona.

6. Plaintiff Paul LePage is the Governor of Maine and Chief Executive of the Maine Constitution and the laws enacted by the Maine Legislature. ME. CONST. art. V, Pt. 1, § 1.

7. Governor Phil Bryant brings this suit on behalf of the State of Mississippi pursuant to Miss. Code Ann. § 7-1-33. Mississippi is similarly situated to the State of Texas and the Plaintiff States in that it (1) is a covered employer under Title VII, (2) its agencies and departments are subject to Title IX, (3) its agencies and departments receive other federal grant funding that requires, as a condition of the grant, compliance with the Title IX provisions at issue in this lawsuit, and (4) many public educational institutions, departments, and agencies in Mississippi are subject to Title IX.

8. Governor Matthew G. Bevin brings this suit on behalf of the Commonwealth of Kentucky pursuant to the Kentucky Constitution, which provides that the "supreme executive power" shall be vested in the Governor. KY. CONST. § 69. Kentucky is similarly situated to the State of Texas and the Plaintiff States in that it (1) is a covered employer under Title VII, (2) its agencies and departments are subject to Title IX, (3) its agencies and departments receive other federal grant funding that requires, as a condition of the grant, compliance with the Title IX provisions at issue in this lawsuit, and (4) many public educational institutions, departments, and agencies in Kentucky are subject to Title IX.

9. Defendant United States Department of Education ("DOE") is an executive agency of the United States and responsible for the administration and enforcement of Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 ("Title IX").

10. Defendant John B. King, Jr., is the United States Secretary of Education. In this capacity, he is responsible for the operation and management of the DOE. He is sued in his official capacity.

11. Defendant United States Department of Justice ("DOJ") is an executive agency of the United States and responsible for the enforcement of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. DOJ has the authority to bring enforcement actions to enforce Title IX. Exec. Order No. 12250, 28 C.F.R. Part 41 app. A (1980).

12. Defendant Loretta A. Lynch is the Attorney General of the United States and head of DOJ. She is sued in her official capacity.

13. Defendant Vanita Gupta is Principal Deputy Assistant Attorney General at DOJ and acting head of the Civil Rights Division of DOJ. She is assigned the responsibility to bring enforcement actions under Titles VII and IX. 28 C.F.R. § 42.412. She is sued in her official capacity.

14. Defendant Equal Employment Opportunity Commission ("EEOC") is a federal agency that administers, interprets, and enforces certain laws, including Title VII. EEOC is, among other things, responsible for investigating employment and hiring discrimination complaints.

15. Defendant Jenny R. Yang is Chair of the EEOC. In this capacity, she is responsible for the administration and implementation of policy within the EEOC, including the investigating of employment and hiring discrimination complaints. She is sued in her official capacity.

16. Defendant United States Department of Labor ("DOL") is the federal agency responsible for supervising the formulation, issuance, and enforcement of rules, regulations, policies, and forms by the Occupational Safety and Health Administration ("OSHA").

17. Defendant Thomas E. Perez is the United States Secretary of Labor. He is authorized to issue, amend, and rescind the rules, regulations, policies, and forms of OSHA. He is sued in his official capacity.

18. Defendant David Michaels is the Assistant Secretary of Labor for OSHA. In this capacity, he is responsible for assuring safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance. He is sued in his official capacity.

II. JURISDICTION AND VENUE

19. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this suit concerns the *ultra vires* revision of the term "sex" under multiple provisions of the United States Code. This Court also has jurisdiction to compel an officer of the United States or any federal agency to perform his or her duty pursuant to 28 U.S.C. § 1361.

20. Venue is proper in the Northern District of Texas pursuant to 28 U.S.C. § 1391 because the United States, several of its agencies, and several of its officers in their official capacity are Defendants; a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District; and Plaintiff Harrold ISD (TX) is both an employer subject to Title VII, and a recipient of federal monies subject to Title IX restrictions in Harrold, Wilbarger County, Texas.

21. The Court is authorized to award the requested declaratory relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201–2202. The Court is authorized to order corrective action under the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 611.

III. FACTUAL BACKGROUND

A. Congressional History.

22. In 1964, Congress enacted Title VII of the Civil Rights Act, making it illegal for employers to invidiously discriminate on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2.

23. Eight years later, Congress passed Title IX of the Education Amendments of 1972, proscribing *invidious* discrimination on the basis of "sex" in federally funded education programs and activities. 20 U.S.C. § 1681(a). Title IX permits institutions to differentiate intimate facilities by sex. 20 U.S.C. § 1686 ("Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different

sexes."). Section 1686 was added to address concerns that Title IX would force a school to allow women in facilities designated for men only, and vice versa. When Senator Birch Bayh first introduced the legislation, Senator Dominick asked about the scope of the law:

> Mr. DOMINICK. The provisions on page 1, under section 601, refer to the fact that no one shall be denied the benefits of any program or activity conducted, et cetera. The words "any program or activity," in what way is the Senator thinking here? *Is he thinking in terms of dormitory facilities, is he thinking in terms of athletic facilities or equipment, or in what terms are we dealing here?* Or are we dealing with just educational requirements?
>
> I think it is important, for example, because we have institutions of learning which, because of circumstances such as I have pointed out, may feel they do not have dormitory facilities which are adequate, or they may feel, as some institutions are already saying, that you cannot [sexually] segregate dormitories anyway. *But suppose they want to [sexually] segregate the dormitories; can they do it?*
>
> Mr. BAYH. The rulemaking powers referred to earlier, I think, give the Secretary discretion to take care of this particular policy problem. *I do not read this as requiring integration of dormitories between the sexes*, nor do I feel it mandates the [sexual] desegregation of football fields.
>
> What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, *nor that the men's locker room be [sexually] desegregated*.

117 Cong. Rec. 30407 (1971) (emphasis added).

24. The following year, when Title IX was passed, Senator Bayh again reiterated that this was not meant to force men and women to share intimate facilities where their privacy rights would be compromised:

> Under this amendment, each Federal agency which extends Federal financial assistance is empowered to issue implementing rules and

> regulations effective after approval of the President. *These regulations would allow enforcing agencies to permit differential treatment by sex only*—very unusual cases where such treatment is absolutely necessary to the success of the program—such as in classes for pregnant girls or emotionally disturbed students, in sports facilities *or other instances where personal privacy must be preserved*.

118 Cong. Rec. 5807 (1972) (emphasis added).

25. Privacy was raised when Title IX was debated in the House. Representative Thompson, concerned about men and women using the same intimate facilities, offered an amendment:

> *I have been disturbed however, about the statements that if there is to be no discrimination based on sex then there can be no separate living facilities for the different sexes*. I have talked with the gentlewoman from Oregon (Mrs. Green) and discussed with the gentlewoman an amendment which she says she would accept. *The amendment simply would state that nothing contained herein shall preclude any educational institution from maintaining separate living facilities because of sex*. So, with that understanding I feel that the amendment [exempting undergraduate programs from Title IX] now under consideration should be opposed and I will offer the "living quarters" amendment at the proper time.

117 Cong. Rec. 39260 (1971) (emphasis added). This amendment was eventually introduced and passed. 117 Cong. Rec. 39263 (1971).

B. Aftermath of Title IX.

26. At the time that Title IX was enacted, there was broad support behind the policy of maintaining separate intimate facilities for female and male students. Scholars defended the practice. *See*, *e.g.*, Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 901 (1971) (discussing the "separation of the sexes in public rest rooms"). A 1971 article in the *Harvard Law Review* candidly

remarked: "[T]here has never been any indication that men have wished to avoid intimate contact with women on a daily basis." Note, *Sex Discrimination and Equal Protection: Do We Need A Constitutional Amendment*?, 84 HARV. L. REV. 1499, 1514 (1971). And a 1972 article in the *Texas Law Review* characterized restrictions on accessing bathrooms and changing areas as a commonsense "response to our society's concern for privacy and modesty." Brian E. Berwick & Carol Oppenheimer, *Marriage, Pregnancy, and the Right to Go to School*, 50 TEX. L. REV. 1196, 1228 n.116 (1972).

27. Following the enactment of Title IX, there continued to be significant backing for the longstanding arrangement of maintaining sex-separated intimate facilities. The initial rules promulgated to implement Title IX permitted separate restrooms, locker rooms, and shower facilities on the basis of sex. 34 C.F.R. § 106.33. And legal scholars continued to defend sex-separated intimate facilities as necessary to preserve individual privacy rights. In a 1975 *Washington Post* editorial, then Columbia Law School Professor Ruth Bader Ginsburg wrote that "[s]eparate places to disrobe, sleep, perform personal bodily functions are permitted, *in some situations required*, by regard for individual privacy." Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21 (emphasis added). And in a 1977 report, the United States Commission on Civil Rights concluded the "the personal privacy principle permits maintenance of separate sleeping and bathroom facilities" for women and men. United States Commission on Civil Rights, *Sex Bias in the U.S. Code* 216 (1977). Courts have recognized this privacy concern as well. In 1996, the United States Supreme Court determined that in admitting female students, a

previously all-male military institute must "afford members of each sex privacy from the other sex." *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996).

28. Congress construes its prohibitions against invidious "sex" discrimination narrowly. In 1974, Representatives Bella Abzug and Edward Koch proposed to amend the Civil Rights Act to *add* the *new* category of "sexual orientation." H.R. 14752, 93rd Cong. (1974). Congress considered other similar bills during the 1970s. *See* H.R. 166, 94th Cong. (1975); H.R. 2074, 96th Cong. (1979); S. 2081, 96th Cong. (1979). In 1994, lawmakers introduced the Employment Non-Discrimination Act ("ENDA") which, like Rep. Abzug and Koch's earlier effort, was premised on the understanding that Title VII's protections against invidious "sex" discrimination related only to one's biological sex as male or female. H.R. 4636, 103rd Cong. (1994). In 2007, 2009, and 2011, lawmakers proposed a broader version of EDNA to codify protections for "gender identity" in the employment context. H.R. 2015, 110th Cong. (2007); H.R. 2981, 111th Cong. (2009); S. 811, 112th Cong. (2011). In addition, in 2013 and 2015, proposals were made to *add* to Title IX the *new* category of "gender identity." H.R. 1652, 113th Cong. (2013); S.439, 114th Cong. (2015). Notwithstanding the success or failure of the aforementioned Congressional proposals, they all affirmed Congress's enduring understanding that "sex," as a protected class, refers only to one's biological sex, as male or female, and not the radical re-authoring of the term now being foisted upon Americans by the collective efforts of Defendants.

29. And when Congress actually did, in one instance, redefine the term "sex"

for the purposes of its prohibitions against invidious "sex" discrimination, the new definition did not encompass "gender identity." Rather, in 1978, Congress broadened the statutory term "sex" to include discrimination "on the basis of pregnancy, childbirth, or related conditions." Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § (k), 92 Stat. 2076, 2076 (1978). In amending the law in this way, Congress indicated that invidious "sex" discrimination occurs when females and males are not afforded the same avenues for advancement, *i.e.*, when pregnant women may be legally fired or not hired. Thus, this amendment affirmed Congress's long-held view that "sex" refers to biological sex, and not to an individual's self-perception of his or her "gender identity."

C. Secondary Sources.

30. According to standard legal treatises, "gender identity" is not within the ambit of Title VII. *See*, *e.g.*, Margaret C. Jasper, *Employment Discrimination Law Under Title VII* 45 (2d ed. 2008) (stating that Title VII makes it unlawful "to discriminate against any employee or applicant for employment because of his or her sex"); Mack A. Player, *Employment Discrimination Law* 239 (1988) (providing that the term "sex" for the purposes of Title VII generally refers to the division of organisms into biological sexes); Charles A. Sullivan et al, *Federal Statutory Law of Employment Discrimination* 161 (1980) (same). Indeed, "gender identity" was a virtually unrecognized construct among legal academics when Title VII and Title IX became law. It was not even mentioned in a law review article on the subject of Title VII or Title IX until the 1980s.

31. "Gender identity" is a relatively recent addition to the social science lexicon. The 1992 National Health and Social Life Survey did not ask about men or women that identify as the opposite sex, nor did the first four waves of data collection of the National Longitudinal Study of Adolescent Health (begun in 1994 and last fielded in 2008). And the Centers for Disease Control and Prevention ("CDC") has so far passed on doing so. Brian W. Ward et al, *Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013*, 77 NATIONAL HEALTH STATISTICS REPORTS 2 (2014).

32. Among the general public, "gender identity" also became a familiar concept only of late. Law Professor Gail Heriot, a member of the United States Commission on Civil Rights, noted in her recent Congressional testimony that the 1991 Compact Oxford English Dictionary does not define "transgender." *The Federal Government on Autopilot: Delegation of Regulatory Authority to an Unaccountable Bureaucracy: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 13 (2016) (statement of Gail Heriot, Member, U.S. Comm'n on Civil Rights). Likewise, newspapers such as the *Washington Post* and the *New York Times* did not use the term throughout the 1960s and 1970s. *Id.*

33. While not a widely used term at the time President Nixon signed Title IX into law, "gender identity" was first used in 1963 at the 23rd International Psycho-Analytical Congress in Stockholm. David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles*, 1945–2001, ARCHIVES OF SEXUAL BEHAVIOR, Apr. 2004, at 93. Notably, early users of "gender" and "gender identity"

understood these terms to mean something *different* than "sex."

34. In the 1950s, John Money, a psychologist at Johns Hopkins University, introduced "gender"—previously a grammatical term only—into scientific discourse. Joanne Meyerowitz, *A History of "Gender,"* 113 THE AMERICAN HISTORICAL REVIEW 1346, 1353 (2008). Money believed that an individual's "gender role" was not determined at birth but was acquired early in a child's development much in the same fashion that a child learns a language. John Money et al, *Imprinting and the Establishment of Gender Role*, 77 A.M.A. ARCHIVES OF NEUROLOGY AND PSYCHIATRY 333–36 (1957). Robert Stoller, the UCLA psychoanalyst who first used the term "gender identity," was another early adopter of the terminology of "gender." He wrote in 1968 that gender had "psychological or cultural rather than biological connotations." Robert J. Stoller, *Sex and Gender: On the Development of Masculinity and Femininity* 9 (1968). To him, "sex was biological but gender was social." Haig, *supra*, at 93.

35. In 1969, Virginia Prince, who is credited with coining the term "transgender," echoed the view that "sex" and "gender" are distinct: "I, at least, know the difference between sex and gender and have simply elected to change the latter and not the former. . . . I should be termed 'trasngenderal.'" *The Federal Government on* Autopilot, 114th Cong. 13 (Heriot statement) (quoting Virginia Prince, *Change of Sex or Gender*, 10 TRANSVESTIA 53, 60 (1969)). And in the 1970s, feminist scholars joined the chorus differentiating "biological sex" from "socially assigned gender." Haig, *supra*, at 93 (quoting Ethel Tobach, 41 *Some Evolutionary Aspects of Human*

Gender, AMERICAN JOURNAL OF ORTHOPSYCHIATRY 710 (1971)).

36. The meaning of the term "sex" has remained unchanged since the enactment of Title VII and Title IX. Around the time that these laws passed, nearly every dictionary definition of "sex" referred to physiological distinctions between females and males, particularly with respect to their reproductive functions. *See*, *e.g.*, AMERICAN HERITAGE DICTIONARY 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . ."); 9 OXFORD ENGLISH DICTIONARY 578 (1961) ("The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these."). Even today, "sex" continues to refer to biological differences between females and males. *See, e.g.*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); Sari L. Reisner et al, *"Counting" Transgender and Gender-Nonconforming Adults in Health Research*, TRANSGENDER STUDIES QUARTERLY, Feb. 2015, at 37 ("Sex refers to biological differences among females and males, such as genetics, hormones, secondary sex characteristics, and anatomy.").

37. The meaning of "gender" has also remained essentially the same since the term was introduced as a means of drawing a distinction between biological "sex" and social "gender." *See*, *e.g.*, Reisner et al, *supra*, at 37 ("Gender typically refers to cultural meanings ascribed to or associated with patterns of behavior, experience, and personality that are labeled as feminine or masculine."). This usage of "gender" is also more commonplace now. For example, the 2010 New Oxford American Dictionary distinguishes between "sex," defined in biological terms, and "gender," defined in social and cultural terms. NEW OXFORD AMERICAN DICTIONARY 721–22, 1600 (3d ed. 2010).

D. Defendants' Revisions of the Law.

38. Current federal law reflects the emergence of "gender" and "gender identity" as concepts distinct from "sex." Congress chose recently to extend protections for "gender identity" in certain areas of federal law. In 2010, President Obama signed into law hate crimes legislation, 18 U.S.C. § 249, which applies to, *inter alia*, "gender identity." *Id.* § 249(a)(2). The 2013 reauthorization of the Violence Against Women Act (VAWA) prohibits recipients of certain federal grants from discriminating on the basis of both "sex" *and* "gender identity." 42 U.S.C. § 13925(b)(13)(A).

39. While Congress has added "gender identity" next to "sex" in other areas of federal law, it has not changed the terms of Title VII and Title IX. These laws continue to prohibit unlawful discrimination on the basis of "sex." Since 2010,

however, Defendants have pretended that these statutes were actually amended to cover the distinct concept of "gender identity." For example:

- In a 2010 Dear Colleague Letter, the DOE's Office for Civil Rights ("OCR") asserted that "Title IX does protect all students, including . . . transgender (LGBT) students, from sex discrimination." OCR, *Dear Colleague Letter: Harassment and Bullying*, at 8 (Oct. 26, 2010) (Exhibit A).
- In April 2014, OCR stated that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity." OCR, *Questions and Answers on Title IX and Sexual Violence*, at B-2 (Apr. 29, 2014) (Exhibit B).
- Attorney General Eric Holder issued a memo in December 2014 concluding that Title VII's reference to "sex" "encompasses discrimination based on gender identity, including transgender status." DOJ, Memorandum from the Attorney General, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, at 2 (Dec. 15, 2014) (Exhibit C).
- And in 2015, OSHA published a "guide" for employers regarding restroom access for employees who identify as the opposite sex. Press Release, OSHA, *OSHA publishes guide to restroom access for transgender workers* (June 1, 2015). OSHA's guidance concluded that

> "all employees should be permitted to use the facilities that correspond with their gender identity," which is "internal" and could be "different from the sex they were assigned at birth." OSHA, *A Guide to Restroom Access for Transgender Workers* (2015) (Exhibit D).

In 2016, Defendants' disregard for federal law as written—and the ability to maintain sex-separated intimate facilities—reached its nadir in the wake of events in North Carolina.

E. North Carolina.

40. On February 22, 2016, the City Council of Charlotte, North Carolina, amended the city's Non-Discrimination Ordinance (Exhibit E), requiring that every government and business bathroom and shower, however designated, be simultaneously open to both sexes. In other words, Charlotte outlawed the right to maintain separate sex intimate facilities throughout the city. The North Carolina General Assembly then passed the Public Facilities Privacy and Security Act ("the Act") (Exhibit F), preempting the Charlotte ordinance and providing that public employees and public school students use bathrooms and showers correlating with their biological sex, defined as the sex noted on their birth certificate. The Act does not establish a policy for private businesses and permits accommodations based on special circumstances.

41. After signing the Act, on April 12, 2016, North Carolina Governor Patrick L. McCrory issued Executive Order No. 93 to Protect Privacy and Equality ("EO 93") (Exhibit G). EO 93 expanded non-discrimination protections to state

employees on the basis of "gender identity," while simultaneously affirming that cabinet agencies should require multiple occupancy intimate facilities, like bathrooms, to be designated for use only by persons based on their biological sex. EO 93 directed cabinet agencies to make reasonable accommodations when practicable.

42. Nevertheless, on May 3, 2016, the EEOC released a document titled "Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964" ("Fact Sheet") (Exhibit H). The Fact Sheet states that Title VII's prohibition of invidious discrimination on the basis of "sex" also now extends to "gender identity." It further provides that employers that do not allow employees to use the bathroom and other intimate facilities of their choosing are liable for unlawful discrimination on the basis of "sex."

43. Then, on May 4, 2016, DOJ sent Governor McCrory a letter (Exhibit I), declaring that the Act and EO 93 violate both Title VII and Title IX. DOJ threatened to "apply to [an] appropriate court for an order that will ensure compliance with" its *ultra vires* rewriting of the law.

44. On May 9, 2016, DOJ sued North Carolina, asserting that both the Act and EO 93 are impermissible under federal law.

F. The DOJ / DOE Joint Letter.

45. On May 13, 2016, DOJ and DOE issued a joint letter ("the Joint Letter") (Exhibit J), officially foisting its new version of federal law on the more than 100,000 elementary and secondary schools that receive federal funding.

46. The Joint Letter contends that Title IX's prohibition of invidious "sex" discrimination also somehow encompasses discrimination based on "gender identity." Further, it advises that schools taking a different view of Title IX face legal action and the loss of federal funds. The Joint Letter concerns "*Title IX obligations* regarding transgender students" and provides insight as to the manner in which DOJ and DOE will evaluate how schools "are complying with their *legal obligations*" (emphasis added). It refers to an accompanying document collecting examples from school policies and recommends that school officials comb through the document "for practical ways to meet *Title IX's requirements*" (same). Indeed, the Joint Letter amounts to "*significant guidance*" (emphasis in original).

47. According to the Joint Letter, schools must treat a student's "gender identity" as the student's "sex" for purposes of Title IX compliance, with one notable exception. "Gender identity," the Joint Letter explains, refers to a person's "internal sense of gender," without regard to one's biological sex. One's "gender identity" can be the same as a person's biological sex, or different. The Joint Letter provides that no medical diagnosis or treatment requirement is a prerequisite to selecting one's "gender identity," nor is there any form of temporal requirement. In other words, a student can choose one "gender identity" on one particular day or hour, and then the

opposite one the next. And students of any age may establish a "gender identity" different from their biological sex simply by notifying the school administration—the involvement of a parent or guardian is not necessary.

48. In the case of athletics, however, the Joint Letter does *not* require schools to treat a student's "gender identity" as the student's "sex" for the purpose of Title IX compliance. Instead, the Joint Letter basically leaves intact Title IX regulations allowing schools to restrict athletic teams to members of one biological sex. The only change that the Joint Letter makes to athletic programs is that schools may not "rely on overly broad generalizations or stereotypes" about students. Otherwise, differentiating sports teams on the basis of "sex"—not "gender identity"—is consistent with the Joint Letter. The Joint Letter's disparate treatment of bathrooms and showers, on the one hand, and athletic teams, on the other, demonstrates that DOJ/DOE is not simply demanding that schools abide by Title IX (as misinterpreted to somehow include "gender identity"). Rather, the Joint Letter tries to rewrite Title IX by executive fiat, mandating all bathrooms and showers to be simultaneously open to both sexes, while concurrently permitting different sex athletics subject to limited exceptions. The new policy has no basis in law.

49. Adapting to the new demands of DOJ and DOE requires significant changes in the operations of the nation's school districts. Schools subject to Title IX must allow students to choose the restrooms, locker rooms, and other intimate facilities that match their chosen "gender identity" at any given time. Single-sex

classes, schools, and dormitories must also be open to students based on their chosen "gender identity."

50. On May 17, 2016, the Attorneys General of Oklahoma, Texas, and West Virginia sent DOJ and DOE a letter (Exhibit K) requesting clarification on the effect of the Joint Letter on agencies within these States. DOJ and DOE did not respond.

G. Harrold Independent School District (TX).

51. On May 23, 2016, school board members of the Harrold ISD ("the Board") convened a regular session. At the session, the Board adopted a policy ("the Policy") (Exhibit L) consistent with its current practice. The Policy, which applies to students and employees of the Harrold ISD, limits multiple occupancy bathrooms and locker rooms to usage by persons based on their biological sex. The Policy also allows for accommodations.

52. After adopting the Policy, the Board requested representation (Exhibit M) from the Office of the Attorney General ("OAG") of Texas, under Texas Education Code § 11.151(e), to determine whether the Policy is in conflict with federal law and, if so, whether the Policy is enforceable. The OAG agreed to represent the Board.

53. Harrold ISD is subject to Title VII and receives federal funding subject to Title IX. In 2015–16, Harrold ISD operated on a total annual budget exceeding $1.4 million, with the federal portion amounting to approximately $117,000.

54. Defendants have indicated they will enforce their revision of federal law against entities, such as Harrold ISD, that do not obey the new obligations unlawfully imposed on them. The Joint Letter of May 13, 2016, (Exhibit J) states that Title IX

and its implementing regulations apply to "educational programs and activities operated by recipients of Federal financial assistance" and that schools agree to same "as a condition of receiving federal assistance." According to its website, DOE "vigorously enforces Title IX to ensure that institutions that receive federal financial assistance from [DOE] comply with the law." DOE, http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html. And federal regulations provide for mandatory investigations into recipients of Title IX-linked funds who discriminate on the basis of "sex." 34 C.F.R. §§ 100.7(a), 100.8, 106.71 (incorporating Title VI procedures).

55. Thus, the federal government possesses the ability to deny federal funds that comprise a substantial portion of Harrold ISD's budget if Harrold ISD chooses to follow its Policy instead of the new rules, regulations, guidance and interpretations of Defendants. As a result, Harrold ISD must budget and reallocate resources now in order to prepare for the prospective loss of federal funding.

H. Arizona Plaintiffs.

56. Plaintiffs Arizona Department of Education, by and through Superintendent of Public Instruction Diane Douglas, and Heber-Overgaard Unified School District (collectively, the "Arizona Plaintiffs") have requested that Arizona Attorney General Mark Brnovich represent them in the present litigation. Arizona Attorney General Mark Brnovich deems it necessary to represent the Arizona Plaintiffs. Arizona Department of Education Guideline and Procedure Doc. No. HR-20 (Exhibit N), which applies to all Arizona Plaintiffs, provides that "It is not . . .

discriminatory for a school to offer separate housing, toilet, athletic and other facilities on the basis of sex, so long as the facilities provided to each sex are comparable." Exhibit N, at 2.

I. Federal Education Funding.

57. The loss of all federal funding for state and local education programs will have a major effect on State and local education budgets. The $69,867,660,640 in annual funding makes its way to all 50 states. DOE, *Funds for State Formula-Allocated and Selected Student Aid Programs, U.S. Dep't of Educ. Funding*, at 120, *available at* http://www2.ed.gov/about/overview/budget/statetables/index.html (charts listing the amount of federal education funding by program nationally and by state). DOE estimates that the federal government will spend over $36 billion in State and local elementary and secondary education, and over $30 billion in State and local postsecondary education programs in 2016.

58. Not counting funds paid directly to state education agencies, or funds paid for non-elementary and secondary programs, the national amount of direct federal funding to public elementary and secondary schools alone exceeds $55,862,552,000 on average annually—which amounts to 9.3 percent of the average State's total revenue for public elementary and secondary schools, or $1,128 per pupil. Texas's public elementary and secondary schools, for example, receive an average of $5,872,123,000 in federal funds annually, or $1,156 per pupil, which amounts to about 11.7 percent of the State's revenue for public elementary and secondary schools.

59. Alabama's public elementary and secondary schools, for example, receive an average of $850,523,000 in federal funds annually, or $1,142 per pupil, which amounts to about 11.8 percent of the State's revenue for public elementary and secondary schools. West Virginia's public elementary and secondary schools, for example, receive an average of $380,192,000 in federal funds annually, or $1,343 per pupil, which amounts to about 10.7 percent of the State's revenue for public elementary and secondary schools. Wisconsin's public elementary and secondary schools, for example, receive an average of $850,329,000 in federal funds annually, or $975 per pupil, which amounts to about 7.9 percent of the State's revenue for public elementary and secondary schools. The percentages in other States are comparable. Nat'l Ctr. For Educ. Statistics, U.S. Dep't of Educ. & Institute of Educ. Sciences, *Digest of Education Statistics*, Tab. 235.20, *available at* https://nces.ed.gov/programs/digest/d15/tables/dt15_235.20.asp?current=yes.

IV. CLAIMS FOR RELIEF

COUNT ONE

Relief Under 5 U.S.C. § 706 (APA) that the new Rules, Regulations, Guidance and Interpretations at Issue Are Being Imposed Without Observance of Procedure Required by Law

60. The allegations in paragraphs 1 through 59 are reincorporated herein.

61. Defendants are "agencies" under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are "rules" under the APA, *id*. § 551(4), and constitute "[a]gency action made reviewable by

statute and final agency action for which there is no other adequate remedy in a court." *Id*. § 704.

62. The APA requires this Court to hold unlawful and set aside any agency action taken "without observance of procedure required by law." *Id*. § 706(2)(D).

63. With exceptions that are not applicable here, agency rules must go through notice-and-comment rulemaking. *Id*. § 553.

64. Defendants failed to properly engage in notice-and-comment rulemaking in promulgating the new rules, regulations, guidance and interpretations described herein.

COUNT TWO

Relief Under 5 U.S.C. § 706 (APA) that the new Rules, Regulations, Guidance and Interpretations at Issue Are Unlawful by Exceeding Congressional Authorization

65. The allegations in paragraphs 1 through 64 are reincorporated herein.

66. Defendants are "agencies" under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are "rules" under the APA, *id*. § 551(4), and constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." *Id*. § 704.

67. The APA requires this Court to hold unlawful and set aside any agency action that is "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id*. § 706(2)(B)–(C).

68. The new rules, regulations, guidance and interpretations described herein go so far beyond any reasonable reading of the relevant Congressional text such that the new rules, regulations, guidance and interpretations functionally exercise lawmaking power reserved only to Congress. U.S. CONST. art. I, § 1 ("*All* legislative powers herein granted shall be vested in . . . Congress") (emphasis added); The Federalist No. 48, at 256 (James Madison) (Carey and McClellan eds. 1990) (noting that "[i]t is not unfrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere," but that "the executive power [is] restrained within a narrower compass and . . . more simple in its nature").

69. The new rules, regulations, guidance and interpretations described herein also violate separation of powers principles by purporting to expand federal court jurisdiction to cover whether persons of both sexes have a right to use previously separate sex intimate facilities, an issue on which Congress has not intended to legislate. Only Congress, not an agency, can expand federal court jurisdiction, U.S. CONST. art. III, § 1-2; *Vaden v. Discover Bank*, 556 U.S. 49, 59 n.9 (2009); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("[Federal courts] possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.) (internal citations omitted); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) ("[A] court created by the general government derives its jurisdiction wholly from the authority of Congress . . . provided it be not extended

beyond the boundaries fixed by the Constitution."), and the Defendants' attempts to do so as described herein violates the constitutional separation of powers.

70. Because the new rules, regulations, guidance and interpretations are not in accordance with the law articulated above, they are unlawful, violate 5 U.S.C. § 706, and should be set aside.

COUNT THREE

Relief Under 5 U.S.C. § 706 (APA) that the new Rules, Regulations, Guidance and Interpretations at Issue Are Unlawful by Violating the Tenth Amendment

71. The allegations in paragraphs 1 through 70 are reincorporated herein.

72. Defendants are "agencies" under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are "rules" under the APA, *id*. § 551(4), and constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." *Id*. § 704.

73. The APA requires this Court to hold unlawful and set aside any agency action that is "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id*. § 706(2)(B)–(C).

74. The federal government is one of limited, enumerated powers; all others—including a general police power—are reserved to the States. *See United States v. Morrison*, 529 U.S. 598, 617–19 (2000). The States' police power includes the "protection of the safety of persons," *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80,

82 (1946), the "general power of governing," *NFIB v. Sebelius*, 132 S. Ct. 2566, 2578 (2012), and the "authority to enact legislation for the public good," *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014).

75. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

76. The new rules, regulations, guidance and interpretations described herein violate the Tenth Amendment because they effectively commandeer the States' historic and well-established regulation of civil privacy law. *New York v. United States*, 505 U.S. 144, 162 (1992) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.").

77. The new rules, regulations, guidance and interpretations described herein unlawfully attempt to preempt State law regarding rights of privacy because historic powers reserved to the States, such as civil privacy protections, cannot be superseded by federal act, "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Gregory v. Ashcroft*, 501 U.S. 452, 460–70 (1991). As explained herein, not only is there no evidence that Congress intended to regulate civil privacy circumstances within the States, but legislative history demonstrates that Congress expressed its clear intent to *not* encroach upon the traditional State

role in safeguarding privacy expectations in the workplace, public accommodations, and educational settings.

78. Because the new rules, regulations, guidance and interpretations are not in accordance with the law as articulated above, they are unlawful, violate 5 U.S.C. § 706, and should be set aside.

COUNT FOUR

Relief Under 5 U.S.C. § 706 (APA) that the new Rules, Regulations, Guidance and Interpretations at Issue Are Unlawful by Violating the Equal Protection of Law

79. The allegations in paragraphs 1 through 78 are reincorporated herein.

80. Defendants are "agencies" under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are "rules" under the APA, *id*. § 551(4), and constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." *Id*. § 704.

81. The APA requires this Court to hold unlawful and set aside any agency action that is "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id*. § 706(2)(B)–(C).

82. The new rules, regulations, guidance and interpretations violate the constitutional right to the equal protection of law because they treat similarly situated individuals differently. For example, under Defendants' new rules, a female who proclaims a male "gender identity" can use either the men's or women's restroom,

but a female who proclaims a female "gender identity" may use only the women's restroom. Thus, not all men or women are treated the same.

83. Because the new rules, regulations, guidance and interpretations are not in accordance with the law articulated above, they are unlawful, violate 5 U.S.C. § 706, and should be set aside.

COUNT FIVE

Relief Under 28 U.S.C. §§ 2201-2202 (DJA) and 5 U.S.C. § 706 (APA) that the new Rules, Regulations, Guidance and Interpretations at Issue Unlawfully Attempt to Abrogate State Sovereign Immunity

84. The allegations in paragraphs 1 through 83 are reincorporated herein.

85. Defendants are "agencies" under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are "rules" under the APA, *id*. § 551(4), and constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." *Id*. § 704.

86. The APA requires this Court to hold unlawful and set aside any agency action that is "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id*. § 706(2)(B)–(C).

87. The new rules, regulations, guidance and interpretations improperly abrogate the States' sovereign immunity without supporting Congressional findings.

88. The Supreme Court acknowledges Congress's abrogation of the States' sovereign immunity in the employment context, but only on the basis of

Congressional findings and concerns about unequal treatment between men and women, and not an employee's decision on whether they declare themselves male or female. *See, e.g., Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 and n.2 (2003) (observing that the FMLA aims to promote the goal of equal employment opportunity for women and men).

89. In adopting their new rules, regulations, guidance and interpretations, the Defendants point to no Congressional findings about invidious discrimination based on "gender identity." Indeed, the Defendants ignore the complete lack of any Congressional intent that the term "sex" include an individual's right to choose his or her sex. The Defendants cannot expand abrogation of the State's sovereign immunity by rewriting the meaning of "sex" employed by Congress.

COUNT SIX

Relief Under 5 U.S.C. § 706 (APA) that new Rules, Regulations, Guidance and Interpretations at Issue Are Arbitrary and Capricious in that they Interfere with Local Schools

90. The allegations in paragraphs 1 through 89 are reincorporated herein.

91. Defendants are "agencies" under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are "rules" under the APA, *id*. § 551(4), and constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." *Id*. § 704.

92. The APA requires this Court to hold unlawful and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. § 706(2)(A).

93. Defendants' actions—rewriting federal law to suit their own policy preferences—are arbitrary and capricious and not otherwise in accordance with the law. Defendants' actions are arbitrary and capricious because they interfere with local schools by unilaterally changing the statutory term "sex"—long and widely accepted to be a biological category—to include "gender identity." Title IX and Title VII do not refer to "gender identity." Nor does 34 C.F.R. § 106.33, which expressly authorizes separate restrooms and locker rooms "on the basis of sex." The federal laws at issue prohibit disparate treatment "on the basis of sex," 20 U.S.C. § 1681(a); 34 C.F.R. § 106.33, a term long understood unambiguously to be a biological category based principally on male or female reproductive anatomy, and not one that includes self-proclaimed "gender identity."

COUNT SEVEN

Relief Under 5 U.S.C. § 706 (APA) that new Rules, Regulations, Guidance and Interpretations at Issue Are Arbitrary and Capricious in that they Conflict with Federal Law

94. The allegations in paragraphs 1 through 93 are reincorporated herein.

95. Defendants are "agencies" under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are "rules" under the APA, *id*. § 551(4), and constitute "[a]gency action made reviewable by

statute and final agency action for which there is no other adequate remedy in a court." *Id*. § 704.

96. The APA requires this Court to hold unlawful and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. § 706(2)(A).

97. Under PREA (Prison Rape Elimination Act), 42 U.S.C. § 15601 *et seq*., those that identify as the opposite sex have the option to shower separately. 28 C.F.R. § 115.42(f). Coupling this element in PREA with the new rules, regulations, guidance and interpretations at issue (where everyone may identify as the opposite sex, if they choose to do so) means that e*very* inmate can exercise a right to take a separate shower, which is an untenable position (and, thus, arbitrary and capricious), especially within a correctional circumstance.

COUNT EIGHT

Relief Under 28 U.S.C. §§ 2201-2202 (DJA) and 5 U.S.C. § 706 (APA) that the new Rules, Regulations, Guidance and Interpretations at Issue Are Unlawful and Violate Constitutional Standards of Clear Notice

98. The allegations in paragraphs 1 through 97 are reincorporated herein.

99. Defendants are "agencies" under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are "rules" under the APA, *id*. § 551(4), and constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." *Id*. § 704.

100. The APA requires this Court to hold unlawful and set aside any agency action that is "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id*. § 706(2)(B)–(C).

101. When Congress exercises its Spending Clause power, conditions on Congressional funds must enable the recipient to "clearly understand," from the language of the law itself, the conditions to which they are agreeing to when accepting the federal funds. *Arlington Cent. Sch. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Defendants' *ex-post* rules, regulations, guidance and interpretations described herein are not in accord with the understanding that existed when the States opted into the programs. *Bennett v. New Jersey*, 470 U.S. 632, 638 (1985) (providing that a state's obligation under cooperative federalism program "generally should be determined by reference to the law in effect when the grants were made").

102. The text employed by Congress does not support understanding the term "sex" in the manner put forth by Defendants. Congress expressed its intent to cover "gender identity," as a protected class, in *other* pieces of legislation, *see*, *e.g.*, 18 U.S.C. § 249(a)(2)(A); 42 U.S.C. § 13925(b)(13)(A), but not Title IX. In *other* legislation, Congress included "gender identity" along with "sex," thus evidencing its intent for "sex" in Title IX to retain its original and only meaning—one's immutable, biological sex as acknowledged at or before birth.

COUNT NINE

Declaratory Judgment Under 28 U.S.C. §§ 2201-2202 (DJA) and 5 U.S.C. § 706 (APA) that the new Rules, Regulations, Guidance and Interpretations at Issue Are Unlawful and Unconstitutionally Coercive

103. The allegations in paragraphs 1 through 102 are reincorporated herein.

104. Defendants are "agencies" under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are "rules" under the APA, *id*. § 551(4), and constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." *Id*. § 704.

105. The APA requires this Court to hold unlawful and set aside any agency action that is "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id*. § 706(2)(B)–(C).

106. By placing in jeopardy a substantial percentage of Plaintiffs' budgets if they refuse to comply with the new rules, regulations, guidance and interpretations of Defendants, Defendants have left Plaintiffs no real choice but to acquiesce in such policy. *See NFIB*, 132 S. Ct. at 2605 ("The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce . . . .").

107. "The legitimacy of Congress's exercise of the spending power 'thus rests on whether the [entity] voluntarily and knowingly accepts the terms of the 'contract.'" *NFIB*, 132 S. Ct. at 2602 (quoting *Pennhurst State Sch. & Hosp. v.*

Halderman, 451 U.S. 1, 17 (1981)). "Congress may use its spending power to create incentives for [entities] to act in accordance with federal policies. But when 'pressure turns into compulsion,' the legislation runs contrary to our system of federalism." *Id.* (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). "That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *Id.*

108. "[T]he financial 'inducement' [Defendants have] chosen is much more than 'relatively mild encouragement' – it is a gun to the head." *Id.* at 2604. When conditions on the receipt of funds "take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the states to accept policy changes." *Id.*; *cf. South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

109. Furthermore, the Spending Clause requires that entities "voluntarily and knowingly accept[]" the conditions for the receipt of federal funds. *NFIB*, 132 S. Ct. at 2602 (quoting *Halderman*, 451 U.S. at 17).

110. Because Defendants' new rules, regulations, guidance and interpretations change the conditions for the receipt of federal funds *after* the acceptance of Congress's original conditions, the Court should declare that the new rules, regulations, guidance and interpretations are unconstitutional because they violate the Spending Clause.

COUNT TEN

Declaratory Judgment Under 28 U.S.C. §§ 2201-2202 (DJA) and 5 U.S.C. § 611 (RFA) that the new Rules, Regulations, Guidance and Interpretations Were Issued Without a Proper Regulatory Flexibility Analysis

111. The allegations in paragraphs 1 through 110 are reincorporated herein.

112. Before issuing any of the new rules, regulations, guidance and interpretations at issue, Defendants failed to prepare and make available for public comment an initial and final regulatory flexibility analysis as required by the RFA. 5 U.S.C. § 603(a). An agency can avoid performing a flexibility analysis if the agency's top official certifies that the rule will not have a significant economic impact on a substantial number of small entities. *Id*. § 605(b). The certification must include a statement providing the factual basis for the agency's determination that the rule will not significantly impact small entities. *Id*.

113. The new rules, regulations, guidance and interpretations impact a substantial number of small entities because they require public schools receiving Title IX-linked funds either to comply or lose a significant portion of their budgets. None of the Defendants even attempted such a certification. Thus, the Court should declare Defendants' new rules, regulations, guidance and interpretations unlawful and set them aside.

V. DEMAND FOR JUDGMENT

Plaintiffs respectfully request the following relief from the Court:

114. A declaration that the new rules, regulations, guidance and interpretations are unlawful and must be set aside as actions taken "without observance of procedure required by law" under the APA;

115. A declaration that the new rules, regulations, guidance and interpretations are substantively unlawful under the APA;

116. A declaration that the new rules, regulations, guidance and interpretations are arbitrary and capricious under the APA;

117. A declaration that the new rules, regulations, guidance and interpretations are invalid because they abrogate Plaintiffs' sovereign immunity;

118. A declaration that the new rules, regulations, guidance and interpretations are invalid because Defendants failed to conduct the proper regulatory flexibility analysis required by the RFA.

119. A vacatur, as a consequence of each or any of the declarations aforesaid, as to the Defendants' promulgation, implementation, and determination of applicability of the Joint Letter, and its terms and conditions, along with all related rules, regulations, guidance and interpretations, as issued and applied to Plaintiffs and similarly situated parties throughout the United States, within the jurisdiction of this Court.

120. Preliminary relief, enjoining the new rules, regulations, guidance and interpretations from having any legal effect;

121. A final, permanent injunction preventing the Defendants from implementing, applying, or enforcing the new rules, regulations, guidance and interpretations; and

122. All other relief to which the Plaintiffs may show themselves to be entitled, including attorneys' fees and costs of court.

Respectfully submitted,

LUTHER STRANGE Attorney General of Alabama BRAD D. SCHIMEL Attorney General of Wisconsin PATRICK MORRISEY Attorney General of West Virginia HERBERT SLATERY, III Attorney General of Tennessee MARK BRNOVICH Attorney General of Arizona SCOTT PRUITT Attorney General of Oklahoma JEFF LANDRY Attorney General of Louisiana SEAN REYES Attorney General of Utah SAM OLENS Attorney General of Georgia	KEN PAXTON Attorney General of Texas JEFFREY C. MATEER First Assistant Attorney General BRANTLEY STARR Deputy First Assistant Attorney General PRERAK SHAH Senior Counsel to the Attorney General ANDREW LEONIE Associate Deputy Attorney General for Special Litigation AUSTIN R. NIMOCKS Associate Deputy Attorney General for Special Litigation /s/ Austin R. Nimocks AUSTIN R. NIMOCKS Texas Bar No. 24002695 Austin.Nimocks@texasattorneygeneral.gov Special Litigation Division P.O. Box 12548, Mail Code 001 Austin, Texas 78711-2548 *ATTORNEYS FOR PLAINTIFFS*

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

October 26, 2010

Dear Colleague:

In recent years, many state departments of education and local school districts have taken steps to reduce bullying in schools. The U.S. Department of Education (Department) fully supports these efforts. Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential. The movement to adopt anti-bullying policies reflects schools' appreciation of their important responsibility to maintain a safe learning environment for all students. I am writing to remind you, however, that some student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department's Office for Civil Rights (OCR). As discussed in more detail below, by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment.

The statutes that OCR enforces include Title VI of the Civil Rights Act of 1964[1] (Title VI), which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972[2] (Title IX), which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 1973[3] (Section 504); and Title II of the Americans with Disabilities Act of 1990[4] (Title II). Section 504 and Title II prohibit discrimination on the basis of disability.[5] School districts may violate these civil rights statutes and the Department's implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.[6] School personnel who understand their legal obligations to address harassment under these laws are in the best position to prevent it from occurring and to respond appropriately when it does. Although this letter focuses on the elementary and secondary school context, the legal principles also apply to postsecondary institutions covered by the laws and regulations enforced by OCR.

Some school anti-bullying policies already may list classes or traits on which bases bullying or harassment is specifically prohibited. Indeed, many schools have adopted anti-bullying policies that go beyond prohibiting bullying on the basis of traits expressly protected by the federal civil

[1] 42 U.S.C. § 2000d *et seq.*
[2] 20 U.S.C. § 1681 *et seq.*
[3] 29 U.S.C. § 794.
[4] 42 U.S.C. § 12131 *et seq*.
[5] OCR also enforces the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*, and the Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905. This letter does not specifically address those statutes.
[6] The Department's regulations implementing these statutes are in 34 C.F.R. parts 100, 104, and 106. Under these federal civil rights laws and regulations, students are protected from harassment by school employees, other students, and third parties. This guidance focuses on peer harassment, and articulates the legal standards that apply in administrative enforcement and in court cases where plaintiffs are seeking injunctive relief.

EXHIBIT A

rights laws enforced by OCR—race, color, national origin, sex, and disability—to include such bases as sexual orientation and religion. While this letter concerns your legal obligations under the laws enforced by OCR, other federal, state, and local laws impose additional obligations on schools.[7] And, of course, even when bullying or harassment is not a civil rights violation, schools should still seek to prevent it in order to protect students from the physical and emotional harms that it may cause.

Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.[8]

A school is responsible for addressing harassment incidents about which it knows or reasonably should have known.[9] In some situations, harassment may be in plain sight, widespread, or well-known to students and staff, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on a school bus, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the school on notice. In other situations, the school may become aware of misconduct, triggering an investigation that could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment. In all cases, schools should have well-publicized policies prohibiting harassment and procedures for reporting and resolving complaints that will alert the school to incidents of harassment.[10]

When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial.

If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile

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[7] For instance, the U.S. Department of Justice (DOJ) has jurisdiction over Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c (Title IV), which prohibits discrimination on the basis of race, color, sex, religion, or national origin by public elementary and secondary schools and public institutions of higher learning. State laws also provide additional civil rights protections, so districts should review these statutes to determine what protections they afford (*e.g.*, some state laws specifically prohibit discrimination on the basis of sexual orientation).

[8] Some conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression. For more information on the First Amendment's application to harassment, see the discussions in OCR's Dear Colleague Letter: First Amendment (July 28, 2003), *available at* http://www.ed.gov/about/offices/list/ocr/firstamend.html, and OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001) (*Sexual Harassment Guidance*), *available at* http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.

[9] A school has notice of harassment if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment. For a discussion of what a "responsible employee" is, see OCR's *Sexual Harassment Guidance*.

[10] Districts must adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex and disability discrimination complaints, and must notify students, parents, employees, applicants, and other interested parties that the district does not discriminate on the basis of sex or disability. *See* 28 C.F.R. § 35.106; 28 C.F.R. § 35.107(b); 34 C.F.R. § 104.7(b); 34 C.F.R. § 104.8; 34 C.F.R. § 106.8(b); 34 C.F.R. § 106.9.

environment and its effects, and prevent the harassment from recurring. These duties are a school's responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed. For example, any separation of the target from an alleged harasser should be designed to minimize the burden on the target's educational program (*e.g.*, not requiring the target to change his or her class schedule).

In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond. A school also may be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment. An effective response also may need to include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment (or wide dissemination of existing policies and procedures), as well as wide distribution of the contact information for the district's Title IX and Section 504/Title II coordinators.[11]

Finally, a school should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses. At a minimum, the school's responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems.

When responding to incidents of misconduct, schools should keep in mind the following:

- The label used to describe an incident (*e.g.*, bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications. So, for example, if the abusive behavior is on the basis of race, color, national origin, sex, or disability, and creates a hostile environment, a school is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR.

- When the behavior implicates the civil rights laws, school administrators should look beyond simply disciplining the perpetrators. While disciplining the perpetrators is likely a necessary step, it often is insufficient. A school's responsibility is to eliminate the

[11] Districts must designate persons responsible for coordinating compliance with Title IX, Section 504, and Title II, including the investigation of any complaints of sexual, gender-based, or disability harassment. *See* 28 C.F.R. § 35.107(a); 34 C.F.R. § 104.7(a); 34 C.F.R. § 106.8(a).

hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. Put differently, the unique effects of discriminatory harassment may demand a different response than would other types of bullying.

Below, I provide hypothetical examples of how a school's failure to recognize student misconduct as discriminatory harassment violates students' civil rights.[12] In each of the examples, the school was on notice of the harassment because either the school or a responsible employee knew or should have known of misconduct that constituted harassment. The examples describe how the school should have responded in each circumstance.

Title VI: Race, Color, or National Origin Harassment

- *Some students anonymously inserted offensive notes into African-American students' lockers and notebooks, used racial slurs, and threatened African-American students who tried to sit near them in the cafeteria. Some African-American students told school officials that they did not feel safe at school. The school investigated and responded to individual instances of misconduct by assigning detention to the few student perpetrators it could identify. However, racial tensions in the school continued to escalate to the point that several fights broke out between the school's racial groups.*

  In this example, school officials failed to acknowledge the pattern of harassment as indicative of a racially hostile environment in violation of Title VI. Misconduct need not be directed at a particular student to constitute discriminatory harassment and foster a racially hostile environment. Here, the harassing conduct included overtly racist behavior (*e.g.*, racial slurs) and also targeted students on the basis of their race (*e.g.*, notes directed at African-American students). The nature of the harassment, the number of incidents, and the students' safety concerns demonstrate that there was a racially hostile environment that interfered with the students' ability to participate in the school's education programs and activities.

  Had the school recognized that a racially hostile environment had been created, it would have realized that it needed to do more than just discipline the few individuals whom it could identify as having been involved. By failing to acknowledge the racially hostile environment, the school failed to meet its obligation to implement a more systemic response to address the unique effect that the misconduct had on the school climate. A more effective response would have included, in addition to punishing the perpetrators, such steps as reaffirming the school's policy against discrimination (including racial harassment), publicizing the means to report allegations of racial harassment, training faculty on constructive responses to racial conflict, hosting class discussions about racial harassment and sensitivity to students of other races, and conducting outreach to involve parents and students in an effort to identify problems and improve the school climate. Finally, had school officials responded appropriately

[12] Each of these hypothetical examples contains elements taken from actual cases.

and aggressively to the racial harassment when they first became aware of it, the school might have prevented the escalation of violence that occurred.[13]

- *Over the course of a school year, school employees at a junior high school received reports of several incidents of anti-Semitic conduct at the school. Anti-Semitic graffiti, including swastikas, was scrawled on the stalls of the school bathroom. When custodians discovered the graffiti and reported it to school administrators, the administrators ordered the graffiti removed but took no further action. At the same school, a teacher caught two ninth-graders trying to force two seventh-graders to give them money. The ninth-graders told the seventh-graders, "You Jews have all of the money, give us some." When school administrators investigated the incident, they determined that the seventh-graders were not actually Jewish. The school suspended the perpetrators for a week because of the serious nature of their misconduct. After that incident, younger Jewish students started avoiding the school library and computer lab because they were located in the corridor housing the lockers of the ninth-graders. At the same school, a group of eighth-grade students repeatedly called a Jewish student "Drew the dirty Jew." The responsible eighth-graders were reprimanded for teasing the Jewish student.*

  The school administrators failed to recognize that anti-Semitic harassment can trigger responsibilities under Title VI. While Title VI does not cover discrimination based solely on religion,[14] groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (*e.g.*, Muslims or Sikhs). Thus, harassment against students who are members of any religious group triggers a school's Title VI responsibilities when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices. A school also has responsibilities under Title VI when its students are harassed based on their actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.[15]

  In this example, school administrators should have recognized that the harassment was based on the students' actual or perceived shared ancestry or ethnic identity as Jews (rather than on the students' religious practices). The school was not relieved of its responsibilities under Title VI because the targets of one of the incidents were not actually Jewish. The harassment was still based on the perceived ancestry or ethnic characteristics of the targeted students. Furthermore, the harassment negatively affected the ability and willingness of Jewish students to participate fully in the school's

[13] More information about the applicable legal standards and OCR's approach to investigating allegations of harassment on the basis of race, color, or national origin is included in *Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance*, 59 Fed. Reg. 11,448 (Mar. 10, 1994), *available at* http://www.ed.gov/about/offices/list/ocr/docs/race394.html.
[14] As noted in footnote seven, DOJ has the authority to remedy discrimination based solely on religion under Title IV.
[15] More information about the applicable legal standards and OCR's approach to investigating complaints of discrimination against members of religious groups is included in OCR's Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), *available at* http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html.

education programs and activities (*e.g.*, by causing some Jewish students to avoid the library and computer lab). Therefore, although the discipline that the school imposed on the perpetrators was an important part of the school's response, discipline alone was likely insufficient to remedy a hostile environment. Similarly, removing the graffiti, while a necessary and important step, did not fully satisfy the school's responsibilities. As discussed above, misconduct that is not directed at a particular student, like the graffiti in the bathroom, can still constitute discriminatory harassment and foster a hostile environment. Finally, the fact that school officials considered one of the incidents "teasing" is irrelevant for determining whether it contributed to a hostile environment.

Because the school failed to recognize that the incidents created a hostile environment, it addressed each only in isolation, and therefore failed to take prompt and effective steps reasonably calculated to end the harassment and prevent its recurrence. In addition to disciplining the perpetrators, remedial steps could have included counseling the perpetrators about the hurtful effect of their conduct, publicly labeling the incidents as anti-Semitic, reaffirming the school's policy against discrimination, and publicizing the means by which students may report harassment. Providing teachers with training to recognize and address anti-Semitic incidents also would have increased the effectiveness of the school's response. The school could also have created an age-appropriate program to educate its students about the history and dangers of anti-Semitism, and could have conducted outreach to involve parents and community groups in preventing future anti-Semitic harassment.

Title IX: Sexual Harassment

- *Shortly after enrolling at a new high school, a female student had a brief romance with another student. After the couple broke up, other male and female students began routinely calling the new student sexually charged names, spreading rumors about her sexual behavior, and sending her threatening text messages and e-mails. One of the student's teachers and an athletic coach witnessed the name calling and heard the rumors, but identified it as "hazing" that new students often experience. They also noticed the new student's anxiety and declining class participation. The school attempted to resolve the situation by requiring the student to work the problem out directly with her harassers.*

  Sexual harassment is unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. Thus, sexual harassment prohibited by Title IX can include conduct such as touching of a sexual nature; making sexual comments, jokes, or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating e-mails or Web sites of a sexual nature.

In this example, the school employees failed to recognize that the "hazing" constituted sexual harassment. The school did not comply with its Title IX obligations when it failed to investigate or remedy the sexual harassment. The conduct was clearly unwelcome, sexual (*e.g.*, sexual rumors and name calling), and sufficiently serious that it limited the student's ability to participate in and benefit from the school's education program (*e.g.*, anxiety and declining class participation).

The school should have trained its employees on the type of misconduct that constitutes sexual harassment. The school also should have made clear to its employees that they could not require the student to confront her harassers. Schools may use informal mechanisms for addressing harassment, but only if the parties agree to do so on a voluntary basis. Had the school addressed the harassment consistent with Title IX, the school would have, for example, conducted a thorough investigation and taken interim measures to separate the student from the accused harassers. An effective response also might have included training students and employees on the school's policies related to harassment, instituting new procedures by which employees should report allegations of harassment, and more widely distributing the contact information for the district's Title IX coordinator. The school also might have offered the targeted student tutoring, other academic assistance, or counseling as necessary to remedy the effects of the harassment.[16]

Title IX: Gender-Based Harassment

- *Over the course of a school year, a gay high school student was called names (including anti-gay slurs and sexual comments) both to his face and on social networking sites, physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions of how teenage boys are expected to act and appear (e.g., effeminate mannerisms, nontraditional choice of extracurricular activities, apparel, and personal grooming choices). As a result, the student dropped out of the drama club to avoid further harassment. Based on the student's self-identification as gay and the homophobic nature of some of the harassment, the school did not recognize that the misconduct included discrimination covered by Title IX. The school responded to complaints from the student by reprimanding the perpetrators consistent with its anti-bullying policy. The reprimands of the identified perpetrators stopped the harassment by those individuals. It did not, however, stop others from undertaking similar harassment of the student.*

As noted in the example, the school failed to recognize the pattern of misconduct as a form of sex discrimination under Title IX. Title IX prohibits harassment of both male and female students regardless of the sex of the harasser—*i.e.*, even if the harasser and target are members of the same sex. It also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their

[16] More information about the applicable legal standards and OCR's approach to investigating allegations of sexual harassment is included in OCR's *Sexual Harassment Guidance*, *available at* http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.

sex, or for failing to conform to stereotypical notions of masculinity and femininity. Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.

Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also, as this example illustrates, be subjected to forms of sex discrimination prohibited under Title IX. The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment. In this example, the harassing conduct was based in part on the student's failure to act as some of his peers believed a boy should act. The harassment created a hostile environment that limited the student's ability to participate in the school's education program (*e.g.*, access to the drama club). Finally, even though the student did not identify the harassment as sex discrimination, the school should have recognized that the student had been subjected to gender-based harassment covered by Title IX.

In this example, the school had an obligation to take immediate and effective action to eliminate the hostile environment. By responding to individual incidents of misconduct on an *ad hoc* basis only, the school failed to confront and prevent a hostile environment from continuing. Had the school recognized the conduct as a form of sex discrimination, it could have employed the full range of sanctions (including progressive discipline) and remedies designed to eliminate the hostile environment. For example, this approach would have included a more comprehensive response to the situation that involved notice to the student's teachers so that they could ensure the student was not subjected to any further harassment, more aggressive monitoring by staff of the places where harassment occurred, increased training on the scope of the school's harassment and discrimination policies, notice to the target and harassers of available counseling services and resources, and educating the entire school community on civil rights and expectations of tolerance, specifically as they apply to gender stereotypes. The school also should have taken steps to clearly communicate the message that the school does not tolerate harassment and will be responsive to any information about such conduct.[17]

Section 504 and Title II: Disability Harassment

- *Several classmates repeatedly called a student with a learning disability "stupid," "idiot," and "retard" while in school and on the school bus. On one occasion, these students tackled him, hit him with a school binder, and threw his personal items into the garbage. The student complained to his teachers and guidance counselor that he was continually being taunted and teased. School officials offered him counseling services and a*

[17] Guidance on gender-based harassment is also included in OCR's *Sexual Harassment Guidance*, *available at* http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.

psychiatric evaluation, but did not discipline the offending students. As a result, the harassment continued. The student, who had been performing well academically, became angry, frustrated, and depressed, and often refused to go to school to avoid the harassment.

In this example, the school failed to recognize the misconduct as disability harassment under Section 504 and Title II. The harassing conduct included behavior based on the student's disability, and limited the student's ability to benefit fully from the school's education program (*e.g.*, absenteeism). In failing to investigate and remedy the misconduct, the school did not comply with its obligations under Section 504 and Title II.

Counseling may be a helpful component of a remedy for harassment. In this example, however, since the school failed to recognize the behavior as disability harassment, the school did not adopt a comprehensive approach to eliminating the hostile environment. Such steps should have at least included disciplinary action against the harassers, consultation with the district's Section 504/Title II coordinator to ensure a comprehensive and effective response, special training for staff on recognizing and effectively responding to harassment of students with disabilities, and monitoring to ensure that the harassment did not resume.[18]

I encourage you to reevaluate the policies and practices your school uses to address bullying[19] and harassment to ensure that they comply with the mandates of the federal civil rights laws. For your convenience, the following is a list of online resources that further discuss the obligations of districts to respond to harassment prohibited under the federal antidiscrimination laws enforced by OCR:

- *Sexual Harassment: It's Not Academic* (Revised 2008): http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html
- *Dear Colleague Letter: Sexual Harassment Issues* (2006): http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html
- *Dear Colleague Letter: Religious Discrimination* (2004): http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html
- *Dear Colleague Letter: First Amendment* (2003): http://www.ed.gov/about/offices/list/ocr/firstamend.html

[18] More information about the applicable legal standards and OCR's approach to investigating allegations of disability harassment is included in OCR's Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html.

[19] For resources on preventing and addressing bullying, please visit http://www.bullyinginfo.org, a Web site established by a federal Interagency Working Group on Youth Programs. For information on the Department's bullying prevention resources, please visit the Office of Safe and Drug-Free Schools' Web site at http://www.ed.gov/offices/OESE/SDFS. For information on regional Equity Assistance Centers that assist schools in developing and implementing policies and practices to address issues regarding race, sex, or national origin discrimination, please visit http://www.ed.gov/programs/equitycenters.

- *Sexual Harassment Guidance* (Revised 2001): http://www.ed.gov/about/offices/list/ocr/docs/shguide.html

- *Dear Colleague Letter: Prohibited Disability Harassment* (2000): http://www.ed.gov/about/offices/list/ocr/docs/disabharassltr.html

- *Racial Incidents and Harassment Against Students* (1994): http://www.ed.gov/about/offices/list/ocr/docs/race394.html

Please also note that OCR has added new data items to be collected through its Civil Rights Data Collection (CRDC), which surveys school districts in a variety of areas related to civil rights in education. The CRDC now requires districts to collect and report information on allegations of harassment, policies regarding harassment, and discipline imposed for harassment. In 2009-10, the CRDC covered nearly 7,000 school districts, including all districts with more than 3,000 students. For more information about the CRDC data items, please visit http://www2.ed.gov/about/offices/list/ocr/whatsnew.html.

OCR is committed to working with schools, students, students' families, community and advocacy organizations, and other interested parties to ensure that students are not subjected to harassment. Please do not hesitate to contact OCR if we can provide assistance in your efforts to address harassment or if you have other civil rights concerns.

For the OCR regional office serving your state, please visit: http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm, or call OCR's Customer Service Team at 1-800-421-3481.

I look forward to continuing our work together to ensure equal access to education, and to promote safe and respectful school climates for America's students.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Questions and Answers on Title IX and Sexual Violence[1]

Title IX of the Education Amendments of 1972 ("Title IX")[2] is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance (hereinafter "schools", "recipients", or "recipient institutions") must comply with Title IX.[3]

On April 4, 2011, the Office for Civil Rights (OCR) in the U.S. Department of Education issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence ("DCL").[4] The DCL explains a school's responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX.[5] Specifically, the DCL:

- Provides guidance on the unique concerns that arise in sexual violence cases, such as a school's independent responsibility under Title IX to investigate (apart from any separate criminal investigation by local police) and address sexual violence.

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[1] The Department has determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at* www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. The Office for Civil Rights (OCR) issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202.

[2] 20 U.S.C. § 1681 *et seq*.

[3] Throughout this document the term "schools" refers to recipients of federal financial assistance that operate educational programs or activities. For Title IX purposes, at the elementary and secondary school level, the recipient generally is the school district; and at the postsecondary level, the recipient is the individual institution of higher education. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that the law's requirements conflict with the organization's religious tenets. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office.

[4] Available at http://www.ed.gov/ocr/letters/colleague-201104.html.

[5] Although this document and the DCL focus on sexual violence, the legal principles generally also apply to other forms of sexual harassment.

EXHIBIT B

- Provides guidance and examples about key Title IX requirements and how they relate to sexual violence, such as the requirements to publish a policy against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures.

- Discusses proactive efforts schools can take to prevent sexual violence.

- Discusses the interplay between Title IX, the Family Educational Rights and Privacy Act ("FERPA"),[6] and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act ("Clery Act")[7] as it relates to a complainant's right to know the outcome of his or her complaint, including relevant sanctions imposed on the perpetrator.

- Provides examples of remedies and enforcement strategies that schools and OCR may use to respond to sexual violence.

The DCL supplements OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, issued in 2001 (*2001 Guidance*).[8] The *2001 Guidance* discusses in detail the Title IX requirements related to sexual harassment of students by school employees, other students, or third parties. The DCL and the *2001 Guidance* remain in full force and we recommend reading these Questions and Answers in conjunction with these documents.

In responding to requests for technical assistance, OCR has determined that elementary and secondary schools and postsecondary institutions would benefit from additional guidance concerning their obligations under Title IX to address sexual violence as a form of sexual harassment. The following questions and answers further clarify the legal requirements and guidance articulated in the DCL and the *2001 Guidance* and include examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects. In order to gain a complete understanding of these legal requirements and recommendations, this document should be read in full.

Authorized by

/s/

Catherine E. Lhamon April 29, 2014
Assistant Secretary for Civil Rights

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[6] 20 U.S.C. §1232g; 34 C.F.R. Part 99.
[7] 20 U.S.C. §1092(f).
[8] Available at http://www.ed.gov/ocr/docs/shguide.html.

Notice of Language Assistance
Questions and Answers on Title IX and Sexual Violence

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

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A. A School's Obligation to Respond to Sexual Violence

A-1. What is sexual violence?

Answer: Sexual violence, as that term is used in this document and prior OCR guidance, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (*e.g.*, due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Sexual violence can be carried out by school employees, other students, or third parties. All such acts of sexual violence are forms of sex discrimination prohibited by Title IX.

A-2. How does Title IX apply to student-on-student sexual violence?

Answer: Under Title IX, federally funded schools must ensure that students of all ages are not denied or limited in their ability to participate in or benefit from the school's educational programs or activities on the basis of sex. A school violates a student's rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program, *i.e.* creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.[9]

A-3. How does OCR determine if a hostile environment has been created?

Answer: As discussed more fully in OCR's *2001 Guidance*, OCR considers a variety of related factors to determine if a hostile environment has been created; and also considers the conduct in question from both a subjective and an objective perspective. Specifically, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.

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[9] This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. *See 2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629, 643 (1999).

A-4. When does OCR consider a school to have notice of student-on-student sexual violence?

Answer: OCR deems a school to have notice of student-on-student sexual violence if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence. See question D-2 regarding who is a responsible employee.

A school can receive notice of sexual violence in many different ways. Some examples of notice include: a student may have filed a grievance with or otherwise informed the school's Title IX coordinator; a student, parent, friend, or other individual may have reported an incident to a teacher, principal, campus law enforcement, staff in the office of student affairs, or other responsible employee; or a teacher or dean may have witnessed the sexual violence.

The school may also receive notice about sexual violence in an indirect manner, from sources such as a member of the local community, social networking sites, or the media. In some situations, if the school knows of incidents of sexual violence, the exercise of reasonable care should trigger an investigation that would lead to the discovery of additional incidents. For example, if school officials receive a credible report that a student has perpetrated several acts of sexual violence against different students, that pattern of conduct should trigger an inquiry as to whether other students have been subjected to sexual violence by that student. In other cases, the pervasiveness of the sexual violence may be widespread, openly practiced, or well-known among students or employees. In those cases, OCR may conclude that the school should have known of the hostile environment. In other words, if the school would have found out about the sexual violence had it made a proper inquiry, knowledge of the sexual violence will be imputed to the school even if the school failed to make an inquiry. A school's failure to take prompt and effective corrective action in such cases (as described in questions G-1 to G-3 and H-1 to H-3) would violate Title IX even if the student did not use the school's grievance procedures or otherwise inform the school of the sexual violence.

A-5. What are a school's basic responsibilities to address student-on-student sexual violence?

Answer: When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E). If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its

effects. But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation.[10] The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. If the school determines that the sexual violence occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary. The school should also ensure that the complainant is aware of any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. For additional information on interim measures, see questions G-1 to G-3.

If a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to a hostile environment. If it does, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately. For example, if a school's ignoring of a student's complaints of sexual assault by a fellow student results in the complaining student having to remain in classes with the other student for several weeks and the complaining student's grades suffer because he or she was unable to concentrate in these classes, the school may need to permit the complaining student to retake the classes without an academic or financial penalty (in addition to any other remedies) in order to address the effects of the sexual violence.

A-6. Does Title IX cover employee-on-student sexual violence, such as sexual abuse of children?

Answer: Yes. Although this document and the DCL focus on student-on-student sexual violence, Title IX also protects students from other forms of sexual harassment (including sexual violence and sexual abuse), such as sexual harassment carried out by school employees. Sexual harassment by school employees can include unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, or physical conduct of a sexual nature, including but not limited to sexual activity. Title IX's prohibition against

[10] Throughout this document, unless otherwise noted, the term "complainant" refers to the student who allegedly experienced the sexual violence.

sexual harassment generally does not extend to legitimate nonsexual touching or other nonsexual conduct. But in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment. Early signs of inappropriate behavior with a child can be the key to identifying and preventing sexual abuse by school personnel.

A school's Title IX obligations regarding sexual harassment by employees can, in some instances, be greater than those described in this document and the DCL. Recipients should refer to OCR's *2001 Guidance* for further information about Title IX obligations regarding harassment of students by school employees. In addition, many state and local laws have mandatory reporting requirements for schools working with minors. Recipients should be careful to satisfy their state and local legal obligations in addition to their Title IX obligations, including training to ensure that school employees are aware of their obligations under such state and local laws and the consequences for failing to satisfy those obligations.

With respect to sexual activity in particular, OCR will always view as unwelcome and nonconsensual sexual activity between an adult school employee and an elementary school student or any student below the legal age of consent in his or her state. In cases involving a student who meets the legal age of consent in his or her state, there will still be a strong presumption that sexual activity between an adult school employee and a student is unwelcome and nonconsensual. When a school is on notice that a school employee has sexually harassed a student, it is responsible for taking prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and remedy its effects. Indeed, even if a school was not on notice, the school is nonetheless responsible for remedying any effects of the sexual harassment on the student, as well as for ending the sexual harassment and preventing its recurrence, when the employee engaged in the sexual activity in the context of the employee's provision of aid, benefits, or services to students (*e.g.*, teaching, counseling, supervising, advising, or transporting students).

A school should take steps to protect its students from sexual abuse by its employees. It is therefore imperative for a school to develop policies prohibiting inappropriate conduct by school personnel and procedures for identifying and responding to such conduct. For example, this could include implementing codes of conduct, which might address what is commonly known as grooming – a desensitization strategy common in adult educator sexual misconduct. Such policies and procedures can ensure that students, parents, and

school personnel have clear guidelines on what are appropriate and inappropriate interactions between adults and students in a school setting or in school-sponsored activities. Additionally, a school should provide training for administrators, teachers, staff, parents, and age-appropriate classroom information for students to ensure that everyone understands what types of conduct are prohibited and knows how to respond when problems arise.[11]

B. Students Protected by Title IX

B-1. Does Title IX protect all students from sexual violence?

Answer: Yes. Title IX protects all students at recipient institutions from sex discrimination, including sexual violence. Any student can experience sexual violence: from elementary to professional school students; male and female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins.

B-2. How should a school handle sexual violence complaints in which the complainant and the alleged perpetrator are members of the same sex?

Answer: A school's obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved. Title IX protects all students from sexual violence, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. A school must investigate and resolve allegations of sexual violence involving parties of the same sex using the same procedures and standards that it uses in all complaints involving sexual violence.

Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations. Indeed, lesbian, gay, bisexual, and transgender (LGBT) youth report high rates of sexual harassment and sexual violence. A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it

[11] For additional informational on training please see the Department of Education's Resource and Emergency Management for Schools Technical Assistance Center – Adult Sexual Misconduct in Schools: Prevention and Management Training, available at http://rems.ed.gov/Docs/ASM_Marketing_Flyer.pdf.

uses in all complaints involving sexual violence. The fact that incidents of sexual violence may be accompanied by anti-gay comments or be partly based on a student's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy those instances of sexual violence.

If a school's policies related to sexual violence include examples of particular types of conduct that violate the school's prohibition on sexual violence, the school should consider including examples of same-sex conduct. In addition, a school should ensure that staff are capable of providing culturally competent counseling to all complainants. Thus, a school should ensure that its counselors and other staff who are responsible for receiving and responding to complaints of sexual violence, including investigators and hearing board members, receive appropriate training about working with LGBT and gender-nonconforming students and same-sex sexual violence. See questions J-1 to J-4 for additional information regarding training.

Gay-straight alliances and similar student-initiated groups can also play an important role in creating safer school environments for LGBT students. On June 14, 2011, the Department issued guidance about the rights of student-initiated groups in public secondary schools under the Equal Access Act. That guidance is available at http://www2.ed.gov/policy/elsec/guid/secletter/110607.html.

B-3. What issues may arise with respect to students with disabilities who experience sexual violence?

Answer: When students with disabilities experience sexual violence, federal civil rights laws other than Title IX may also be relevant to a school's responsibility to investigate and address such incidents.[12] Certain students require additional assistance and support. For example, students with intellectual disabilities may need additional help in learning about sexual violence, including a school's sexual violence education and prevention programs, what constitutes sexual violence and how students can report incidents of sexual

[12] OCR enforces two civil rights laws that prohibit disability discrimination. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits disability discrimination by public or private entities that receive federal financial assistance, and Title II of the American with Disabilities Act of 1990 (Title II) prohibits disability discrimination by all state and local public entities, regardless of whether they receive federal funding. *See* 29 U.S.C. § 794 and 34 C.F.R. part 104; 42 U.S.C. § 12131 *et seq.* and 28 C.F.R. part 35. OCR and the U.S. Department of Justice (DOJ) share the responsibility of enforcing Title II in the educational context. The Department of Education's Office of Special Education Programs in the Office of Special Education and Rehabilitative Services administers Part B of the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. 1400 *et seq*. and 34 C.F.R. part 300. IDEA provides financial assistance to states, and through them to local educational agencies, to assist in providing special education and related services to eligible children with disabilities ages three through twenty-one, inclusive.

violence. In addition, students with disabilities who experience sexual violence may require additional services and supports, including psychological services and counseling services. Postsecondary students who need these additional services and supports can seek assistance from the institution's disability resource office.

A student who has not been previously determined to have a disability may, as a result of experiencing sexual violence, develop a mental health-related disability that could cause the student to need special education and related services. At the elementary and secondary education level, this may trigger a school's child find obligations under IDEA and the evaluation and placement requirements under Section 504, which together require a school to evaluate a student suspected of having a disability to determine if he or she has a disability that requires special education or related aids and services.[13]

A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner that is accessible to students and employees with disabilities, for example, by providing electronically-accessible versions of paper forms to individuals with print disabilities, or by providing a sign language interpreter to a deaf individual attending a training. See question J-4 for more detailed information on student training.

B-4. What issues arise with respect to international students and undocumented students who experience sexual violence?

Answer: Title IX protects all students at recipient institutions in the United States regardless of national origin, immigration status, or citizenship status.[14] A school should ensure that all students regardless of their immigration status, including undocumented students and international students, are aware of their rights under Title IX. A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner accessible to students who are English language learners. OCR recommends that a school coordinate with its international office and its undocumented student program coordinator, if applicable, to help communicate information about Title IX in languages that are accessible to these groups of students. OCR also encourages schools to provide foreign national complainants with information about the U nonimmigrant status and the T nonimmigrant status. The U nonimmigrant status is set

[13] *See* 34 C.F.R. §§ 300.8; 300.111; 300.201; 300.300-300.311 (IDEA); 34 C.F.R. §§ 104.3(j) and 104.35 (Section 504). Schools must comply with applicable consent requirements with respect to evaluations. *See* 34 C.F.R. § 300.300.
[14] OCR enforces Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of federal financial assistance on the basis of race, color, or national origin. 42 U.S.C. § 2000d.

aside for victims of certain crimes who have suffered substantial mental or physical abuse as a result of the crime and are helpful to law enforcement agency in the investigation or prosecution of the qualifying criminal activity.[15] The T nonimmigrant status is available for victims of severe forms of human trafficking who generally comply with a law enforcement agency in the investigation or prosecution of the human trafficking and who would suffer extreme hardship involving unusual and severe harm if they were removed from the United States.[16]

A school should be mindful that unique issues may arise when a foreign student on a student visa experiences sexual violence. For example, certain student visas require the student to maintain a full-time course load (generally at least 12 academic credit hours per term), but a student may need to take a reduced course load while recovering from the immediate effects of the sexual violence. OCR recommends that a school take steps to ensure that international students on student visas understand that they must typically seek prior approval of the designated school official (DSO) for student visas to drop below a full-time course load. A school may also want to encourage its employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence to approach the DSO on the student's behalf if the student wishes to drop below a full-time course load. OCR recommends that a school take steps to ensure that its employees who work with international students, including the school's DSO, are trained on the school's sexual violence policies and that employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence are aware of the special issues that international students may encounter. See questions J-1 to J-4 for additional information regarding training.

A school should also be aware that threatening students with deportation or invoking a student's immigration status in an attempt to intimidate or deter a student from filing a Title IX complaint would violate Title IX's protections against retaliation. For more information on retaliation see question K-1.

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[15] For more information on the U nonimmigrant status, see http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/questions-answers-victims-criminal-activity-u-nonimmigrant-status.

[16] For more information on the T nonimmigrant status, see http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status.

B-5. How should a school respond to sexual violence when the alleged perpetrator is not affiliated with the school?

Answer: The appropriate response will differ depending on the level of control the school has over the alleged perpetrator. For example, if an athlete or band member from a visiting school sexually assaults a student at the home school, the home school may not be able to discipline or take other direct action against the visiting athlete or band member. However (and subject to the confidentiality provisions discussed in Section E), it should conduct an inquiry into what occurred and should report the incident to the visiting school and encourage the visiting school to take appropriate action to prevent further sexual violence. The home school should also notify the student of any right to file a complaint with the alleged perpetrator's school or local law enforcement. The home school may also decide not to invite the visiting school back to its campus.

Even though a school's ability to take direct action against a particular perpetrator may be limited, the school must still take steps to provide appropriate remedies for the complainant and, where appropriate, the broader school population. This may include providing support services for the complainant, and issuing new policy statements making it clear that the school does not tolerate sexual violence and will respond to any reports about such incidents. For additional information on interim measures see questions G-1 to G-3.

C. Title IX Procedural Requirements

Overview

C-1. What procedures must a school have in place to prevent sexual violence and resolve complaints?

Answer: The Title IX regulations outline three key procedural requirements. Each school must:

(1) disseminate a notice of nondiscrimination (see question C-2);[17]

(2) designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX (see questions C-3 to C-4);[18] and

[17] 34 C.F.R. § 106.9.
[18] *Id.* § 106.8(a).

(3) adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints (see questions C-5 to C-6).[19]

These requirements apply to all forms of sex discrimination and are particularly important for preventing and effectively responding to sexual violence.

Procedural requirements under other federal laws may also apply to complaints of sexual violence, including the requirements of the Clery Act.[20] For additional information about the procedural requirements in the Clery Act, please see http://www2.ed.gov/admins/lead/safety/campus.html.

Notice of Nondiscrimination

C-2. What information must be included in a school's notice of nondiscrimination?

Answer: The notice of nondiscrimination must state that the school does not discriminate on the basis of sex in its education programs and activities, and that it is required by Title IX not to discriminate in such a manner. The notice must state that questions regarding Title IX may be referred to the school's Title IX coordinator or to OCR. The school must notify all of its students and employees of the name or title, office address, telephone number, and email address of the school's designated Title IX coordinator.[21]

Title IX Coordinator

C-3. What are a Title IX coordinator's responsibilities?

Answer: A Title IX coordinator's core responsibilities include overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. This means that the Title IX coordinator must have knowledge of the requirements of Title IX, of the school's own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the school. To accomplish this, subject to the exemption for school counseling employees discussed in question E-3, the Title IX coordinator must be informed of all

[19] *Id.* § 106.8(b).
[20] All postsecondary institutions participating in the Higher Education Act's Title IV student financial assistance programs must comply with the Clery Act.
[21] For more information on notices of nondiscrimination, please see OCR's Notice of Nondiscrimination (August 2010), available at http://www.ed.gov/ocr/docs/nondisc.pdf.

reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office or if the investigation will be conducted by another individual or office. The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.

Because the Title IX coordinator must have knowledge of all Title IX reports and complaints at the school, this individual (when properly trained) is generally in the best position to evaluate a student's request for confidentiality in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students. A school may determine, however, that another individual should perform this role. For additional information on confidentiality requests, see questions E-1 to E-4. If a school relies in part on its disciplinary procedures to meet its Title IX obligations, the Title IX coordinator should review the disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX as discussed in question C-5.

In addition to these core responsibilities, a school may decide to give its Title IX coordinator additional responsibilities, such as: providing training to students, faculty, and staff on Title IX issues; conducting Title IX investigations, including investigating facts relevant to a complaint, and determining appropriate sanctions against the perpetrator and remedies for the complainant; determining appropriate interim measures for a complainant upon learning of a report or complaint of sexual violence; and ensuring that appropriate policies and procedures are in place for working with local law enforcement and coordinating services with local victim advocacy organizations and service providers, including rape crisis centers. A school must ensure that its Title IX coordinator is appropriately trained in all areas over which he or she has responsibility. The Title IX coordinator or designee should also be available to meet with students as needed.

If a school designates more than one Title IX coordinator, the school's notice of nondiscrimination and Title IX grievance procedures should describe each coordinator's responsibilities, and one coordinator should be designated as having ultimate oversight responsibility.

C-4. Are there any employees who should not serve as the Title IX coordinator?

Answer: Title IX does not categorically preclude particular employees from serving as Title IX coordinators. However, Title IX coordinators should not have other job responsibilities that may create a conflict of interest. Because some complaints may raise issues as to whether or how well the school has met its Title IX obligations, designating

the same employee to serve both as the Title IX coordinator and the general counsel (which could include representing the school in legal claims alleging Title IX violations) poses a serious risk of a conflict of interest. Other employees whose job responsibilities may conflict with a Title IX coordinator's responsibilities include Directors of Athletics, Deans of Students, and any employee who serves on the judicial/hearing board or to whom an appeal might be made. Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest.

Grievance Procedures

C-5. Under Title IX, what elements should be included in a school's procedures for responding to complaints of sexual violence?

Answer: Title IX requires that a school adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination, including sexual violence. In evaluating whether a school's grievance procedures satisfy this requirement, OCR will review all aspects of a school's policies and practices, including the following elements that are critical to achieve compliance with Title IX:

(1) notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;

(2) application of the grievance procedures to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties;

(3) provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;

(4) designated and reasonably prompt time frames for the major stages of the complaint process (see question F-8);

(5) written notice to the complainant and alleged perpetrator of the outcome of the complaint (see question H-3); and

(6) assurance that the school will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.

To ensure that students and employees have a clear understanding of what constitutes sexual violence, the potential consequences for such conduct, and how the school processes complaints, a school's Title IX grievance procedures should also explicitly include the following in writing, some of which themselves are mandatory obligations under Title IX:

(1) a statement of the school's jurisdiction over Title IX complaints;

(2) adequate definitions of sexual harassment (which includes sexual violence) and an explanation as to when such conduct creates a hostile environment;

(3) reporting policies and protocols, including provisions for confidential reporting;

(4) identification of the employee or employees responsible for evaluating requests for confidentiality;

(5) notice that Title IX prohibits retaliation;

(6) notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;

(7) notice of available interim measures that may be taken to protect the student in the educational setting;

(8) the evidentiary standard that must be used (preponderance of the evidence) (*i.e.*, more likely than not that sexual violence occurred) in resolving a complaint;

(9) notice of potential remedies for students;

(10) notice of potential sanctions against perpetrators; and

(11) sources of counseling, advocacy, and support.

For more information on interim measures, see questions G-1 to G-3.

The rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights. Procedures that ensure the Title IX rights of the complainant, while at the same time according any federally guaranteed due process to both parties involved, will lead to sound and supportable decisions. Of course, a school should ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.

A school's procedures and practices will vary in detail, specificity, and components, reflecting differences in the age of its students, school size and administrative structure, state or local legal requirements (*e.g.*, mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

C-6. Is a school required to use separate grievance procedures for sexual violence complaints?

Answer: No. Under Title IX, a school may use student disciplinary procedures, general Title IX grievance procedures, sexual harassment procedures, or separate procedures to resolve sexual violence complaints. However, any procedures used for sexual violence complaints, including disciplinary procedures, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution (as discussed in question C-5), including applying the preponderance of the evidence standard of review. As discussed in question C-3, the Title IX coordinator should review any process used to resolve complaints of sexual violence to ensure it complies with requirements for prompt and equitable resolution of these complaints. When using disciplinary procedures, which are often focused on the alleged perpetrator and can take considerable time, a school should be mindful of its obligation to provide interim measures to protect the complainant in the educational setting. For more information on timeframes and interim measures, see questions F-8 and G-1 to G-3.

D. Responsible Employees and Reporting[22]

D-1. Which school employees are obligated to report incidents of possible sexual violence to school officials?

Answer: Under Title IX, whether an individual is obligated to report incidents of alleged sexual violence generally depends on whether the individual is a responsible employee of the school. A responsible employee must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee, subject to the exemption for school counseling employees discussed in question E-3. This is because, as discussed in question A-4, a school is obligated to address sexual violence about which a responsible employee knew or should have known. As explained in question C-3, the Title IX coordinator must be informed of all reports and complaints raising Title IX issues, even if the report or

[22] This document addresses only Title IX's reporting requirements. It does not address requirements under the Clery Act or other federal, state, or local laws, or an individual school's code of conduct.

complaint was initially filed with another individual or office, subject to the exemption for school counseling employees discussed in question E-3.

D-2. Who is a "responsible employee"?

Answer: According to OCR's *2001 Guidance*, a responsible employee includes any employee: who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.[23]

A school must make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees. A school must also inform all employees of their own reporting responsibilities and the importance of informing complainants of: the reporting obligations of responsible employees; complainants' option to request confidentiality and available confidential advocacy, counseling, or other support services; and complainants' right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.

Whether an employee is a responsible employee will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures. For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has this same authority.

As noted in response to question A-4, when a responsible employee knows or reasonably should know of possible sexual violence, OCR deems a school to have notice of the sexual violence. The school must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E), and, if the school determines that sexual violence created a hostile environment, the school must then take appropriate steps to address the situation. The

[23] The Supreme Court held that a school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action. *Gebser v. Lago Vista Ind. Sch. Dist*., 524 U.S. 274, 290 (1998), and *Davis*, 524 U.S. at 642. The concept of a "responsible employee" under OCR's guidance for administrative enforcement of Title IX is broader.

school has this obligation regardless of whether the student, student's parent, or a third party files a formal complaint. For additional information on a school's responsibilities to address student-on-student sexual violence, see question A-5. For additional information on training for school employees, see questions J-1 to J-3.

D-3. What information is a responsible employee obligated to report about an incident of possible student-on-student sexual violence?

Answer: Subject to the exemption for school counseling employees discussed in question E-3, a responsible employee must report to the school's Title IX coordinator, or other appropriate school designee, all relevant details about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation. This includes the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location. A school must make clear to its responsible employees to whom they should report an incident of alleged sexual violence.

To ensure compliance with these reporting obligations, it is important for a school to train its responsible employees on Title IX and the school's sexual violence policies and procedures. For more information on appropriate training for school employees, see question J-1 to J-3.

D-4. What should a responsible employee tell a student who discloses an incident of sexual violence?

Answer: Before a student reveals information that he or she may wish to keep confidential, a responsible employee should make every effort to ensure that the student understands: (i) the employee's obligation to report the names of the alleged perpetrator and student involved in the alleged sexual violence, as well as relevant facts regarding the alleged incident (including the date, time, and location), to the Title IX coordinator or other appropriate school officials, (ii) the student's option to request that the school maintain his or her confidentiality, which the school (*e.g.*, Title IX coordinator) will consider, and (iii) the student's ability to share the information confidentially with counseling, advocacy, health, mental health, or sexual-assault-related services (*e.g.*, sexual assault resource centers, campus health centers, pastoral counselors, and campus mental health centers). As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request

and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

D-5. If a student informs a resident assistant/advisor (RA) that he or she was subjected to sexual violence by a fellow student, is the RA obligated under Title IX to report the incident to school officials?

Answer: As discussed in questions D-1 and D-2, for Title IX purposes, whether an individual is obligated under Title IX to report alleged sexual violence to the school's Title IX coordinator or other appropriate school designee generally depends on whether the individual is a responsible employee.

The duties and responsibilities of RAs vary among schools, and, therefore, a school should consider its own policies and procedures to determine whether its RAs are responsible employees who must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee.[24] When making this determination, a school should consider if its RAs have the general authority to take action to redress misconduct or the duty to report misconduct to appropriate school officials, as well as whether students could reasonably believe that RAs have this authority or duty. A school should also consider whether it has determined and clearly informed students that RAs are generally available for confidential discussions and do not have the authority or responsibility to take action to redress any misconduct or to report any misconduct to the Title IX coordinator or other appropriate school officials. A school should pay particular attention to its RAs' obligations to report other student violations of school policy (*e.g.*, drug and alcohol violations or physical assault). If an RA is required to report other misconduct that violates school policy, then the RA would be considered a responsible employee obligated to report incidents of sexual violence that violate school policy.

If an RA is a responsible employee, the RA should make every effort to ensure that *before* the student reveals information that he or she may wish to keep confidential, the student understands the RA's reporting obligation and the student's option to request that the school maintain confidentiality. It is therefore important that schools widely disseminate policies and provide regular training clearly identifying the places where students can seek confidential support services so that students are aware of this information. The RA

[24] Postsecondary institutions should be aware that, regardless of whether an RA is a responsible employee under Title IX, RAs are considered "campus security authorities" under the Clery Act. A school's responsibilities in regard to crimes reported to campus security authorities are discussed in the Department's regulations on the Clery Act at 34 C.F.R. § 668.46.

should also explain to the student (again, before the student reveals information that he or she may wish to keep confidential) that, although the RA must report the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location to the Title IX coordinator or other appropriate school designee, the school will protect the student's confidentiality to the greatest extent possible. Prior to providing information about the incident to the Title IX coordinator or other appropriate school designee, the RA should consult with the student about how to protect his or her safety and the details of what will be shared with the Title IX coordinator. The RA should explain to the student that reporting this information to the Title IX coordinator or other appropriate school designee does not necessarily mean that a formal complaint or investigation under the school's Title IX grievance procedure must be initiated if the student requests confidentiality. As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

Regardless of whether a reporting obligation exists, all RAs should inform students of their right to file a Title IX complaint with the school and report a crime to campus or local law enforcement. If a student discloses sexual violence to an RA who is a responsible employee, the school will be deemed to have notice of the sexual violence even if the student does not file a Title IX complaint. Additionally, all RAs should provide students with information regarding on-campus resources, including victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. RAs should also be familiar with local rape crisis centers or other off-campus resources and provide this information to students.

E. Confidentiality and a School's Obligation to Respond to Sexual Violence

E-1. How should a school respond to a student's request that his or her name not be disclosed to the alleged perpetrator or that no investigation or disciplinary action be pursued to address the alleged sexual violence?

Answer: Students, or parents of minor students, reporting incidents of sexual violence sometimes ask that the students' names not be disclosed to the alleged perpetrators or that no investigation or disciplinary action be pursued to address the alleged sexual violence. OCR strongly supports a student's interest in confidentiality in cases involving sexual violence. There are situations in which a school must override a student's request

for confidentiality in order to meet its Title IX obligations; however, these instances will be limited and the information should only be shared with individuals who are responsible for handling the school's response to incidents of sexual violence. Given the sensitive nature of reports of sexual violence, a school should ensure that the information is maintained in a secure manner. A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence. In the case of minors, state mandatory reporting laws may require disclosure, but can generally be followed without disclosing information to school personnel who are not responsible for handling the school's response to incidents of sexual violence.[25]

Even if a student does not specifically ask for confidentiality, to the extent possible, a school should only disclose information regarding alleged incidents of sexual violence to individuals who are responsible for handling the school's response. To improve trust in the process for investigating sexual violence complaints, a school should notify students of the information that will be disclosed, to whom it will be disclosed, and why. Regardless of whether a student complainant requests confidentiality, a school must take steps to protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. For additional information on interim measures see questions G-1 to G-3.

For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator. The school should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate

[25] The school should be aware of the alleged student perpetrator's right under the Family Educational Rights and Privacy Act ("FERPA") torequest to inspect and review information about the allegations if the information directly relates to the alleged student perpetrator and the information is maintained by the school as an education record. In such a case, the school must either redact the complainant's name and all identifying information before allowing the alleged perpetrator to inspect and review the sections of the complaint that relate to him or her, or must inform the alleged perpetrator of the specific information in the complaint that are about the alleged perpetrator. *See* 34 C.F.R. § 99.12(a) The school should also make complainants aware of this right and explain how it might affect the school's ability to maintain complete confidentiality.

and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary. See question K-1 regarding retaliation.

If the student still requests that his or her name not be disclosed to the alleged perpetrator or that the school not investigate or seek action against the alleged perpetrator, the school will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. As discussed in question C-3, the Title IX coordinator is generally in the best position to evaluate confidentiality requests. Because schools vary widely in size and administrative structure, OCR recognizes that a school may reasonably determine that an employee other than the Title IX coordinator, such as a sexual assault response coordinator, dean, or other school official, is better suited to evaluate such requests. Addressing the needs of a student reporting sexual violence while determining an appropriate institutional response requires expertise and attention, and a school should ensure that it assigns these responsibilities to employees with the capability and training to fulfill them. For example, if a school has a sexual assault response coordinator, that person should be consulted in evaluating requests for confidentiality. The school should identify in its Title IX policies and procedures the employee or employees responsible for making such determinations.

If the school determines that it can respect the student's request not to disclose his or her identity to the alleged perpetrator, it should take all reasonable steps to respond to the complaint consistent with the request. Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual allegation of sexual violence, other means may be available to address the sexual violence. There are steps a school can take to limit the effects of the alleged sexual violence and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school's policies on sexual violence; and conducting climate surveys regarding sexual violence. In instances affecting many students, an alleged perpetrator can be put on notice of allegations of harassing behavior and be counseled appropriately without revealing, even indirectly, the identity of the student complainant. A school must also take immediate action as necessary to protect the student while keeping the identity of the student confidential. These actions may include providing support services to the student and changing living arrangements or course schedules, assignments, or tests.

E-2. What factors should a school consider in weighing a student's request for confidentiality?

Answer: When weighing a student's request for confidentiality that could preclude a meaningful investigation or potential discipline of the alleged perpetrator, a school should consider a range of factors.

These factors include circumstances that suggest there is an increased risk of the alleged perpetrator committing additional acts of sexual violence or other violence (e.g., whether there have been other sexual violence complaints about the same alleged perpetrator, whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence, whether the alleged perpetrator threatened further sexual violence or other violence against the student or others, and whether the sexual violence was committed by multiple perpetrators). These factors also include circumstances that suggest there is an increased risk of future acts of sexual violence under similar circumstances (e.g., whether the student's report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group). Other factors that should be considered in assessing a student's request for confidentiality include whether the sexual violence was perpetrated with a weapon; the age of the student subjected to the sexual violence; and whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).

A school should take requests for confidentiality seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. For example, if the school has credible information that the alleged perpetrator has committed one or more prior rapes, the balance of factors would compel the school to investigate the allegation of sexual violence, and if appropriate, pursue disciplinary action in a manner that may require disclosure of the student's identity to the alleged perpetrator. If the school determines that it must disclose a student's identity to an alleged perpetrator, it should inform the student prior to making this disclosure. In these cases, it is also especially important for schools to take whatever interim measures are necessary to protect the student and ensure the safety of other students. If a school has a sexual assault response coordinator, that person should be consulted in identifying safety risks and interim measures that are necessary to protect the student. In the event the student requests that the school inform the perpetrator that the student asked the school not to investigate or seek discipline, the school should honor this request and inform the alleged perpetrator that the school made the decision to go forward. For additional information on interim measures see questions G-1 to G-3. Any school officials responsible for

discussing safety and confidentiality with students should be trained on the effects of trauma and the appropriate methods to communicate with students subjected to sexual violence. See questions J-1 to J-3.

On the other hand, if, for example, the school has no credible information about prior sexual violence committed by the alleged perpetrator and the alleged sexual violence was not perpetrated with a weapon or accompanied by threats to repeat the sexual violence against the complainant or others or part of a larger pattern at a given location or by a particular group, the balance of factors would likely compel the school to respect the student's request for confidentiality. In this case the school should still take all reasonable steps to respond to the complaint consistent with the student's confidentiality request and determine whether interim measures are appropriate or necessary. Schools should be mindful that traumatic events such as sexual violence can result in delayed decisionmaking by a student who has experienced sexual violence. Hence, a student who initially requests confidentiality might later request that a full investigation be conducted.

E-3. What are the reporting responsibilities of school employees who provide or support the provision of counseling, advocacy, health, mental health, or sexual assault-related services to students who have experienced sexual violence?

Answer: OCR does not require campus mental-health counselors, pastoral counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality, or who is supervised by such a person, to report, without the student's consent, incidents of sexual violence to the school in a way that identifies the student. Although these employees may have responsibilities that would otherwise make them responsible employees for Title IX purposes, OCR recognizes the importance of protecting the counselor-client relationship, which often requires confidentiality to ensure that students will seek the help they need.

Professional counselors and pastoral counselors whose official responsibilities include providing mental-health counseling to members of the school community are not required by Title IX to report *any* information regarding an incident of alleged sexual violence to the Title IX coordinator or other appropriate school designee.[26]

[26] The exemption from reporting obligations for pastoral and professional counselors under Title IX is consistent with the Clery Act. For additional information on reporting obligations under the Clery Act, see Office of Postsecondary Education, *Handbook for Campus Safety and Security Reporting* (2011), available at http://www2.ed.gov/admins/lead/safety/handbook.pdf. Similar to the Clery Act, for Title IX purposes, a pastoral counselor is a person who is associated with a religious order or denomination, is recognized by that religious

OCR recognizes that some people who provide assistance to students who experience sexual violence are not professional or pastoral counselors. They include all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers ("non-professional counselors or advocates"), including front desk staff and students. OCR wants students to feel free to seek their assistance and therefore interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student's consent.[27] These non-professional counselors or advocates are valuable sources of support for students, and OCR strongly encourages schools to designate these individuals as confidential sources.

Pastoral and professional counselors and non-professional counselors or advocates should be instructed to inform students of their right to file a Title IX complaint with the school and a separate complaint with campus or local law enforcement. In addition to informing students about campus resources for counseling, medical, and academic support, these persons should also indicate that they are available to assist students in filing such complaints. They should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary.

In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, women's centers, or

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order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor. A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the school, but are under contract to provide counseling at the school. This includes individuals who are not yet licensed or certified as a counselor, but are acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the school.

[27] Postsecondary institutions should be aware that an individual who is counseling students, but who does not meet the Clery Act definition of a pastoral or professional counselor, is not exempt from being a campus security authority if he or she otherwise has significant responsibility for student and campus activities. See fn. 24.

health centers. Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information about a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity.

E-4. Is a school required to investigate information regarding sexual violence incidents shared by survivors during public awareness events, such as "Take Back the Night"?

Answer: No. OCR wants students to feel free to participate in preventive education programs and access resources for survivors. Therefore, public awareness events such as "Take Back the Night" or other forums at which students disclose experiences with sexual violence are not considered notice to the school for the purpose of triggering an individual investigation unless the survivor initiates a complaint. The school should instead respond to these disclosures by reviewing sexual assault policies, creating campus-wide educational programs, and conducting climate surveys to learn more about the prevalence of sexual violence at the school. Although Title IX does not require the school to investigate particular incidents discussed at such events, the school should ensure that survivors are aware of any available resources, including counseling, health, and mental health services. To ensure that the entire school community understands their Title IX rights related to sexual violence, the school should also provide information at these events on Title IX and how to file a Title IX complaint with the school, as well as options for reporting an incident of sexual violence to campus or local law enforcement.

F. Investigations and Hearings

Overview

F-1. What elements should a school's Title IX investigation include?

Answer: The specific steps in a school's Title IX investigation will vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements (including mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

For the purposes of this document the term "investigation" refers to the process the school uses to resolve sexual violence complaints. This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine: (1) whether or not the conduct occurred; and, (2) if the conduct occurred, what actions

the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.

In all cases, a school's Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence. The investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing.[28] Furthermore, neither Title IX nor the DCL specifies who should conduct the investigation. It could be the Title IX coordinator, provided there are no conflicts of interest, but it does not have to be. All persons involved in conducting a school's Title IX investigations must have training or experience in handling complaints of sexual violence and in the school's grievance procedures. For additional information on training, see question J-3.

When investigating an incident of alleged sexual violence for Title IX purposes, to the extent possible, a school should coordinate with any other ongoing school or criminal investigations of the incident and establish appropriate fact-finding roles for each investigator. A school should also consider whether information can be shared among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event. If the investigation includes forensic evidence, it may be helpful for a school to consult with local or campus law enforcement or a forensic expert to ensure that the evidence is correctly interpreted by school officials. For additional information on working with campus or local law enforcement see question F-3.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without additional remedies, likely will not be sufficient to eliminate the hostile environment and prevent recurrence as required by Title IX. If a school typically processes complaints of sexual violence through its disciplinary process and that process, including any investigation and hearing, meets the Title IX requirements discussed above and enables the school to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, then the school may use that process to satisfy its Title IX obligations and does not need to conduct a separate Title IX investigation. As discussed in question C-3, the Title IX coordinator should review the disciplinary process

[28] This answer addresses only Title IX's requirements for investigations. It does not address legal rights or requirements under the U.S. Constitution, the Clery Act, or other federal, state, or local laws.

to ensure that it: (1) complies with the prompt and equitable requirements of Title IX; (2) allows for appropriate interim measures to be taken to protect the complainant during the process; and (3) provides for remedies to the complainant and school community where appropriate. For more information about interim measures, see questions G-1 to G-3, and about remedies, see questions H-1 and H-2.

The investigation may include, but is not limited to, conducting interviews of the complainant, the alleged perpetrator, and any witnesses; reviewing law enforcement investigation documents, if applicable; reviewing student and personnel files; and gathering and examining other relevant documents or evidence. While a school has flexibility in how it structures the investigative process, for Title IX purposes, a school must give the complainant any rights that it gives to the alleged perpetrator. A balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.[29] Specifically:

- Throughout the investigation, the parties must have an equal opportunity to present relevant witnesses and other evidence.
- The school must use a preponderance-of-the-evidence (*i.e.*, more likely than not) standard in any Title IX proceedings, including any fact-finding and hearings.
- If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.
- If the school permits one party to submit third-party expert testimony, it must do so equally for both parties.
- If the school provides for an appeal, it must do so equally for both parties.
- Both parties must be notified, in writing, of the outcome of both the complaint and any appeal (see question H-3).

[29] As explained in question C-5, the parties may have certain due process rights under the U.S. Constitution.

Intersection with Criminal Investigations

F-2. What are the key differences between a school's Title IX investigation into allegations of sexual violence and a criminal investigation?

Answer: A criminal investigation is intended to determine whether an individual violated criminal law; and, if at the conclusion of the investigation, the individual is tried and found guilty, the individual may be imprisoned or subject to criminal penalties. The U.S. Constitution affords criminal defendants who face the risk of incarceration numerous protections, including, but not limited to, the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confrontation. In addition, government officials responsible for criminal investigations (including police and prosecutors) normally have discretion as to which complaints from the public they will investigate.

By contrast, a Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required. Further, while a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary; a school has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students, free from sexual harassment and sexual violence. Because the standards for pursuing and completing criminal investigations are different from those used for Title IX investigations, the termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations.

Of course, criminal investigations conducted by local or campus law enforcement may be useful for fact gathering if the criminal investigation occurs within the recommended timeframe for Title IX investigations; but, even if a criminal investigation is ongoing, a school must still conduct its own Title IX investigation.

A school should notify complainants of the right to file a criminal complaint and should not dissuade a complainant from doing so either during or after the school's internal Title IX investigation. Title IX does not require a school to report alleged incidents of sexual violence to law enforcement, but a school may have reporting obligations under state, local, or other federal laws.

F-3. How should a school proceed when campus or local law enforcement agencies are conducting a criminal investigation while the school is conducting a parallel Title IX investigation?

Answer: A school should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, it is important for a school to understand that during this brief delay in the Title IX investigation, it must take interim measures to protect the complainant in the educational setting. The school should also continue to update the parties on the status of the investigation and inform the parties when the school resumes its Title IX investigation. For additional information on interim measures see questions G-1 to G-3.

If a school delays the fact-finding portion of a Title IX investigation, the school must promptly resume and complete its fact-finding for the Title IX investigation once it learns that the police department has completed its evidence gathering stage of the criminal investigation. The school should not delay its investigation until the ultimate outcome of the criminal investigation or the filing of any charges. OCR recommends that a school work with its campus police, local law enforcement, and local prosecutor's office to learn when the evidence gathering stage of the criminal investigation is complete. A school may also want to enter into a memorandum of understanding (MOU) or other agreement with these agencies regarding the protocols and procedures for referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations. Any MOU or other agreement must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably, and must comply with the Family Educational Rights and Privacy Act ("FERPA") and other applicable privacy laws.

The DCL states that in one instance a prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances. OCR understands that this example may not be representative and that the law enforcement agency's process often takes more than ten days. OCR recognizes that the length of time for evidence gathering by criminal investigators will vary depending on the specific circumstances of each case.

Off-Campus Conduct

F-4. Is a school required to process complaints of alleged sexual violence that occurred off campus?

Answer: Yes. Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.

A school must determine whether the alleged off-campus sexual violence occurred in the context of an education program or activity of the school; if so, the school must treat the complaint in the same manner that it treats complaints regarding on-campus conduct. In other words, if a school determines that the alleged misconduct took place in the context of an education program or activity of the school, the fact that the alleged misconduct took place off campus does not relieve the school of its obligation to investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus.

Whether the alleged misconduct occurred in this context may not always be apparent from the complaint, so a school may need to gather additional information in order to make such a determination. Off-campus education programs and activities are clearly covered and include, but are not limited to: activities that take place at houses of fraternities or sororities recognized by the school; school-sponsored field trips, including athletic team travel; and events for school clubs that occur off campus (*e.g.*, a debate team trip to another school or to a weekend competition).

Even if the misconduct did not occur in the context of an education program or activity, a school must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual violence while at school or in an off-campus education program or activity. The school cannot address the continuing effects of the off-campus sexual violence at school or in an off-campus education program or activity unless it processes the complaint and gathers appropriate additional information in accordance with its established procedures.

Once a school is on notice of off-campus sexual violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct. The mere presence on campus or in an

off-campus education program or activity of the alleged perpetrator of off-campus sexual violence can have continuing effects that create a hostile environment. A school should also take steps to protect a student who alleges off-campus sexual violence from further harassment by the alleged perpetrator or his or her friends, and a school may have to take steps to protect other students from possible assault by the alleged perpetrator. In other words, the school should protect the school community in the same way it would had the sexual violence occurred on campus. Even if there are no continuing effects of the off-campus sexual violence experienced by the student on campus or in an off-campus education program or activity, the school still should handle these incidents as it would handle other off-campus incidents of misconduct or violence and consistent with any other applicable laws. For example, if a school, under its code of conduct, exercises jurisdiction over physical altercations between students that occur off campus outside of an education program or activity, it should also exercise jurisdiction over incidents of student-on-student sexual violence that occur off campus outside of an education program or activity.

Hearings[30]

F-5. Must a school allow or require the parties to be present during an entire hearing?

Answer: If a school uses a hearing process to determine responsibility for acts of sexual violence, OCR does not require that the school allow a complainant to be present for the entire hearing; it is up to each school to make this determination. But if the school allows one party to be present for the entirety of a hearing, it must do so equally for both parties. At the same time, when requested, a school should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time. These two objectives may be achieved by using closed circuit television or other means. Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school's Title IX investigation process, the school must not require a complainant to be present at the hearing as a prerequisite to proceed with the hearing.

[30] As noted in question F-1, the investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing. Although Title IX does not dictate the membership of a hearing board, OCR discourages schools from allowing students to serve on hearing boards in cases involving allegations of sexual violence.

F-6. May every witness at the hearing, including the parties, be cross-examined?

Answer: OCR does not require that a school allow cross-examination of witnesses, including the parties, if they testify at the hearing. But if the school allows one party to cross-examine witnesses, it must do so equally for both parties.

OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. Allowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment. A school may choose, instead, to allow the parties to submit questions to a trained third party (*e.g.*, the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.

F-7. May the complainant's sexual history be introduced at hearings?

Answer: Questioning about the complainant's sexual history with anyone other than the alleged perpetrator should not be permitted. Further, a school should recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence. The school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant.

Timeframes

F-8. What stages of the investigation are included in the 60-day timeframe referenced in the DCL as the length for a typical investigation?

Answer: As noted in the DCL, the 60-calendar day timeframe for investigations is based on OCR's experience in typical cases. The 60-calendar day timeframe refers to the entire investigation process, which includes conducting the fact-finding investigation, holding a hearing or engaging in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment and prevent its recurrence, including imposing sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate. Although this timeframe does not include appeals, a school should be aware that an unduly long appeals process may impact whether the school's response was prompt and equitable as required by Title IX.

OCR does not require a school to complete investigations within 60 days; rather OCR evaluates on a case-by-case basis whether the resolution of sexual violence complaints is prompt and equitable. Whether OCR considers an investigation to be prompt as required by Title IX will vary depending on the complexity of the investigation and the severity and extent of the alleged conduct. OCR recognizes that the investigation process may take longer if there is a parallel criminal investigation or if it occurs partially during school breaks. A school may need to stop an investigation during school breaks or between school years, although a school should make every effort to try to conduct an investigation during these breaks unless so doing would sacrifice witness availability or otherwise compromise the process.

Because timeframes for investigations vary and a school may need to depart from the timeframes designated in its grievance procedures, both parties should be given periodic status updates throughout the process.

G. Interim Measures

G-1. Is a school required to take any interim measures before the completion of its investigation?

Answer: Title IX requires a school to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow the complainant to change academic and extracurricular activities or his or her living, transportation, dining, and working situation as appropriate. The school should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. If a school does not offer these services on campus, it should enter into an MOU with a local victim services provider if possible.

Even when a school has determined that it can respect a complainant's request for confidentiality and therefore may not be able to respond fully to an allegation of sexual violence and initiate formal action against an alleged perpetrator, the school must take immediate action to protect the complainant while keeping the identity of the complainant confidential. These actions may include: providing support services to the

complainant; changing living arrangements or course schedules, assignments, or tests; and providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred.

G-2. How should a school determine what interim measures to take?

Answer: The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case. A school should consider a number of factors in determining what interim measures to take, including, for example, the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation, or job location; and whether other judicial measures have been taken to protect the complainant (*e.g.*, civil protection orders).

In general, when taking interim measures, schools should minimize the burden on the complainant. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the complainant from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case.

G-3. If a school provides all students with access to counseling on a fee basis, does that suffice for providing counseling as an interim measure?

Answer: No. Interim measures are determined by a school on a case-by-case basis. If a school determines that it needs to offer counseling to the complainant as part of its Title IX obligation to take steps to protect the complainant while the investigation is ongoing, it must not require the complainant to pay for this service.

H. Remedies and Notice of Outcome[31]

H-1. What remedies should a school consider in a case of student-on-student sexual violence?

Answer: Effective remedial action may include disciplinary action against the perpetrator, providing counseling for the perpetrator, remedies for the complainant and others, as well as changes to the school's overall services or policies. All services needed to remedy the hostile environment should be offered to the complainant. These remedies are separate from, and in addition to, any interim measure that may have been provided prior to the conclusion of the school's investigation. In any instance in which the complainant did not take advantage of a specific service (*e.g.*, counseling) when offered as an interim measure, the complainant should still be offered, and is still entitled to, appropriate final remedies that may include services the complainant declined as an interim measure. A refusal at the interim stage does not mean the refused service or set of services should not be offered as a remedy.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without more, likely will not be sufficient to satisfy its Title IX obligation to eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. Additional remedies for the complainant and the school community may be necessary. If the school's student disciplinary procedure does not include a process for determining and implementing these remedies for the complainant and school community, the school will need to use another process for this purpose.

Depending on the specific nature of the problem, remedies for the complainant may include, but are not limited to:

- Providing an effective escort to ensure that the complainant can move safely between classes and activities;

[31] As explained in question A-5, if a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to be subjected to a hostile environment. In this case, in addition to the remedies discussed in this section, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately.

- Ensuring the complainant and perpetrator do not share classes or extracurricular activities;

- Moving the perpetrator or complainant (if the complainant requests to be moved) to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;

- Providing comprehensive, holistic victim services including medical, counseling and academic support services, such as tutoring;

- Arranging for the complainant to have extra time to complete or re-take a class or withdraw from a class without an academic or financial penalty; and

- Reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the sexual violence and the misconduct that may have resulted in the complainant being disciplined.[32]

Remedies for the broader student population may include, but are not limited to:

- Designating an individual from the school's counseling center who is specifically trained in providing trauma-informed comprehensive services to victims of sexual violence to be on call to assist students whenever needed;

- Training or retraining school employees on the school's responsibilities to address allegations of sexual violence and how to conduct Title IX investigations;

- Developing materials on sexual violence, which should be distributed to all students;

- Conducting bystander intervention and sexual violence prevention programs with students;

- Issuing policy statements or taking other steps that clearly communicate that the school does not tolerate sexual violence and will respond to any incidents and to any student who reports such incidents;

[32] For example, if the complainant was disciplined for skipping a class in which the perpetrator was enrolled, the school should review the incident to determine if the complainant skipped class to avoid contact with the perpetrator.

- Conducting, in conjunction with student leaders, a campus climate check to assess the effectiveness of efforts to ensure that the school is free from sexual violence, and using that information to inform future proactive steps that the school will take;

- Targeted training for a group of students if, for example, the sexual violence created a hostile environment in a residence hall, fraternity or sorority, or on an athletic team; and

- Developing a protocol for working with local law enforcement as discussed in question F-3.

When a school is unable to conduct a full investigation into a particular incident (*i.e.*, when it received a general report of sexual violence without any personally identifying information), it should consider remedies for the broader student population in response.

H-2. If, after an investigation, a school finds the alleged perpetrator responsible and determines that, as part of the remedies for the complainant, it must separate the complainant and perpetrator, how should the school accomplish this if both students share the same major and there are limited course options?

Answer: If there are limited sections of required courses offered at a school and both the complainant and perpetrator are required to take those classes, the school may need to make alternate arrangements in a manner that minimizes the burden on the complainant. For example, the school may allow the complainant to take the regular sections of the courses while arranging for the perpetrator to take the same courses online or through independent study.

H-3. What information must be provided to the complainant in the notice of the outcome?

Answer: Title IX requires both parties to be notified, in writing, about the outcome of both the complaint and any appeal. OCR recommends that a school provide written notice of the outcome to the complainant and the alleged perpetrator concurrently.

For Title IX purposes, a school must inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, if the school finds one to exist, and prevent recurrence. The perpetrator should not be notified of the individual remedies offered or provided to the complainant.

Sanctions that directly relate to the complainant (but that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to another residence hall, other classes, or another school. Additional steps the school has taken to eliminate the hostile environment may include counseling and academic support services for the complainant and other affected students. Additional steps the school has taken to prevent recurrence may include sexual violence training for faculty and staff, revisions to the school's policies on sexual violence, and campus climate surveys. Further discussion of appropriate remedies is included in question H-1.

In addition to the Title IX requirements described above, the Clery Act requires, and FERPA permits, postsecondary institutions to inform the complainant of the institution's final determination and any disciplinary sanctions imposed on the perpetrator in sexual violence cases (as opposed to all harassment and misconduct covered by Title IX) not just those sanctions that directly relate to the complainant.[33]

I. Appeals

I-1. What are the requirements for an appeals process?

Answer: While Title IX does not require that a school provide an appeals process, OCR does recommend that the school do so where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings. If a school chooses to provide for an appeal of the findings or remedy or both, it must do so equally for both parties. The specific design of the appeals process is up to the school, as long as the entire grievance process, including any appeals, provides prompt and equitable resolutions of sexual violence complaints, and the school takes steps to protect the complainant in the educational setting during the process. Any individual or body handling appeals should be trained in the dynamics of and trauma associated with sexual violence.

If a school chooses to offer an appeals process it has flexibility to determine the type of review it will apply to appeals, but the type of review the school applies must be the same regardless of which party files the appeal.

[33] 20 U.S.C. § 1092(f) and 20 U.S.C. § 1232g(b)(6)(A).

I-2. Must an appeal be available to a complainant who receives a favorable finding but does not believe a sanction that directly relates to him or her was sufficient?

Answer: The appeals process must be equal for both parties. For example, if a school allows a perpetrator to appeal a suspension on the grounds that it is too severe, the school must also allow a complainant to appeal a suspension on the grounds that it was not severe enough. See question H-3 for more information on what must be provided to the complainant in the notice of the outcome.

J. Title IX Training, Education and Prevention[34]

J-1. What type of training on Title IX and sexual violence should a school provide to its employees?

Answer: A school needs to ensure that responsible employees with the authority to address sexual violence know how to respond appropriately to reports of sexual violence, that other responsible employees know that they are obligated to report sexual violence to appropriate school officials, and that all other employees understand how to respond to reports of sexual violence. A school should ensure that professional counselors, pastoral counselors, and non-professional counselors or advocates also understand the extent to which they may keep a report confidential. A school should provide training to all employees likely to witness or receive reports of sexual violence, including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsels, athletic coaches, health personnel, and resident advisors. Training for employees should include practical information about how to prevent and identify sexual violence, including same-sex sexual violence; the behaviors that may lead to and result in sexual violence; the attitudes of bystanders that may allow conduct to continue; the potential for revictimization by responders and its effect on students; appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language; the impact of trauma on victims; and, as applicable, the person(s) to whom such misconduct must be reported. The training should also explain responsible employees' reporting obligation, including what should be included in a report and any consequences for the failure to report and the procedure for responding to students' requests for confidentiality, as well as provide the contact

[34] As explained earlier, although this document focuses on sexual violence, the legal principles apply to other forms of sexual harassment. Schools should ensure that any training they provide on Title IX and sexual violence also covers other forms of sexual harassment. Postsecondary institutions should also be aware of training requirements imposed under the Clery Act.

information for the school's Title IX coordinator. A school also should train responsible employees to inform students of: the reporting obligations of responsible employees; students' option to request confidentiality and available confidential advocacy, counseling, or other support services; and their right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement. For additional information on the reporting obligations of responsible employees and others see questions D-1 to D-5.

There is no minimum number of hours required for Title IX and sexual violence training at every school, but this training should be provided on a regular basis. Each school should determine based on its particular circumstances how such training should be conducted, who has the relevant expertise required to conduct the training, and who should receive the training to ensure that the training adequately prepares employees, particularly responsible employees, to fulfill their duties under Title IX. A school should also have methods for verifying that the training was effective.

J-2. How should a school train responsible employees to report incidents of possible sexual harassment or sexual violence?

Answer: Title IX requires a school to take prompt and effective steps reasonably calculated to end sexual harassment and sexual violence that creates a hostile environment (*i.e.*, conduct that is sufficiently serious as to limit or deny a student's ability to participate in or benefit from the school's educational program and activity). But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

OCR therefore recommends that a school train responsible employees to report to the Title IX coordinator or other appropriate school official any incidents of sexual harassment or sexual violence that may violate the school's code of conduct or may create or contribute to the creation of a hostile environment. The school can then take steps to investigate and prevent any harassment or violence from recurring or escalating, as appropriate. For example, the school may separate the complainant and alleged perpetrator or conduct sexual harassment and sexual violence training for the school's students and employees. Responsible employees should understand that they do not need to determine whether the alleged sexual harassment or sexual violence actually occurred or that a hostile environment has been created before reporting an incident to the school's Title IX coordinator. Because the Title IX coordinator should have in-depth knowledge of Title IX and Title IX complaints at the school, he or she is likely to be in a better position than are other employees to evaluate whether an incident of sexual

harassment or sexual violence creates a hostile environment and how the school should respond. There may also be situations in which individual incidents of sexual harassment do not, by themselves, create a hostile environment; however when considered together, those incidents may create a hostile environment.

J-3. What type of training should a school provide to employees who are involved in implementing the school's grievance procedures?

Answer: All persons involved in implementing a school's grievance procedures (*e.g.*, Title IX coordinators, others who receive complaints, investigators, and adjudicators) must have training or experience in handling sexual violence complaints, and in the operation of the school's grievance procedures. The training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the evidence); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.

In rare circumstances, employees involved in implementing a school's grievance procedures may be able to demonstrate that prior training and experience has provided them with competency in the areas covered in the school's training. For example, the combination of effective prior training and experience investigating complaints of sexual violence, together with training on the school's current grievance procedures may be sufficient preparation for an employee to resolve Title IX complaints consistent with the school's grievance procedures. In-depth knowledge regarding Title IX and sexual violence is particularly helpful. Because laws and school policies and procedures may change, the only way to ensure that all employees involved in implementing the school's grievance procedures have the requisite training or experience is for the school to provide regular training to all individuals involved in implementing the school's Title IX grievance procedures even if such individuals also have prior relevant experience.

J-4. What type of training on sexual violence should a school provide to its students?

Answer: To ensure that students understand their rights under Title IX, a school should provide age-appropriate training to its students regarding Title IX and sexual violence. At the elementary and secondary school level, schools should consider whether sexual violence training should also be offered to parents, particularly training on the school's process for handling complaints of sexual violence. Training may be provided separately or as part of the school's broader training on sex discrimination and sexual harassment. However, sexual violence is a unique topic that should not be assumed to be covered adequately in other educational programming or training provided to students. The school may want to include this training in its orientation programs for new students; training for student athletes and members of student organizations; and back-to-school nights. A school should consider educational methods that are most likely to help students retain information when designing its training, including repeating the training at regular intervals. OCR recommends that, at a minimum, the following topics (as appropriate) be covered in this training:

- Title IX and what constitutes sexual violence, including same-sex sexual violence, under the school's policies;
- the school's definition of consent applicable to sexual conduct, including examples;
- how the school analyzes whether conduct was unwelcome under Title IX;
- how the school analyzes whether unwelcome sexual conduct creates a hostile environment;
- reporting options, including formal reporting and confidential disclosure options and any timeframes set by the school for reporting;
- the school's grievance procedures used to process sexual violence complaints;
- disciplinary code provisions relating to sexual violence and the consequences of violating those provisions;
- effects of trauma, including neurobiological changes;
- the role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence;
- strategies and skills for bystanders to intervene to prevent possible sexual violence;
- how to report sexual violence to campus or local law enforcement and the ability to pursue law enforcement proceedings simultaneously with a Title IX grievance; and
- Title IX's protections against retaliation.

The training should also encourage students to report incidents of sexual violence. The training should explain that students (and their parents or friends) do not need to determine whether incidents of sexual violence or other sexual harassment created a

hostile environment before reporting the incident. A school also should be aware that persons may be deterred from reporting incidents if, for example, violations of school or campus rules regarding alcohol or drugs were involved. As a result, a school should review its disciplinary policy to ensure it does not have a chilling effect on students' reporting of sexual violence offenses or participating as witnesses. OCR recommends that a school inform students that the school's primary concern is student safety, and that use of alcohol or drugs never makes the survivor at fault for sexual violence.

It is also important for a school to educate students about the persons on campus to whom they can confidentially report incidents of sexual violence. A school's sexual violence education and prevention program should clearly identify the offices or individuals with whom students can speak confidentially and the offices or individuals who can provide resources such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. It should also identify the school's responsible employees and explain that if students report incidents to responsible employees (except as noted in question E-3) these employees are required to report the incident to the Title IX coordinator or other appropriate official. This reporting includes the names of the alleged perpetrator and student involved in the sexual violence, as well as relevant facts including the date, time, and location, although efforts should be made to comply with requests for confidentiality from the complainant. For more detailed information regarding reporting and responsible employees and confidentiality, see questions D-1 to D-5 and E-1 to E-4.

K. Retaliation

K-1. Does Title IX protect against retaliation?

Answer: Yes. The Federal civil rights laws, including Title IX, make it unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by these laws. This means that if an individual brings concerns about possible civil rights problems to a school's attention, including publicly opposing sexual violence or filing a sexual violence complaint with the school or any State or Federal agency, it is unlawful for the school to retaliate against that individual for doing so. It is also unlawful to retaliate against an individual because he or she testified, or participated in any manner, in an OCR or school's investigation or proceeding. Therefore, if a student, parent, teacher, coach, or other individual complains formally or informally about sexual violence or participates in an OCR or school's investigation or proceedings related to sexual violence, the school is prohibited from retaliating (including intimidating, threatening, coercing, or in any way

discriminating against the individual) because of the individual's complaint or participation.

A school should take steps to prevent retaliation against a student who filed a complaint either on his or her own behalf or on behalf of another student, or against those who provided information as witnesses.

Schools should be aware that complaints of sexual violence may be followed by retaliation against the complainant or witnesses by the alleged perpetrator or his or her associates. When a school knows or reasonably should know of possible retaliation by other students or third parties, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and witnesses and ensure their safety as necessary. At a minimum, this includes making sure that the complainant and his or her parents, if the complainant is in elementary or secondary school, and witnesses know how to report retaliation by school officials, other students, or third parties by making follow-up inquiries to see if there have been any new incidents or acts of retaliation, and by responding promptly and appropriately to address continuing or new problems. A school should also tell complainants and witnesses that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation, but will also take strong responsive action if it occurs.

L. First Amendment

L-1. How should a school handle its obligation to respond to sexual harassment and sexual violence while still respecting free-speech rights guaranteed by the Constitution?

Answer: The DCL on sexual violence did not expressly address First Amendment issues because it focuses on unlawful physical sexual violence, which is not speech or expression protected by the First Amendment.

However, OCR's previous guidance on the First Amendment, including the 2001 Guidance, OCR's July 28, 2003, Dear Colleague Letter on the First Amendment,[35] and OCR's October 26, 2010, Dear Colleague Letter on harassment and bullying,[36] remain fully in effect. OCR has made it clear that the laws and regulations it enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution. Therefore, when a school works to prevent

[35] Available at http://www.ed.gov/ocr/firstamend.html.
[36] Available at http://www.ed.gov/ocr/letters/colleague-201010.html.

and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.

Title IX protects students from sex discrimination; it does not regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under Title IX. Title IX also does not require, prohibit, or abridge the use of particular textbooks or curricular materials.[37]

M. The Clery Act and the Violence Against Women Reauthorization Act of 2013

M-1. How does the Clery Act affect the Title IX obligations of institutions of higher education that participate in the federal student financial aid programs?

Answer: Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX. The Clery Act requires institutions of higher education to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime prevention programs and policies. The Clery Act requirements apply to many crimes other than those addressed by Title IX. For those areas in which the Clery Act and Title IX both apply, the institution must comply with both laws. For additional information about the Clery Act and its regulations, please see http://www2.ed.gov/admins/lead/safety/campus.html.

M-2. Were a school's obligations under Title IX and the DCL altered in any way by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, including Section 304 of that Act, which amends the Clery Act?

Answer: No. The Violence Against Women Reauthorization Act has no effect on a school's obligations under Title IX or the DCL. The Violence Against Women Reauthorization Act amended the Violence Against Women Act and the Clery Act, which are separate statutes. Nothing in Section 304 or any other part of the Violence Against Women Reauthorization Act relieves a school of its obligation to comply with the requirements of Title IX, including those set forth in these Questions and Answers, the 2011 DCL, and the *2001 Guidance*. For additional information about the Department's negotiated rulemaking related to the Violence Against Women Reauthorization Act please see http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html.

[37] 34 C.F.R. § 106.42.

N. Further Federal Guidance

N-1. Whom should I contact if I have additional questions about the DCL or OCR's other Title IX guidance?

Answer: Anyone who has questions regarding this guidance, or Title IX should contact the OCR regional office that serves his or her state. Contact information for OCR regional offices can be found on OCR's webpage at https://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm. If you wish to file a complaint of discrimination with OCR, you may use the online complaint form available at http://www.ed.gov/ocr/complaintintro.html or send a letter to the OCR enforcement office responsible for the state in which the school is located. You may also email general questions to OCR at ocr@ed.gov.

N-2. Are there other resources available to assist a school in complying with Title IX and preventing and responding to sexual violence?

Answer: Yes. OCR's policy guidance on Title IX is available on OCR's webpage at http://www.ed.gov/ocr/publications.html#TitleIX. In addition to the April 4, 2011, Dear Colleague Letter, OCR has issued the following resources that further discuss a school's obligation to respond to allegations of sexual harassment and sexual violence:

- Dear Colleague Letter: Harassment and Bullying (October 26, 2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf
- *Sexual Harassment: It's Not Academic* (Revised September 2008), http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf
- *Revised Sexual Harassment Guidance: Harassment of Students by Employees, Other Students, or Third Parties* (January 19, 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf

In addition to guidance from OCR, a school may also find resources from the Departments of Education and Justice helpful in preventing and responding to sexual violence:

- Department of Education's Letter to Chief State School Officers on Teen Dating Violence Awareness and Prevention (February 28, 2013) https://www2.ed.gov/policy/gen/guid/secletter/130228.html
- Department of Education's National Center on Safe Supportive Learning Environments http://safesupportivelearning.ed.gov/
- Department of Justice, Office on Violence Against Women http://www.ovw.usdoj.gov/

Office of the Attorney General
Washington, D. C. 20530

December 15, 2014

MEMORANDUM

TO: UNITED STATES ATTORNEYS
HEADS OF DEPARTMENT COMPONENTS

FROM: THE ATTORNEY GENERAL

SUBJECT: Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate in the employment of an individual "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a) (prohibiting discrimination by private employers and by state and local governments); 42 U.S.C. § 2000e-16(a) (providing that personnel actions by federal agencies "shall be made free from any discrimination based on … sex"). Title VII's prohibition of sex discrimination is a strong and vital principle that underlies the integrity of our workforce. In a variety of judicial and administrative contexts, however, questions have arisen concerning the appropriate legal standard for establishing claims of gender identity discrimination, including discrimination claims raised by transgender employees.[1]

Many courts have recognized that gender identity discrimination claims may be established under a "sex-stereotyping" theory. Following the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), courts have interpreted Title VII's prohibition of discrimination because of "sex" as barring discrimination based on a perceived failure to conform to socially constructed characteristics of males and females. *See, e.g.*, *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *see also Glenn v. Bromby*, 663 F.3d 1312 (11th Cir. 2011). But courts have reached varying conclusions about whether discrimination based on gender identity in and of itself—including transgender status—constitutes discrimination based on sex. *Compare Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), *with Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2005).

The federal government's approach to this issue has also evolved over time. In 2006, the Department stated in litigation that Title VII's prohibition of discrimination based on sex did not cover discrimination based on transgender status or gender identity *per se*; the district court rejected that position. *See Schroer*, 577 F. Supp. 2d at 293. Subsequently, in 2011, the Office of

[1] Guidance from the Office of Personnel Management states that "[t]ransgender individuals are people with a gender identity that is different from the sex assigned to them at birth," and defines "gender identity" as an individual's "internal sense of being male or female." *See* http://www.opm.gov/diversity/Transgender/Guidance.asp.

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Personnel Management issued guidance announcing that the federal government's policy of providing a workplace free of discrimination based on sex includes a prohibition against discrimination based on gender identity. In 2012, the Equal Employment Opportunity Commission ruled that discrimination on the basis of gender identity is discrimination on the basis of sex. *Macy v. Holder*, Appeal No. 0120120821 (EEOC April 20, 2012). More recently, the President announced that discrimination based on gender identity is prohibited for purposes of federal employment and government contracting. *See* Executive Order 13672 (July 21, 2014); *see also* U.S. Dep't of Labor Directive 2014-02 (August 19, 2014).

After considering the text of Title VII, the relevant Supreme Court case law interpreting the statute, and the developing jurisprudence in this area, I have determined that the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status. The most straightforward reading of Title VII is that discrimination "because of . . . sex" includes discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex. As the Court explained in *Price Waterhouse*, by using "the simple words 'because of,' . . . Congress meant to obligate" a Title VII plaintiff to prove only "that the employer relied upon sex-based considerations in coming to its decision." 490 U.S. at 241-242. It follows that, as a matter of plain meaning, Title VII's prohibition against discrimination "because of . . . sex" encompasses discrimination founded on sex-based considerations, including discrimination based on an employee's transitioning to, or identifying as, a different sex altogether. Although Congress may not have had such claims in mind when it enacted Title VII, the Supreme Court has made clear that Title VII must be interpreted according to its plain text, noting that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

For these reasons, the Department will no longer assert that Title VII's prohibition against discrimination based on sex does not encompass gender identity *per se* (including transgender discrimination).[2] This memorandum is not intended to otherwise prescribe the course of litigation or defenses that should be raised in any particular employment discrimination case. The application of Title VII to any given case will necessarily turn on the specific facts at hand. My hope, however, is that this clarification of the Department's position will foster consistent treatment of claimants throughout the government, in furtherance of this Department's commitment to fair and impartial justice for all Americans.

If you have questions about this memorandum or its application in a case, please contact your Civil Chief or your Component's Front Office.

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[2] "Sex-stereotyping" remains an available theory under which to bring a Title VII claim, including a claim by a transgender individual, in cases where the evidence supports that theory.

BestPractices

A Guide to Restroom Access for Transgender Workers

Core principle: All employees, including transgender employees, should have access to restrooms that correspond to their gender identity.

Introduction

The Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) requires that all employers under its jurisdiction provide employees with sanitary and available toilet facilities, so that employees will not suffer the adverse health effects that can result if toilets are not available when employees need them. This publication provides guidance to employers on best practices regarding restroom access for transgender workers. OSHA's goal is to assure that employers provide a safe and healthy working environment for *all* employees.

Understanding Gender Identity

In many workplaces, separate restroom and other facilities are provided for men and women. In some cases, questions can arise in the workplace about which facilities certain employees should use. According to the Williams Institute at the University of California-Los Angeles, an estimated 700,000 adults in the United States are *transgender*—meaning their internal *gender identity* is different from the sex they were assigned at birth (e.g., the sex listed on their birth certificate). For example, a *transgender man* may have been assigned female at birth and raised as a girl, but identify as a man. Many transgender people *transition* to live their everyday life as the gender they identify with. Thus, a transgender man may transition from living as a woman to living as a man. Similarly, a *transgender woman* may be assigned male at birth, but transition to living as a woman consistent with her gender identity. Transitioning is a different process for everyone—it may involve social changes (such as going by a new first name), medical steps, and changing identification documents.

Why Restroom Access Is a Health and Safety Matter

Gender identity is an intrinsic part of each person's identity and everyday life. Accordingly, authorities on gender issues counsel that it is essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives, based on their gender identity. Restricting employees to using only restrooms that are not consistent with their gender identity, or segregating them from other workers by requiring them to use gender-neutral or other specific restrooms, singles those employees out and may make them fear for their physical safety. Bathroom restrictions can result in employees avoiding using restrooms entirely while at work, which can lead to potentially serious physical injury or illness.

OSHA's Sanitation Standard

Under OSHA's Sanitation standard (1910.141), employers are required to provide their employees with toilet facilities. This standard is intended to protect employees from the health effects created when toilets are not available. Such adverse effects include urinary tract infections and bowel and bladder problems. OSHA has consistently interpreted this standard to require employers to allow employees prompt access to sanitary facilities. Further, employers may not impose unreasonable restrictions on employee use of toilet facilities.

Model Practices for Restroom Access for Transgender Employees

Many companies have implemented written policies to ensure that *all* employees—including transgender employees—have prompt access to appropriate sanitary facilities. The core belief underlying these policies is that all employees should be permitted to use the facilities that correspond with their gender identity. For example, a person who identifies as a man should be permitted to use men's restrooms, and a person who identifies as a woman should be permitted to use women's restrooms. The employee should determine the most appropriate and safest option for him- or herself.

The best policies also provide additional options, which employees may choose, but are not required, to use. These include:

- Single-occupancy gender-neutral (unisex) facilities; and
- Use of multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls.

Regardless of the physical layout of a worksite, all employers need to find solutions that are safe and convenient and respect transgender employees.

Under these best practices, employees are not asked to provide any medical or legal documentation of their gender identity in order to have access to gender-appropriate facilities. In addition, no employee should be required to use a segregated facility apart from other employees because of their gender identity or transgender status. Under OSHA standards, employees generally may not be limited to using facilities that are an unreasonable distance or travel time from the employee's worksite.

Other Federal, State and Local Laws

Employers should be aware of specific laws, rules, or regulations regarding restroom access in their states and/or municipalities, as well as the potential application of federal anti-discrimination laws.

The Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), DOL, and several other federal agencies, following several court rulings, have interpreted prohibitions on sex discrimination, including those contained in Title VII of the *Civil Rights Act of 1964*, to prohibit employment discrimination based on gender identity or transgender status. In April 2015, the DOL's Office of Federal Contract Compliance Programs (OFCCP) announced it would require federal contractors subject to Executive Order 11246, as amended, which prohibits discrimination based on both sex and gender identity, to allow transgender employees to use the restrooms and other facilities consistent with their gender identity. Also in April 2015, the EEOC ruled that a transgender employee cannot be denied access to the common restrooms used by other employees of the same gender identity, regardless of whether that employee has had any medical procedure or whether other employees' may have negative reactions to allowing the employee to do so. The EEOC held that such a denial of access constituted direct evidence of sex discrimination under Title VII.

The following is a sample of state and local legal provisions, all reaffirming the core principle that employees should be allowed to use the restrooms that correspond to their gender identity.

Colorado: Rule 81.9 of the Colorado regulations requires that employers permit their employees to use restrooms appropriate to their gender identity rather than their assigned gender at birth without being harassed or questioned. 3 CCR 708-1-81.9 (revised December 15, 2014), available at http://cdn.colorado.gov/cs/Satellite/DORA-DCR/CBON/DORA/1251629367483.

For more information refer to: "Sexual Orientation & Transgender Status Discrimination—Employment, Housing & Public Accommodations," Colorado Civil Rights Division, available at: http://cdn.colorado.gov/cs/Satellite/DORA-DCR/CBON/DORA/1251631542607.

Delaware: Guidance from the Delaware Department of Human Resource Management provides Delaware state employees with access to restrooms that correspond to their gender identity. The guidance was issued pursuant to the state's gender identity nondiscrimination law.

Delaware's policy also suggests: Whenever practical, a single stall or gender-neutral restroom may be provided, which all employees may utilize.

However, a transgender employee will not be compelled to use only a specific restroom unless all other co-workers of the same gender identity are compelled to use only that same restroom.

For more information refer to: State of Delaware Guidelines on Equal Employment Opportunity and Affirmative Action Gender Identity, available at: http://www.delawarepersonnel.com/policies/documents/sod-eeoc-guide.pdf.

District of Columbia: Rule 4-802 of the D.C. Municipal Regulations prohibits discriminatory practices in regard to restroom access. Individuals have the right to use facilities consistent with their gender identity. In addition, single-stall restrooms must have gender-neutral signage. D.C. Municipal Regulations 4-802, "Restrooms and Other Gender Specific Facilities," available at: http://www.dcregs.dc.gov/Gateway/RuleHome.aspx?RuleNumber=4-802.

Iowa: The Iowa Civil Rights Commission requires that employers allow employees access to restrooms in accordance with their gender identity, rather than their assigned sex at birth.

For more information refer to: "Sexual Orientation & Gender Identity – An Employer's Guide to Iowa Law Compliance," Iowa Civil Rights Commission, available at: https://icrc.iowa.gov/sites/files/civil_rights/publications/2012/SOGIEmpl.pdf.

Vermont: The Vermont Human Rights Commission requires that employers permit employees to access bathrooms in accordance with their gender identity.

For more information refer to: "Sex, Sexual Orientation, and Gender Identity: A Guide to Vermont's Anti-Discrimination Law for Employers and Employees," Vermont Human Rights Commission, available at: http://hrc.vermont.gov/sites/hrc/files/pdfs/other%20reports/trans%20employment%20brochure%207-13-12.pdf.

Washington: The Washington State Human Rights Commission requires employers that maintain gender-specific restrooms to permit transgender employees to use the restroom that is consistent with their gender identity. Where single occupancy restrooms are available, the Commission recommends that they be designated as "gender neutral."

For more information refer to: "Guide to Sexual Orientation and Gender Identity and the Washington State Law Against Discrimination," available at: http://www.hum.wa.gov/Documents/Guidance/GuideSO20140703.pdf.

Additional Information

- American Psychological Association. Answers to your questions about transgender people, gender identity and gender expression, 2011: http://www.apa.org/topics/lgbt/transgender.aspx.
- Transgender Law Center's model employer policy, with an extensive section on restrooms, can be found at: http://transgenderlawcenter.org/wp-content/uploads/2013/12/model-workplace-employment-policy-Updated.pdf.
- "Restroom Access for Transgender Employees" on Human Rights Campaign website: http://www.hrc.org/resources/entry/restroom-access-for-transgender-employees.
- National Gay and Lesbian Task Force and the National Center for Transgender Equality. National Transgender Discrimination Survey, 2011: http://endtransdiscrimination.org/report.html.

How OSHA Can Help

OSHA has a great deal of information to assist employers in complying with their responsibilities under the law. Information on OSHA requirements and additional health and safety information, including information on OSHA's Sanitation standard, is available on the agency's website (www.osha.gov).

Workers have a right to a safe workplace (www.osha.gov/workers.html#2). The law requires employers to provide their employees with working conditions that are free of known dangers. An employer's duty to provide a safe workplace includes the duty to provide employees with toilet facilities that are sanitary and available, so that employees can use them when they need to do so. Employers also have a duty to protect all

their employees, regardless of whether they are transgender, from any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. For more information on workplace violence, please see OSHA's website at: www.osha.gov/SLTC/workplaceviolence.

Workers who believe that they have been exposed to a hazard or who just have a question should contact OSHA. For example, workers may file a complaint to have OSHA inspect their workplace if they believe that their workplace is unsafe or that their employer is not following OSHA standards. Just contact OSHA at: 1-800-321-OSHA (6742), or visit www.osha.gov. Complaints that are signed by an employee are more likely to result in an on-site inspection. It's confidential. We can help.

The *Occupational Safety and Health Act* (OSH Act) prohibits employers from retaliating against their employees for exercising their rights under the OSH Act. These rights include raising a workplace health and safety concern with the employer, reporting an injury or illness, filing an OSHA complaint, and participating in an inspection or talking to an inspector. If workers have been retaliated against for exercising their rights, they must file a complaint with OSHA within 30 days of the alleged adverse action. For more information, please visit www.whistleblowers.gov.

OSHA can also help answer questions or concerns from employers. To reach your closest OSHA regional or area office, go to OSHA's Regional and Area Offices webpage (www.osha.gov/html/RAmap.html) or call 1-800-321-OSHA (6742). OSHA also provides free, confidential on-site assistance and advice to small and medium-sized employers in all states across the country, with priority given to high-hazard worksites. On-site Consultation services are separate from enforcement activities and do not result in penalties or citations. To contact OSHA's free consultation program, or for additional compliance assistance, call OSHA at 1-800-321-OSHA (6742).

References:

Department of Labor, Office of Federal Contract Compliance Programs, 2015. "Frequently Asked Questions EO 13672 Final Rule", available at: http://www.dol.gov/ofccp/lgbt/lgbt_faqs.html#Q35.

National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011 at 56 (noting that only 22% of transgender people have been denied access to gender-appropriate restrooms), available at: http://endtransdiscrimination.org/report.html.

Gates, Gary J., How many people are lesbian, gay, bisexual, and transgender? Williams Institute, UCLA School of Law, 2011. Retrieved 5/18/2015 from: http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf.

Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. Injustice at Every Turn: A Report of the National Transgender Discrimination Survey. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011 at 56 (noting that only 22% of transgender people have been denied access to gender-appropriate restrooms), available at: http://endtransdiscrimination.org/report.html.

Lusardi v. McHugh, EEOC Appeal No. 0120133395 (Apr. 1, 2015), available at: http://transgenderlawcenter.org/wp-content/uploads/2015/04/EEOC-Lusardi-Decision.pdf.

Macy v. Holder, EEOC Appeal No. 0120120821 (2012); Attorney General Memorandum, Treatment of Transgender Employment Discrimination Claims (Dec. 15, 2015). Retrieved 5/18/2015 from: http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf.

Memorandum to Regional Administrators and State Designees of the Occupational Safety and Health Administration on the Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities (Apr. 6, 1998), available at: www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22932.

U.S. Department of Labor

OSHA®
Occupational Safety and Health Administration

OSHA 3795-2015

ORDINANCE NUMBER:_____ AMENDING CHAPTERS 2, 12, and 22

AN ORDINANCE AMENDING CHAPTER 2 OF THE CHARLOTTE CITY CODE ENTITLED "ADMINISTRATION", CHAPTER 12 ENTITLED "HUMAN RELATIONS", AND CHAPTER 22 ENTITLED "VEHICLES FOR HIRE"

BE IT ORDAINED by the City Council of the City of Charlotte, North Carolina, that:

Section 1. Article V of Chapter 2 of the Charlotte City Code is amended as follows:

"Sec. 2-151. - Policy statement.

It is the policy of the city not to enter into a contract with any business firm that has discriminated in the solicitation, selection, hiring or treatment of vendors, suppliers, subcontractors or commercial customers on the basis of race, gender, religion, national origin, ethnicity, age, marital status, familial status, sexual orientation, gender identity, gender expression, or disability, or on the basis of any otherwise unlawful use of characteristics regarding such vendor's, supplier's, or commercial customer's employees or owners in connection with a city contract or solicitation; provided that nothing in this commercial non-discrimination policy shall prohibit or limit otherwise lawful efforts to remedy the effects of discrimination that has occurred or is occurring in the marketplace.

Sec. 2-152. - Purpose and intent.

It is the intent of the city to avoid becoming a passive participant in private sector commercial discrimination by refusing to procure goods and services from business firms that discriminate in the solicitation, selection, hiring, or treatment of vendors, suppliers, subcontractors, or commercial customers on the basis of race, gender, religion, national origin, ethnicity, age, marital status, familial status, sexual orientation, gender identity, gender expression, or disability in connection with city contracts or solicitations by providing a procedure for receiving, investigating, and resolving complaints of discrimination involving city contracts or solicitations.

Sec. 2-153. - Definitions.

For purposes of this article, the following terms have the meanings indicated unless the context clearly requires a different meaning.

…

Discrimination means any disadvantage, difference, distinction, or preference in the solicitation, selection, hiring, or treatment of a vendor, supplier, subcontractor or commercial customer on the basis of race, gender, religion, national origin, ethnicity, age, marital status, familial status, sexual orientation, gender identity, gender expression, or disability, or on the basis of any otherwise unlawful use of characteristics regarding such vendor's, supplier's, or commercial customer's employees or owners in connection with a city contract or solicitation;

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provided that nothing in this definition or article shall prohibit or limit otherwise lawful efforts to remedy the effects of discrimination that has occurred or is occurring in the marketplace.
…

Sec. 2-166. - Mandatory nondiscrimination contract clause.

Every contract and subcontract shall contain a nondiscrimination clause that reads substantially as follows:

> As a condition of entering into this agreement, the company represents and warrants that it will fully comply with the city's commercial non-discrimination policy, as described in section 2, article V of the City Code, and consents to be bound by the award of any arbitration conducted thereunder. As part of such compliance, the company shall not discriminate on the basis of race, gender, religion, national origin, ethnicity, age, marital status, familial status, sexual orientation, gender identity, gender expression, or disability in the solicitation, selection, hiring, or treatment of subcontractors, vendors, suppliers, or commercial customers in connection with a city contract or contract solicitation process, nor shall the company retaliate against any person or entity for reporting instances of such discrimination. The company shall provide equal opportunity for subcontractors, vendors and suppliers to participate in all of its subcontracting and supply opportunities on city contracts, provided that nothing contained in this clause shall prohibit or limit otherwise lawful efforts to remedy the effects of marketplace discrimination that has occurred or is occurring in the marketplace. The company understands and agrees that a violation of this clause shall be considered a material breach of this agreement and may result in termination of this agreement, disqualification of the company from participating in city contracts or other sanctions.

Sec. 2-167. - Contractor bid requirements.

All requests for bids or proposals issued for city contracts shall include a certification to be completed by the bidder or proposer in substantially the following form:

> The undersigned bidder or proposer hereby certifies and agrees that the following information is correct:
>
> 1. In preparing ~~it's the~~ its enclosed bid or proposal, the bidder or proposer has considered all bids and proposals submitted from qualified, potential subcontractors and suppliers, and has not engaged in discrimination as defined in section 2.
>
> 2. For purposes of this section, discrimination means discrimination in the solicitation, selection, or treatment of any subcontractor, vendor, supplier or commercial customer on the basis of race, ethnicity, gender, age, religion, national origin, marital status, familial status, sexual orientation, gender identity, gender expression, disability or any otherwise unlawful form of discrimination. Without limiting the foregoing, discrimination also includes retaliating against any person or other entity for reporting any incident of discrimination.

3. Without limiting any other remedies that the city may have for a false certification, it is understood and agreed that, if this certification is false, such false certification will constitute grounds for the city to reject the bid or proposal submitted with this certification, and terminate any contract awarded based on such bid or proposal It shall also constitute a violation of the city's commercial non-discrimination ordinance and shall subject the bidder or proposer to any remedies allowed thereunder, including possible disqualification from participating in city contracts or bid processes for up to two years.

4. As a condition of contracting with the city, the bidder or proposer agrees to promptly provide to the city all information and documentation that may be requested by the city from time to time regarding the solicitation and selection of suppliers and subcontractors in connection with this solicitation process. Failure to maintain or failure to provide such information shall constitutes grounds for the city to reject the bid or proposal and to any contract awarded on such bid or proposal. It shall also constitute a violation of the city's commercial non-discrimination ordinance, and shall subject the bidder or proposer to any remedies that are allowed thereunder.

5. As part of its bid or proposal, the bidder or proposer shall provide to the city a list of all instances within the past ten years where a complaint was filed or pending against bidder or proposer in a legal or administrative proceeding alleging that bidder or proposer discriminated against its subcontractors, vendors, suppliers, or commercial customers, and a description of the status or resolution of that complaint, including any remedial action taken.

6. As a condition of submitting a bid or proposal to the city the bidder or proposer agrees to comply with the city's commercial non-discrimination policy as described in section 2, article V of the city code, and consents to be bound by the award of any arbitration conducted thereunder."

Section 2. Article II of Chapter 12 of the Charlotte City Code is amended as follows:

"Sec. 12-27. - Powers.

Within the limitations provided by law, the community relations committee created under this article has the power to:

…

(9) Render at least annually a written report to the mayor and to the city council and to the chairman and the board of county commissioners. The report may contain recommendations of the committee for legislation or other actions to eliminate or reduce discrimination with respect to race, color, religion, sex, marital status, familial status, sexual orientation, gender identity, gender expression, or national origin.

…

Sec. 12-29. - Powers of conciliation division.

Within the limitations provided by law, the conciliation division of the community relations committee created by this article has the power to:

…

(3) Approve or disapprove plans to eliminate or reduce discrimination with respect to race, color, religion, sex, marital status, familial status, sexual orientation, gender identity, gender expression, or national origin;

..."

Section 3. Article III of Chapter 2 of the Charlotte City Code is amended as follows:

"Sec. 12-58. - Prohibited acts.

(a) It shall be unlawful to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, religion, sex, marital status, familial status, sexual orientation, gender identity, gender expression, or national origin.

(b) It shall be unlawful to make, print, circulate, post, mail or otherwise cause to be published a statement, advertisement, or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation will be refused, withheld from, or denied any person because of race, color, religion, sex, marital status, familial status, sexual orientation, gender identity, gender expression, or national origin, or that any person's patronage of or presence at a place of public accommodation is objectionable, unwelcome, unacceptable, or undesirable because of race, color, religion or national origin; provided, however, this section does not apply to a private club or other establishment not, in fact, open to the public.

~~Sec. 12-59. - Prohibited sex discrimination.~~

~~(a) It shall be unlawful to deny a person, because of sex, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a restaurant, hotel, or motel.~~

~~(b) This section shall not apply to the following:~~

~~(1) Restrooms, shower rooms, bathhouses and similar facilities which are in their nature distinctly private.~~

~~(2) YMCA, YWCA and similar types of dormitory lodging facilities.~~

(3) ~~A private club or other establishment not, in fact, open to the public."~~

Section 4. Article II of Chapter 22 of the Charlotte City Code is amended as follows:

"Sec. 22-31. - Conduct of certificate holders, permit holders, drivers.

…

(i) No company operating certificate holder, vehicle operating permit holder, or driver shall refuse or neglect to transport any person on the basis of race, color, religion, sex, marital status, familial status, sexual orientation, gender identity, gender expression, or national origin. In addition, no company operating certificate holder, vehicle operating permit holder, or driver shall refuse or neglect to transport any person on the basis of disability when such service can be provided to a person with a disability with reasonable accommodation."

Section 5. This ordinance shall be effective April 1, 2015.

Approved as to form

City Attorney

GENERAL ASSEMBLY OF NORTH CAROLINA
SECOND EXTRA SESSION 2016

H **D**

HOUSE BILL DRH40005-TC-1B (03/22)

Short Title:	Public Facilities Privacy & Security Act.	(Public)
Sponsors:	Representatives Bishop, Stam, Howard, and Steinburg (Primary Sponsors).	
Referred to:		

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR SINGLE-SEX MULTIPLE OCCUPANCY BATHROOM AND CHANGING FACILITIES IN SCHOOLS AND PUBLIC AGENCIES AND TO CREATE STATEWIDE CONSISTENCY IN REGULATION OF EMPLOYMENT AND PUBLIC ACCOMMODATIONS.

Whereas, the North Carolina Constitution directs the General Assembly to provide for the organization and government of all cities and counties and to give cities and counties such powers and duties as the General Assembly deems advisable in Section 1 of Article VII of the North Carolina Constitution; and

Whereas, the North Carolina Constitution reflects the importance of statewide laws related to commerce by prohibiting the General Assembly from enacting local acts regulating labor, trade, mining, or manufacturing in Section 24 of Article II of the North Carolina Constitution; and

Whereas, the General Assembly finds that laws and obligations consistent statewide for all businesses, organizations, and employers doing business in the State will improve intrastate commerce; and

Whereas, the General Assembly finds that laws and obligations consistent statewide for all businesses, organizations, and employers doing business in the State benefit the businesses, organizations, and employers seeking to do business in the State and attracts new businesses, organizations, and employers to the State; Now, therefore,

The General Assembly of North Carolina enacts:

PART I. SINGLE-SEX MULTIPLE OCCUPANCY BATHROOM AND CHANGING FACILITIES

SECTION 1.1. G.S. 115C-47 is amended by adding a new subdivision to read:

"(63) To Establish Single-Sex Multiple Occupancy Bathroom and Changing Facilities. – Local boards of education shall establish single-sex multiple occupancy bathroom and changing facilities as provided in G.S. 115C-521.2."

SECTION 1.2. Article 37 of Chapter 115C of the General Statutes is amended by adding a new section to read:

"**§ 115C-521.2. Single-sex multiple occupancy bathroom and changing facilities.**

(a) Definitions. – The following definitions apply in this section:

(1) Biological sex. – The physical condition of being male or female, which is stated on a person's birth certificate.

(2) Multiple occupancy bathroom or changing facility. – A facility designed or designated to be used by more than one person at a time where students may be

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in various states of undress in the presence of other persons. A multiple occupancy bathroom or changing facility may include, but is not limited to, a school restroom, locker room, changing room, or shower room.

(3) Single occupancy bathroom or changing facility. – A facility designed or designated to be used by only one person at a time where students may be in various states of undress. A single occupancy bathroom or changing facility may include, but is not limited to, a single stall restroom designated as unisex or for use based on biological sex.

(b) Single-Sex Multiple Occupancy Bathroom and Changing Facilities. – Local boards of education shall require every multiple occupancy bathroom or changing facility that is designated for student use to be designated for and used only by students based on their biological sex.

(c) Accommodations Permitted. – Nothing in this section shall prohibit local boards of education from providing accommodations such as single occupancy bathroom or changing facilities or controlled use of faculty facilities upon a request due to special circumstances, but in no event shall that accommodation result in the local boards of education allowing a student to use a multiple occupancy bathroom or changing facility designated under subsection (b) of this section for a sex other than the student's biological sex.

(d) Exceptions. – This section does not apply to persons entering a multiple occupancy bathroom or changing facility designated for use by the opposite sex:

(1) For custodial purposes.

(2) For maintenance or inspection purposes.

(3) To render medical assistance.

(4) To accompany a student needing assistance when the assisting individual is an employee or authorized volunteer of the local board of education or the student's parent or authorized caregiver.

(5) To receive assistance in using the facility.

(6) To accompany a person other than a student needing assistance.

(7) That has been temporarily designated for use by that person's biological sex."

SECTION 1.3. Chapter 143 of the General Statutes is amended by adding a new Article to read:

"Article 81.

"Single-Sex Multiple Occupancy Bathroom and Changing Facilities.

"**§ 143-760. Single-sex multiple occupancy bathroom and changing facilities.**

(a) Definitions. – The following definitions apply in this section:

(1) Biological sex. – The physical condition of being male or female, which is stated on a person's birth certificate.

(2) Executive branch agency. – Agencies, boards, offices, departments, and institutions of the executive branch, including The University of North Carolina and the North Carolina Community College System.

(3) Multiple occupancy bathroom or changing facility. – A facility designed or designated to be used by more than one person at a time where persons may be in various states of undress in the presence of other persons. A multiple occupancy bathroom or changing facility may include, but is not limited to, a restroom, locker room, changing room, or shower room.

(4) Public agency. – Includes any of the following:

a. Executive branch agencies.

b. All agencies, boards, offices, and departments under the direction and control of a member of the Council of State.

c. "Unit" as defined in G.S. 159-7(b)(15).

d. "Public authority" as defined in G.S. 159-7(b)(10).

e. A local board of education.

f. The judicial branch.
g. The legislative branch.
h. Any other political subdivision of the State.

(5) Single occupancy bathroom or changing facility. – A facility designed or designated to be used by only one person at a time where persons may be in various states of undress. A single occupancy bathroom or changing facility may include, but is not limited to, a single stall restroom designated as unisex or for use based on biological sex.

(b) Single-Sex Multiple Occupancy Bathroom and Changing Facilities. – Public agencies shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex.

(c) Accommodations Permitted. – Nothing in this section shall prohibit public agencies from providing accommodations such as single occupancy bathroom or changing facilities upon a person's request due to special circumstances, but in no event shall that accommodation result in the public agency allowing a person to use a multiple occupancy bathroom or changing facility designated under subsection (b) of this section for a sex other than the person's biological sex.

(d) Exceptions. – This section does not apply to persons entering a multiple occupancy bathroom or changing facility designated for use by the opposite sex:

(1) For custodial purposes.
(2) For maintenance or inspection purposes.
(3) To render medical assistance.
(4) To accompany a person needing assistance.
(5) That has been temporarily designated for use by that person's biological sex."

PART II. STATEWIDE CONSISTENCY IN LAWS RELATED TO EMPLOYMENT AND CONTRACTING

SECTION 2.1. G.S. 95-25.1 reads as rewritten:

"**§ 95-25.1. Short title and legislative ~~purpose.~~purpose; local governments preempted.**

(a) This Article shall be known and may be cited as the "Wage and Hour Act."

(b) The public policy of this State is declared as follows: The wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry. The General Assembly declares that the general welfare of the State requires the enactment of this law under the police power of the State.

(c) The provisions of this Article supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement upon an employer pertaining to compensation of employees, such as the wage levels of employees, hours of labor, payment of earned wages, benefits, leave, or well-being of minors in the workforce. This subsection shall not apply to any of the following:

(1) A local government regulating, compensating, or controlling its own employees.
(2) Economic development incentives awarded under Part 2H of Article 10 of Chapter 143B of the General Statutes.
(3) Economic development incentives awarded under Article 1 of Chapter 158 of the General Statutes.
(4) A requirement of federal community development block grants.
(5) Programs established under G.S. 153A-376 or G.S. 160A-456."

SECTION 2.2. G.S. 153A-449(a) reads as rewritten:

"(a) Authority. – A county may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the county is authorized by law to engage in. A county may not require a private contractor under this section to abide by ~~any restriction that the county could not impose on all employers in the county, such as paying minimum wage or providing paid sick leave to its employees,~~ regulations or controls on the contractor's employment practices or mandate or prohibit the provision of goods, services, or accommodations to any member of the public as a condition of bidding on a ~~contract.~~contract or a qualification-based selection, except as otherwise required by State law."

SECTION 2.3. G.S. 160A-20.1(a) reads as rewritten:

"(a) Authority. – A city may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the city is authorized by law to engage in. A city may not require a private contractor under this section to abide by ~~any restriction that the city could not impose on all employers in the city, such as paying minimum wage or providing paid sick leave to its employees,~~ regulations or controls on the contractor's employment practices or mandate or prohibit the provision of goods, services, or accommodations to any member of the public as a condition of bidding on a ~~contract.~~contract or a qualification-based selection, except as otherwise required by State law."

PART III. PROTECTION OF RIGHTS IN EMPLOYMENT AND PUBLIC ACCOMMODATIONS

SECTION 3.1. G.S. 143-422.2 reads as rewritten:

"**§ 143-422.2. Legislative declaration.**

(a) It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, biological sex or handicap by employers which regularly employ 15 or more employees.

(b) It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general.

(c) The General Assembly declares that the regulation of discriminatory practices in employment is properly an issue of general, statewide concern, such that this Article and other applicable provisions of the General Statutes supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement upon an employer pertaining to the regulation of discriminatory practices in employment, except such regulations applicable to personnel employed by that body that are not otherwise in conflict with State law."

SECTION 3.2. G.S. 143-422.3 reads as rewritten:

"**§ 143-422.3. Investigations; conciliations.**

The Human Relations Commission in the Department of Administration shall have the authority to receive charges of discrimination from the Equal Employment Opportunity Commission pursuant to an agreement under Section 709(b) of Public Law 88-352, as amended by Public Law 92-261, and investigate and conciliate charges of discrimination. Throughout this process, the agency shall use its good offices to effect an amicable resolution of the charges of discrimination. This Article does not create, and shall not be construed to create or support, a statutory or common law private right of action, and no person may bring any civil action based upon the public policy expressed herein."

SECTION 3.3. Chapter 143 of the General Statutes is amended by adding a new Article to read:

"Article 49B.

"Equal Access to Public Accommodations.

"**§ 143-422.10. Short title.**

This Article shall be known and may be cited as the Equal Access to Public Accommodations Act.

"**§ 143-422.11. Legislative declaration.**

(a) It is the public policy of this State to protect and safeguard the right and opportunity of all individuals within the State to enjoy fully and equally the goods, services, facilities, privileges, advantages, and accommodations of places of public accommodation free of discrimination because of race, religion, color, national origin, or biological sex, provided that designating multiple or single occupancy bathrooms or changing facilities according to biological sex, as defined in G.S. 143-760(a)(1), (3), and (5), shall not be deemed to constitute discrimination.

(b) The General Assembly declares that the regulation of discriminatory practices in places of public accommodation is properly an issue of general, statewide concern, such that this Article and other applicable provisions of the General Statutes supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement pertaining to the regulation of discriminatory practices in places of public accommodation.

"**§ 143-422.12. Places of public accommodation – defined.**

For purposes of this Article, places of public accommodation has the same meaning as defined in G.S. 168A-3(8), but shall exclude any private club or other establishment not, in fact, open to the public.

"**§ 143-422.13. Investigations; conciliations.**

The Human Relations Commission in the Department of Administration shall have the authority to receive, investigate, and conciliate complaints of discrimination in public accommodations. Throughout this process, the Human Relations Commission shall use its good offices to effect an amicable resolution of the complaints of discrimination. This Article does not create, and shall not be construed to create or support, a statutory or common law private right of action, and no person may bring any civil action based upon the public policy expressed herein."

PART IV. SEVERABILITY

SECTION 4. If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable. If any provision of this act is temporarily or permanently restrained or enjoined by judicial order, this act shall be enforced as though such restrained or enjoined provisions had not been adopted, provided that whenever such temporary or permanent restraining order or injunction is stayed, dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.

PART V. EFFECTIVE DATE

SECTION 5. This act is effective when it becomes law and applies to any action taken on or after that date, to any ordinance, resolution, regulation, or policy adopted or amended on or after that date, and to any contract entered into on or after that date. The provisions of Sections 2.1, 2.2, 2.3, 3.1, 3.2, and 3.3 of this act supersede and preempt any ordinance, resolution, regulation, or policy adopted prior to the effective date of this act that purports to regulate a subject matter preempted by this act or that violates or is not consistent with this act, and such ordinances, resolutions, regulations, or policies shall be null and void as of the effective date of this act.

State of North Carolina

PAT McCRORY

GOVERNOR

April 12, 2016

EXECUTIVE ORDER NO. 93

TO PROTECT PRIVACY AND EQUALITY

WHEREAS, North Carolina's rich legacy of inclusiveness, diversity and hospitality makes North Carolina a global destination for jobs, business, tourists and talent;

WHEREAS, it is the policy of the Executive Branch that government services be provided equally to all people;

WHEREAS, N.C. Gen. Stat. § 160A-499.2 permits municipalities to adopt ordinances prohibiting discrimination in housing and real estate transactions, and any municipality may expand such ordinance consistent with the federal Fair Housing Act;

WHEREAS, N.C. Gen. Stat. § 143-422.2(c) permits local governments or other political subdivisions of the State to set their own employment policies applicable to their own personnel;

WHEREAS, North Carolina law allows private businesses and nonprofit employers to establish their own non-discrimination employment policies;

WHEREAS, N.C. Gen. Stat. § 143-128.2 requires each city, county or other local public entity to adopt goals for participation by minority businesses and to make good faith efforts to recruit minority participation in line with those goals;

WHEREAS, North Carolina law allows a private business or nonprofit to set their own restroom, locker room or shower policies;

WHEREAS, our citizens have basic common-sense expectations of privacy in our restrooms, locker rooms and shower facilities for children, women and men;

WHEREAS, to protect expectations of privacy in restrooms, locker rooms and shower facilities in public buildings, including our schools, the State of North Carolina maintains these facilities on the basis of biological sex;

WHEREAS, State agencies and local governments are allowed to make reasonable accommodations in restrooms, locker rooms and shower facilities due to special individual circumstances;

NOW, THEREFORE, pursuant to the authority vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED**:

EXHIBIT G

Section 1. Public Services

In the provision of government services and in the administration of programs, including, but not limited to public safety, health and welfare, public agencies shall serve all people equally, consistent with the mission and requirements of the service or program.

Section 2. Equal Employment Opportunity Policy for State Employees

I hereby affirm that the State of North Carolina is committed to administering and implementing all State human resources policies, practices and programs fairly and equitably, without unlawful discrimination, harassment or retaliation on the basis of race, religion, color, national origin, sex, sexual orientation, gender identity, age, political affiliation, genetic information, or disability.

I also affirm that private businesses, nonprofit employers and local governments may establish their own non-discrimination employment policies.

Section 3. Restroom Accommodations

In North Carolina, private businesses can set their own rules for their own restroom, locker room and shower facilities, free from government interference.

Under current law, every multiple occupancy restroom, locker room or shower facility located in a cabinet agency must be designated for and only used by persons based on their biological sex. Agencies may make reasonable accommodations upon a person's request due to special circumstances.

Therefore, when readily available and when practicable in the best judgment of the agency, all cabinet agencies shall provide a reasonable accommodation of a single occupancy restroom, locker room or shower facility upon request due to special circumstances.

All council of state agencies, cities, counties, the University of North Carolina System and the North Carolina Community College System are invited and encouraged to make a similar accommodation when practicable.

Section 4. State Buildings and Facilities Leased to Private Entities

The Department of Administration shall interpret the application of N.C. Gen. Stat. § 143-760 as follows:

> When a private entity leases State real property and the property in the lessee's exclusive possession includes multiple occupancy restrooms, locker rooms or other like facilities, the private entity will control the signage and use of these facilities.

All council of state agencies, cities, counties, the University of North Carolina System and the North Carolina Community College System are invited and encouraged to adopt a similar interpretation of N.C. Gen. Stat. § 143-760.

Section 5. Human Relations Commission

Pursuant to N.C. Gen. Stat. § 143B-391, the Human Relations Commission in the Department of Administration shall promote equality and opportunity for all citizens.

The Human Relations Commission shall work with local government officials to study problems and promote understanding, respect and goodwill among all citizens in all communities in North Carolina.

The Human Relations Commission shall receive, investigate and conciliate fair housing, employment discrimination and public accommodations complaints.

The Human Relations Commission shall submit an annual report by April 1st to the Governor detailing the number of complaints received, the number of investigations completed, and the number of conciliations in the preceding calendar year. This report shall also describe any education and outreach efforts made by the Commission in that same calendar year.

Section 6. State Cause of Action for Wrongful Discharge

I support and encourage the General Assembly to take all necessary steps to restore a State cause of action for wrongful discharge based on unlawful employment discrimination.

Section 7. State or Federal Law

Nothing in this section shall be interpreted as an abrogation of any requirements otherwise imposed by applicable federal or state laws or regulations.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this twelfth day of April in the year of our Lord two thousand and sixteen.

Pat McCrory
Governor

ATTEST:

Elaine F. Marshall
Deputy Secretary of State

U.S. Equal Employment Opportunity Commission

Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964

- "Transgender" refers to people whose gender identity and/or expression is different from the sex assigned to them at birth (e.g. the sex listed on an original birth certificate). The term transgender woman typically is used to refer to someone who was assigned the male sex at birth but who identifies as a female. Likewise, the term transgender man typically is used to refer to someone who was assigned the female sex at birth but who identifies as male. A person does not need to undergo any medical procedure to be considered a transgender man or a transgender woman.
- In addition to other federal laws, the U.S. Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, national origin, religion, and sex (including pregnancy, gender identity, and sexual orientation). Title VII applies to all federal, state, and local government agencies in their capacity as employers, and to all private employers with 15 or more employees.
- In *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 12, 2012), the EEOC ruled that discrimination based on transgender status is sex discrimination in violation of Title VII, and in *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015), the EEOC held that:
    - denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination;
    - an employer cannot condition this right on the employee undergoing or providing proof of surgery or any other medical procedure; and,
    - an employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom instead (though the employer can make a single-user restroom available to all employees who might choose to use it).
- Contrary state law is not a defense under Title VII. 42 U.S.C. § 2000e-7.
- In *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, -- F.3d --, 2016 WL 1567467 (4th Cir. 2016), the United States Court of Appeals for the Fourth Circuit reached a similar conclusion by deferring to the Department of Education's position that the prohibition against sex discrimination under

EXHIBIT H

Title IX requires educational institutions to give transgender students restroom and locker access consistent with their gender identity.

- Gender-based stereotypes, perceptions, or comfort level must not interfere with the ability of any employee to work free from discrimination, including harassment. As the Commission observed in *Lusardi*: "[S]upervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort."
- Like all non-discrimination provisions, these protections address conduct in the workplace, not personal beliefs. Thus, these protections do not require any employee to change beliefs. Rather, they seek to ensure appropriate workplace treatment so that all employees may perform their jobs free from discrimination.
- Further information from other federal government agencies includes: *A Guide to Restroom Access for Transgender Workers*, issued by the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA), https://www.osha.gov/Publications/OSHA3795.pdf, and *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/, issued by the U.S. Office of Personnel Management.
- If you believe you have been discriminated against, you may take action to protect your rights under Title VII by filing a complaint:
    - **Private sector and state/local government employees** may file a charge of discrimination by contacting the EEOC at 1-800-669-4000 or go to https://www.eeoc.gov/employees/howtofile.cfm.
    - **Federal government employees** may initiate the complaint process by contacting an EEO counselor at your agency; more information is available at https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm.

U.S. Department of Justice

Civil Rights Division

Washington, D.C. 20530

May 4, 2016

Via electronic and overnight mail

Governor Pat McCrory
State of North Carolina
North Carolina Office of the Governor
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor McCrory:

This letter is to inform you that the Department of Justice has determined that, as a result of compliance with and implementation of North Carolina House Bill 2 ("H.B. 2"), both you and the State of North Carolina (the "State") are in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). Specifically, the State is engaging in a pattern or practice of discrimination against transgender state employees and both you, in your official capacity, and the State are engaging in a pattern or practice of resistance to the full enjoyment of Title VII rights by transgender employees of public agencies.

Title VII prohibits an employer from discriminating against an individual on the basis of sex and from otherwise resisting the full enjoyment of Title VII rights. *See* 42 U.S.C. § 2000e-2. The Supreme Court made clear in *Price Waterhouse v. Hopkins* that discrimination on the basis of "sex" includes differential treatment based on any "sex-based consideration[]." 490 U.S. 228, 242 (1989) (plurality). Federal courts and administrative agencies have applied Title VII to discrimination against transgender individuals based on sex, including gender identity. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1315-20 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293, 303-08 (D.D.C. 2008); *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at *4-11 (EEOC Apr. 20, 2012).

Access to sex-segregated restrooms and other workplace facilities consistent with gender identity is a term, condition, or privilege of employment. Denying such access to transgender individuals, whose gender identity is different from their gender assigned at birth, while affording it to similarly situated non-transgender employees, violates Title VII. Significantly, the U.S. Equal Employment Opportunity Commission ("EEOC") recently addressed this very issue and held that "'[e]qual access to restrooms is a significant, basic condition of employment,' and that denying transgender individuals access to a restroom consistent with gender identity discriminates on the basis of sex in violation of Title VII." *Lusardi v. Dep't of the Army*, No. 0120133395, 2015 WL 1607756, at *9 (EEOC Apr. 1, 2015). And, in interpreting the analogous

EXHIBIT I

sex discrimination provision of Title IX of the Education Amendments of 1972,[1] the United States Court of Appeals for the Fourth Circuit held in *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467 at *11 (4th Cir. Apr. 19, 2016), that the Department of Education's guidance that educational institutions "generally must treat transgender students consistent with their gender identity" is entitled to "controlling weight" under *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

H.B. 2, which took effect on March 23, 2016, is facially discriminatory against transgender employees on the basis of sex because it treats transgender employees, whose gender identity does not match their "biological sex," as defined by H.B. 2,[2] differently from similarly situated non-transgender employees. Under H.B. 2, non-transgender state employees may access restrooms and changing facilities that are consistent with their gender identity in public buildings, while transgender state employees may not.

H.B. 2 places similar restrictions on access to restrooms and changing facilities for all public agencies[3] in North Carolina, including, for example, all political subdivisions of the State. On April 12, 2016, you issued Executive Order 93, reaffirming the applicability of this provision of H.B. 2 to all cabinet agencies. By requiring compliance with H.B. 2, you and the State are therefore resisting the full enjoyment of Title VII rights and discriminating against transgender employees of public agencies by requiring those public agencies to comply with H.B. 2.

Based upon the above, we have concluded that, in violation of Title VII, the State is engaged in a pattern or practice of discrimination against its employees and both you and the State are engaged in a pattern or practice of resistance to the full enjoyment of Title VII rights by employees of public agencies. When the Attorney General of the United States has a reasonable basis to believe that a state or person has engaged in a pattern or practice of discrimination in violation of Title VII, she may apply to the appropriate court for an order that will ensure compliance with Title VII. *See* 42 U.S.C. § 2000e-6(a). This responsibility has been delegated to the Principal Deputy Assistant Attorney General of the Civil Rights Division.

Please advise the Department, therefore, no later than close of business on May 9, 2016 whether you will remedy these violations of Title VII, including by confirming that the State will not comply with or implement H.B. 2, and that it has notified employees of the State and public agencies that, consistent with federal law, they are permitted to access bathrooms and other facilities consistent with their gender identity.

We further inform you that today the Department sent letters addressed to the North Carolina Department of Public Safety and the University of North Carolina similarly notifying

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[1] Courts consider often Title VII and Title IX precedent together when analyzing discrimination claims. *See, e.g., Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74 (1992); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995).

[2] H.B. 2 defines "biological sex" as the "physical condition of being male or female, which is stated on a person's birth certificate." N.C. Gen. Stat. 143-760(a)(1).

[3] "Public Agencies" are defined by the Act as including: executive branch agencies; all agencies, boards, offices, and departments under the direction and control of a member of the Council of State; units, as defined in N.C. Gen. Stat. 159-7(b)(15); public authorities, as defined in N.C. Gen. Stat. 159-7(b)(10); local boards of education, the judicial and legislative branches, and any other political subdivision of the States. N.C. Gen. Stat. 143-760(a)(4).

them of our conclusion that they have engaged in violations of Title VII, as well as violations of Title IX and its implementing regulations, and the Violence Against Women Reauthorization Act of 2013 ("VAWA"). Courtesy copies of those letters are enclosed.

If you have questions about this letter, please contact Delora Kennebrew at (202) 514-3831/ Delora.Kennebrew@usdoj.gov.

Sincerely,

Vanita Gupta
Principal Deputy Assistant Attorney General

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

Dear Colleague Letter on Transgender Students
Notice of Language Assistance

If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知: 如果您不懂英語，或者使用英语有困难，您可以要求獲得向大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊，請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339),或電郵: Ed.Language.Assistance@ed.gov。

Thông báo dành cho những người có khả năng Anh ngữ hạn chế: Nếu quý vị gặp khó khăn trong việc hiểu Anh ngữ thì quý vị có thể yêu cầu các dịch vụ hỗ trợ ngôn ngữ cho các tin tức của Bộ dành cho công chúng. Các dịch vụ hỗ trợ ngôn ngữ này đều miễn phí. Nếu quý vị muốn biết thêm chi tiết về các dịch vụ phiên dịch hay thông dịch, xin vui lòng gọi số 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), hoặc email: Ed.Language.Assistance@ed.gov.

영어 미숙자를 위한 공고: 영어를 이해하는 데 어려움이 있으신 경우, 교육부 정보 센터에 일반인 대상 언어 지원 서비스를 요청하실 수 있습니다. 이러한 언어 지원 서비스는 무료로 제공됩니다. 통역이나 번역 서비스에 대해 자세한 정보가 필요하신 경우, 전화번호 1-800-USA-LEARN (1-800-872-5327) 또는 청각 장애인용 전화번호 1-800-877-8339 또는 이메일주소 Ed.Language.Assistance@ed.gov 으로 연락하시기 바랍니다.

Paunawa sa mga Taong Limitado ang Kaalaman sa English: Kung nahihirapan kayong makaintindi ng English, maaari kayong humingi ng tulong ukol dito sa inpormasyon ng Kagawaran mula sa nagbibigay ng serbisyo na pagtulong kaugnay ng wika. Ang serbisyo na pagtulong kaugnay ng wika ay libre. Kung kailangan ninyo ng dagdag na impormasyon tungkol sa mga serbisyo kaugnay ng pagpapaliwanag o pagsasalin, mangyari lamang tumawag sa 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o mag-email sa: Ed.Language.Assistance@ed.gov.

Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.

EXHIBIT J

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

May 13, 2016

Dear Colleague:

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance.[1] This prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status. This letter summarizes a school's Title IX obligations regarding transgender students and explains how the U.S. Department of Education (ED) and the U.S. Department of Justice (DOJ) evaluate a school's compliance with these obligations.

ED and DOJ (the Departments) have determined that this letter is *significant guidance*.[2] This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you have questions or are interested in commenting on this guidance, please contact ED at ocr@ed.gov or 800-421-3481 (TDD 800-877-8339); or DOJ at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Accompanying this letter is a separate document from ED's Office of Elementary and Secondary Education, *Examples of Policies and Emerging Practices for Supporting Transgender Students*. The examples in that document are taken from policies that school districts, state education agencies, and high school athletics associations around the country have adopted to help ensure that transgender students enjoy a supportive and nondiscriminatory school environment. Schools are encouraged to consult that document for practical ways to meet Title IX's requirements.[3]

Terminology

- *Gender identity* refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth.

- *Sex assigned at birth* refers to the sex designation recorded on an infant's birth certificate should such a record be provided at birth.

- *Transgender* describes those individuals whose gender identity is different from the sex they were assigned at birth. A *transgender male* is someone who identifies as male but was assigned the sex of female at birth; a *transgender female* is someone who identifies as female but was assigned the sex of male at birth.

- *Gender transition* refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

Compliance with Title IX

As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations.[4] The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments' interpretation is consistent with courts' and other agencies' interpretations of Federal laws prohibiting sex discrimination.[5]

The Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity. Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.[6] Because transgender students often are unable to obtain identification documents that reflect their gender identity (*e.g.*, due to restrictions imposed by state or local law in their place of birth or residence),[7] requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity.

A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students.[8]

1. Safe and Nondiscriminatory Environment

Schools have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. Harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly.[9] If sex-based harassment creates a hostile environment, the school must take prompt and effective steps to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. A school's failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX. For a more detailed discussion of Title IX

requirements related to sex-based harassment, see guidance documents from ED's Office for Civil Rights (OCR) that are specific to this topic.[10]

2. Identification Documents, Names, and Pronouns

Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex. The Departments have resolved Title IX investigations with agreements committing that school staff and contractors will use pronouns and names consistent with a transgender student's gender identity.[11]

3. Sex-Segregated Activities and Facilities

Title IX's implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances.[12] When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.[13]

- **Restrooms and Locker Rooms**. 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.[14] 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. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.[15]

- **Athletics.** Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.[16] A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (*i.e.*, the same gender identity) or others' discomfort with transgender students.[17] Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport.[18]

- **Single-Sex Classes**. Although separating students by sex in classes and activities is generally prohibited, nonvocational elementary and secondary schools may offer nonvocational single-sex classes and extracurricular activities under certain circumstances.[19] When offering such classes and activities, a school must allow transgender students to participate consistent with their gender identity.

- **Single-Sex Schools**. Title IX does not apply to the admissions policies of certain educational institutions, including nonvocational elementary and secondary schools, and private undergraduate colleges.[20] Those schools are therefore permitted under Title IX to set their own

sex-based admissions policies. Nothing in Title IX prohibits a private undergraduate women's college from admitting transgender women if it so chooses.

- **Social Fraternities and Sororities**. Title IX does not apply to the membership practices of social fraternities and sororities.[21] Those organizations are therefore permitted under Title IX to set their own policies regarding the sex, including gender identity, of their members. Nothing in Title IX prohibits a fraternity from admitting transgender men or a sorority from admitting transgender women if it so chooses.

- **Housing and Overnight Accommodations**. Title IX allows a school to provide separate housing on the basis of sex.[22] But a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students. Nothing in Title IX prohibits a school from honoring a student's voluntary request for single-occupancy accommodations if it so chooses.[23]

- **Other Sex-Specific Activities and Rules**. Unless expressly authorized by Title IX or its implementing regulations, a school may not segregate or otherwise distinguish students on the basis of their sex, including gender identity, in any school activities or the application of any school rule. Likewise, a school may not discipline students or exclude them from participating in activities for appearing or behaving in a manner that is consistent with their gender identity or that does not conform to stereotypical notions of masculinity or femininity (*e.g.*, in yearbook photographs, at school dances, or at graduation ceremonies).[24]

4. Privacy and Education Records

Protecting transgender students' privacy is critical to ensuring they are treated consistent with their gender identity. 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.[25] Nonconsensual disclosure of personally identifiable information (PII), such as a student's birth name or sex assigned at birth, could be harmful to or invade the privacy of transgender students and may also violate the Family Educational Rights and Privacy Act (FERPA).[26] A school may maintain records with this information, but such records should be kept confidential.

- **Disclosure of Personally Identifiable Information from Education Records**. FERPA generally prevents the nonconsensual disclosure of PII from a student's education records; one exception is that records may be disclosed to individual school personnel who have been determined to have a legitimate educational interest in the information.[27] Even when a student has disclosed the student's transgender status to some members of the school community, schools may not rely on this FERPA exception to disclose PII from education records to other school personnel who do not have a legitimate educational interest in the information. Inappropriately disclosing (or requiring students or their parents to disclose) PII from education records to the school community may

violate FERPA and interfere with transgender students' right under Title IX to be treated consistent with their gender identity.

- **Disclosure of Directory Information**. Under FERPA's implementing regulations, a school may disclose appropriately designated directory information from a student's education record if disclosure would not generally be considered harmful or an invasion of privacy.[28] Directory information may include a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance.[29] School officials may not designate students' sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy.[30] A school also must allow eligible students (*i.e.*, students who have reached 18 years of age or are attending a postsecondary institution) or parents, as appropriate, a reasonable amount of time to request that the school not disclose a student's directory information.[31]

- **Amendment or Correction of Education Records**. A school may receive requests to correct a student's education records to make them consistent with the student's gender identity. Updating a transgender student's education records to reflect the student's gender identity and new name will help protect privacy and ensure personnel consistently use appropriate names and pronouns.

  - Under FERPA, a school must consider the request of an eligible student or parent to amend information in the student's education records that is inaccurate, misleading, or in violation of the student's privacy rights.[32] If the school does not amend the record, it must inform the requestor of its decision and of the right to a hearing. If, after the hearing, the school does not amend the record, it must inform the requestor of the right to insert a statement in the record with the requestor's comments on the contested information, a statement that the requestor disagrees with the hearing decision, or both. That statement must be disclosed whenever the record to which the statement relates is disclosed.[33]
  - Under Title IX, a school must respond to a request to amend information related to a student's transgender status consistent with its general practices for amending other students' records.[34] If a student or parent complains about the school's handling of such a request, the school must promptly and equitably resolve the complaint under the school's Title IX grievance procedures.[35]

* * *

We appreciate the work that many schools, state agencies, and other organizations have undertaken to make educational programs and activities welcoming, safe, and inclusive for all students.

Sincerely,

/s/	/s/
Catherine E. Lhamon	Vanita Gupta
Assistant Secretary for Civil Rights	Principal Deputy Assistant Attorney General for Civil Rights
U.S. Department of Education	U.S. Department of Justice

[1] 20 U.S.C. §§ 1681–1688; 34 C.F.R. Pt. 106; 28 C.F.R. Pt. 54. In this letter, the term *schools* refers to recipients of Federal financial assistance at all educational levels, including school districts, colleges, and universities. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that compliance would not be consistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a).

[2] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf.

[3] ED, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 13, 2016), www.ed.gov/oese/oshs/emergingpractices.pdf. OCR also posts many of its resolution agreements in cases involving transgender students online at www.ed.gov/ocr/lgbt.html. While these agreements address fact-specific cases, and therefore do not state general policy, they identify examples of ways OCR and recipients have resolved some issues addressed in this guidance.

[4] 34 C.F.R. §§ 106.4, 106.31(a). For simplicity, this letter cites only to ED's Title IX regulations. DOJ has also promulgated Title IX regulations. *See* 28 C.F.R. Pt. 54. For purposes of how the Title IX regulations at issue in this guidance apply to transgender individuals, DOJ interprets its regulations similarly to ED. State and local rules cannot limit or override the requirements of Federal laws. *See* 34 C.F.R. § 106.6(b).

[5] *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998); *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *8 (4th Cir. Apr. 19, 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008); *Macy v. Dep't of Justice*, Appeal No. 012012082 (U.S. Equal Emp't Opportunity Comm'n Apr. 20, 2012). *See also* U.S. Dep't of Labor (USDOL), Training and Employment Guidance Letter No. 37-14, *Update on Complying with Nondiscrimination Requirements: Discrimination Based on Gender Identity, Gender Expression and Sex Stereotyping are Prohibited Forms of Sex Discrimination in the Workforce Development System* (2015), wdr.doleta.gov/directives/attach/TEGL/TEGL_37-14.pdf; USDOL, Job Corps, Directive: Job Corps Program Instruction Notice No. 14-31, *Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program* (May 1, 2015), https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi_14_31.pdf; DOJ, Memorandum from the Attorney General, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (2014), www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf; USDOL, Office of Federal Contract Compliance Programs, Directive 2014-02, *Gender Identity and Sex Discrimination* (2014), www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

[6] *See Lusardi v. Dep't of the Army*, Appeal No. 0120133395 at 9 (U.S. Equal Emp't Opportunity Comm'n Apr. 1, 2015) ("An agency may not condition access to facilities—or to other terms, conditions, or privileges of employment—on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity.").

[7] *See G.G.*, 2016 WL 1567467, at *1 n.1 (noting that medical authorities "do not permit sex reassignment surgery for persons who are under the legal age of majority").

[8] 34 C.F.R. § 106.31(b)(4); *see G.G.*, 2016 WL 1567467, at *8 & n.10 (affirming that individuals have legitimate and important privacy interests and noting that these interests do not inherently conflict with nondiscrimination principles); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman "merely [to be] present in the women's faculty restroom" created a hostile environment); *Glenn*, 663 F.3d at 1321 (defendant's proffered justification that "other women might object to [the plaintiff]'s restroom use" was "wholly irrelevant"). *See also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (recognizing that "mere negative attitudes, or fear . . . are not permissible bases for" government action).

[9] *See, e.g.,* Resolution Agreement, *In re Downey Unified Sch. Dist., CA*, OCR Case No. 09-12-1095, (Oct. 8, 2014), www.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (agreement to address harassment of transgender student, including allegations that peers continued to call her by her former name, shared pictures of her prior to her transition, and frequently asked questions about her anatomy and sexuality); Consent Decree, *Doe v. Anoka-Hennepin Sch. Dist. No. 11, MN* (D. Minn. Mar. 1, 2012), www.ed.gov/ocr/docs/investigations/05115901-d.pdf (consent decree to address sex-based harassment, including based on nonconformity with gender stereotypes); Resolution Agreement, *In re Tehachapi Unified Sch. Dist*., *CA*, OCR Case No. 09-11-1031 (June 30, 2011), www.ed.gov/ocr/docs/investigations/09111031-b.pdf (agreement to address sexual and gender-based harassment, including harassment based on nonconformity with gender stereotypes). *See also Lusardi,* Appeal No. 0120133395, at *15 ("Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment").

[10] *See, e.g.*, OCR, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001), www.ed.gov/ocr/docs/shguide.pdf; OCR, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), www.ed.gov/ocr/letters/colleague-201010.pdf; OCR, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), www.ed.gov/ocr/letters/colleague-201104.pdf; OCR, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), www.ed.gov/ocr/docs/qa-201404-title-ix.pdf.

[11] *See, e.g.*, Resolution Agreement, *In re Cent. Piedmont Cmty. Coll.*, *NC*, OCR Case No. 11-14-2265 (Aug. 13, 2015), www.ed.gov/ocr/docs/investigations/more/11142265-b.pdf (agreement to use a transgender student's preferred name and gender and change the student's official record to reflect a name change).

[12] 34 C.F.R. §§ 106.32, 106.33, 106.34, 106.41(b).

[13] *See* 34 C.F.R. § 106.31.

[14] 34 C.F.R. § 106.33.

[15] *See, e.g.*, Resolution Agreement, *In re Township High Sch. Dist. 211, IL*, OCR Case No. 05-14-1055 (Dec. 2, 2015), www.ed.gov/ocr/docs/investigations/more/05141055-b.pdf (agreement to provide any student who requests additional privacy "access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use.").

[16] 34 C.F.R. § 106.41(b). Nothing in Title IX prohibits schools from offering coeducational athletic opportunities.

[17] 34 C.F.R. § 106.6(b), (c). An interscholastic athletic association is subject to Title IX if (1) the association receives Federal financial assistance or (2) its members are recipients of Federal financial assistance and have ceded controlling authority over portions of their athletic program to the association. Where an athletic association is covered by Title IX, a school's obligations regarding transgender athletes apply with equal force to the association.

[18] The National Collegiate Athletic Association (NCAA), for example, reported that in developing its policy for participation by transgender students in college athletics, it consulted with medical experts, athletics officials, affected students, and a consensus report entitled *On the Team: Equal Opportunity for Transgender Student Athletes* (2010) by Dr. Pat Griffin & Helen J. Carroll (*On the Team*), https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf. *See* NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes* 2, 30-31 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf (citing *On the Team*). The *On the Team* report noted that policies that may be appropriate at the college level may "be unfair and too complicated for [the high school] level of competition." *On the Team* at 26. After engaging in similar processes, some state interscholastic athletics associations have adopted policies for participation by transgender students in high school athletics that they determined were age-appropriate.

[19] 34 C.F.R. § 106.34(a), (b). Schools may also separate students by sex in physical education classes during participation in contact sports. *Id*. § 106.34(a)(1).

[20] 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d); 34 C.F.R. § 106.34(c) (a recipient may offer a single-sex public nonvocational elementary and secondary school so long as it provides students of the excluded sex a "substantially

equal single-sex school or coeducational school").

[21] 20 U.S.C. § 1681(a)(6)(A); 34 C.F.R. § 106.14(a).

[22] 20 U.S.C. § 1686; 34 C.F.R. § 106.32.

[23] *See, e.g.,* Resolution Agreement, *In re Arcadia Unified. Sch. Dist., CA*, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, (July 24, 2013), www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf (agreement to provide access to single-sex overnight events consistent with students' gender identity, but allowing students to request access to private facilities).

[24] *See* 34 C.F.R. §§ 106.31(a), 106.31(b)(4). *See also*, *In re Downey Unified Sch. Dist., CA*, *supra* n. 9; *In re Cent. Piedmont Cmty. Coll., NC, supra* n. 11.

[25] 34 C.F.R. § 106.31(b)(7).

[26] 20 U.S.C. § 1232g; 34 C.F.R. Part 99. FERPA is administered by ED's Family Policy Compliance Office (FPCO). Additional information about FERPA and FPCO is available at www.ed.gov/fpco.

[27] 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1).

[28] 34 C.F.R. §§ 99.3, 99.31(a)(11), 99.37.

[29] 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.

[30] Letter from FPCO to Institutions of Postsecondary Education 3 (Sept. 2009), www.ed.gov/policy/gen/guid/fpco/doc/censuslettertohighered091609.pdf.

[31] 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. §§ 99.3. 99.37(a)(3).

[32] 34 C.F.R. § 99.20.

[33] 34 C.F.R. §§ 99.20-99.22.

[34] *See* 34 C.F.R. § 106.31(b)(4).

[35] 34 C.F.R. § 106.8(b).

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ATTORNEY GENERAL OF
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KEN PAXTON
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May 17, 2016

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Re: Dear Colleague Letter on Transgender Students

Dear Assistant Secretary Lhamon and Assistant Attorney General Gupta,

On May 13, 2016, you sent a "Dear Colleague Letter on Transgender Students" to recipients of federal funding subject to Title IX's requirements. We have reviewed the letter. As chief law officers of our respective states, it is imperative that we be able to advise our state agencies with a proper understanding of the effect you intend this letter to have. We thus write to you seeking clarification on several points.

First, you describe the letter as "significant guidance." We understand this designation to mean that you reasonably anticipate that your letter will:

> (i) Lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal

EXHIBIT K

> governments or communities; or (ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or (iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended.[1]

That definition of "significant guidance," taken together with your statement that the purpose of the letter is to "inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations," leads us and others to understand that your Departments will consider any entity not adhering to this "significant guidance" as out of compliance with Title IX, and thus subject to loss of federal funding. In order to clarify this understanding, please answer the following questions: **In your view, must an entity receiving federal funding follow this "significant guidance" in order to be in compliance with Title IX and/or entitled to continued receipt of federal funding? Do circumstances exist in which you would consider a school still in compliance with Title IX despite non compliance with these guidelines? If so, please describe those circumstances and whether you would take steps to recoup or end federal funding.**

Second, in the "Final Bulletin for Agency Good Guidance Practices," the Office of Management and Budget stated that "given their legally nonbinding nature, significant guidance documents should not include mandatory language such as "shall," "must," "required" or "requirement[.]"[2] By our count, your letter uses the word "must" 15 times, and the words "required" and "requirement" 10 times. Because of the mandatory language used in your letter, it is our understanding that you intend the letter to bind recipients of federal funding to compliance. In order to clarify this understanding, please answer the following question: **Must recipients of federal funding satisfy the requirements described in the letter, including the requirement that recipients of federal funding "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations"?**

Third, you state that your letter "does not add requirements to applicable law." However, we are aware of no provision of Title IX, nor any decision of any court that would be binding in our states,[3] that mandates that schools "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations." In other words, if your letter imposes on its recipients the obligation to "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations," then we are at a loss as to how your letter does *not* in fact "add requirements to applicable law." In order to clarify any confusion, please answer the following question: **What existing statute, regulation, or binding court decision mandates that schools receiving federal funding must "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations"?**

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[1] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf.

[2] *Id.*

[3] The recent decision by two judges on the U.S. Court of Appeals for the Fourth Circuit in *G.G. v. Gloucester County School Board* did not address the legality of a federal edict as sweeping as the letter. Moreover, that decision is still subject to challenge; indeed, nine States filed a brief last week supporting further review by all fifteen judges on that court.

Fourth, your letter defines "gender identity" as "an individual's ***internal sense of gender***" (emphasis added). Your letter also explains that "[t]he Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity." We understand this to mean that in your view, schools are bound by each student's subjective statement of their "gender identity" with respect to defining that student's "sex." And once a student notifies the school that their "internal sense of gender" has changed, the school must immediately change the way it administers its programs with respect to that student. As your letter indicates, this would require the school to immediately require all staff to refer to the student as "he" instead of "she" (or vice versa), and to allow the student to use the bathroom and locker room for the sex opposite of that which they previously "identified," and even to let the student play sports for a team of the sex opposite of that which they previously "identified" (unless, apparently, there is "sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport."). In order to clarify any confusion, please answer the following question: **Is it now a requirement of Title IX that schools administer their programs according to each student's subjective "internal sense of gender," and that Title IX bars schools from requiring any sort of objective verification of a student's sex?**

Fifth, most schools understandably require that boys use the boy's restroom/locker room and that girls use the girl's restroom/locker room. Your letter states that once a student's "internal sense of gender" changes, that student must be allowed to use the bathroom of their choosing. It would be an odd result if this requirement meant that a transgender student could use *either* the boy's or the girl's restroom/locker room, whereas other students would remain bound to use one or the other. Indeed, it would conflict with your statement that "a school must not treat a transgender student differently from the way it treats other students of the same gender identity," since non-transgendered students would have less access to fewer restrooms/locker rooms than transgendered students. We assume, therefore, that a school could *require* the student to use only the bathroom for the gender with which the student at that moment in time identify. In order to clarify any confusion, please answer the following question: **May a school require that a student use *only* the bathroom/locker room for the gender with which that student identifies?**

We seek responses to these important clarifying questions by no later than close of business on May 24, 2016.

Sincerely,

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
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PATRICK MORRISEY
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Harrold ISD
244901

SAFETY PROGRAM/RISK MANAGEMENT CK
(LOCAL)

COMPREHENSIVE SAFETY PROGRAMS	The Superintendent or designee shall be responsible for developing, implementing, and promoting comprehensive safety programs designed to address the safety of students, employees, visitors, and all others with whom the District conducts its business.
SAFETY OF STUDENTS, EMPLOYEES, VISITORS WITH RESPECT TO DISTRICT BATHROOM & CHANGING FACILITIES	In accordance with the District's commitment to continually addressing the safety of students, employees, visitors and all others with whom the District conducts its business, the District establishes the following policy with respect to its bathroom and changing facilities.
DEFINITIONS	The following definitions shall apply in this policy:
"BIOLOGICAL SEX"	"Biological sex" shall mean the physical condition of being a male or female as stated on an individual's birth certificate.
"MULTIPLE OCCUPANCY BATHROOM OR CHANGING FACILITY"	"Multiple occupancy bathroom or changing facility" shall mean a facility designed or designated to be used by more than one person at a time where **individuals** may be in various stages of undress in the presence of other persons. A multiple occupancy bathroom or changing facility may include, but is not limited to, a school restroom, locker room, changing room, or shower room.
"SINGLE OCCUPANCY BATHROOM OR CHANGING FACILITY"	"Single occupancy bathroom or changing facility" shall mean a facility designed or designated to be used by only one person at a time where **individuals** may be in various stages of undress. A single occupancy bathroom or changing facility may include, but is not limited to, a single stall restroom designated as unisex or for use based on biological sex.
SINGLE-SEX MULTIPLE OCCUPANCY BATHROOM AND CHANGING FACILITIES	Every multiple occupancy bathroom or changing facility shall be designated for and used only by **individuals** based on their biological sex.
ACCOMMODATIONS PERMITTED	The Superintendent or campus principal may make reasonable accommodations upon a person's request due to special circumstances.
EXCEPTIONS	The provisions in this section shall not apply to persons entering a multiple occupancy bathroom or changing facility designated for use by the opposite sex: 1. For custodial purposes; 2. For maintenance or inspection purposes;

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3. To render medical assistance;

4. To accompany a student needing assistance when the assisting individual is an employee, an authorized volunteer of the Board, the student's parent, or an authorized caregiver;

5. To receive assistance in using the facility; or

6. To accompany a person other than a student needing assistance.

The provisions in this section shall also not apply when the facility has been temporarily designated for use by that person's biological sex.

HARROLD INDEPENDENT SCHOOL DISTRICT
18106 STEWART STREET
HARROLD, TEXAS 76364-0400
Phone: 940.886.2213 Fax: 940.886.2215

May 23, 2016

Attn: Jim Davis
Deputy Attorney General for Civil Litigation
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711
Jim.davis@texasattorneygeneral.gov

Dear Mr. Davis:

On May 23, 2016, the school board voted to request representation from the office of the attorney general pursuant to section 11.151(e) of the Texas Education Code, provided that the District will not be required to pay any costs or other expenses associated with any legal services provided to or on behalf of the District. On May 23, 2016, the school board also adopted the attached policy regarding restrooms, which codifies its longstanding practice. We are requesting representation to determine whether this policy is in conflict with policy guidance from the federal government, and if so, if the policy is enforceable. Please assign this matter to the appropriate division.

In addition, please coordinate day-to-day litigation details with Harrold ISD Superintendent, David Thweatt.

Sincerely,

Dale Owen
President, Harrold ISD Board of Trustees

LaRue Rainwater

LaRue Rainwater
Secretary, Harrold ISD Board of Trustees

EXHIBIT M

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Supersedes 3/04		SHEET 1 of 10
SUBJECT: **SEX DISCRIMINATION AND SEXUAL HARASSMENT FOR STUDENTS IN STATE-OPERATED SCHOOLS**		FILING INSTRUCTIONS (Guidelines & Procedures Manual) Section: Human Resources As item: HR-20 (A)

I. PURPOSE OF THIS GUIDELINE

All schools operated by state agencies are committed to creating and maintaining a learning environment in which all individuals are treated with respect and dignity. Each student has the right to learn in an environment free of sex discrimination and sexual harassment. Sex discrimination and sexual harassment violate federal and state law, and will not be tolerated.

Title IX of the Education Amendments of 1972 and the federal regulations implementing the law prohibit discrimination on the basis of sex in any education program or activity receiving federal financial assistance. This policy has been enacted by the Arizona Department of Education to ensure that students in state operated schools have a prompt and equitable mechanism for filing complaints related to sex discrimination or sexual harassment, in compliance with federal law. This guideline is intended to coordinate with the existing Title IX grievance procedures that have already been established by many of the agencies covered by this guideline. This guideline provides a review procedure that students may utilize after the existing procedures at their school have been exhausted. This guideline also provides a Title IX grievance procedure for students attending state-operated schools that do not already have one, as well as a mechanism for students to follow if they are challenging a state-wide guideline or decision they believe discriminates on the basis of sex. This guideline further advises employees and staff of state-operated schools of their responsibilities to refrain from discriminatory conduct and to act promptly to stop sex discrimination or sexual harassment when it occurs.

II. GUIDELINE

Sex discrimination and sexual harassment, whether verbal, physical, or environmental, is illegal and will not be tolerated. The law views sex discrimination and sexual harassment as a violation of a person's civil rights, just like discrimination on the basis of race, national origin, religion or disability. Sexual harassment, which is a form of sex discrimination, can contribute to a general atmosphere where members of the victim's sex suffer the consequences and in which all students may feel that their safety is compromised. Sexual harassment has no legitimate educational purpose. Retaliation against a person who has filed a sex discrimination complaint or cooperated in an investigation is also illegal and a violation of this guideline.

Educators and staff in state-operated schools have a duty to ensure that they do not discriminate on the basis of sex and to avoid language or behavior that could be construed as sexual

EXHIBIT N

harassment. If educators or staff witness discriminatory behavior or receive a complaint alleging sex discrimination, they should immediately report it to their supervisor or the agency's Title IX Coordinator so that the state agency can promptly and appropriately respond to the situation. In certain circumstances, it may be necessary for staff to act immediately in order to stop continuing harassment or discriminatory behavior. THIS GUIDELINE IN NO WAY AFFECTS OR CHANGES STAFF'S RESPONSIBILITIES TO REPORT SUSPECTED CASES OF CHILD SEXUAL ABUSE OR OTHER CRIMINAL CONDUCT TO THE POLICE, CHILD PROTECTIVE SERVICES, OR OTHER AUTHORITIES.

I. DEFINTIONS AND STATEMENT OF PROHIBITED CONDUCT

There are basically three kinds of sex discrimination that are prohibited by law and this guideline: treating a person differently on the basis of sex, discriminatory policies and sexual harassment. Although these definitions are meant to provide a general understanding of the legal requirements, whether or not sex discrimination has occurred depends on the specific facts involved in each case.

A. Differential Treatment

Treating an individual (or class of individuals) differently because of that person's sex is a form of unlawful sex discrimination. As an example, it would be unlawful to discourage a female student from taking a course about computers based on the assumption that males are more technically adept than females, or to discourage a male student from taking a course about early childhood education based on the assumption that females are better caretakers of young children than males.

B. Discriminatory Guidelines

Enacting guidelines or utilizing administrative procedures that have a discriminatory effect on the basis of sex is also a form of sex discrimination. As an example, it would be unlawful for a state-operated school to offer sports programs only for boys and not offer sports for girls. It is not, however, discriminatory for a school to offer separate housing, toilet, athletic and other facilities on the basis of sex, so long as the facilities provided to each sex are comparable.

C. Sexual Harassment

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Sexual harassment is unwelcome behavior of a sexual nature by peers, teachers, administrators, or anyone a student must interact with in order to pursue school activities. Sexual harassment can consist of unwelcome advances, requests for special favors, and any other verbal, written, visual or physical conduct of a sexual nature. Although it is difficult to fully define sexual harassment because so much depends on the individual case, below are some general guidelines.

1. Sexual harassment can occur if a student is put in a position of having to bargain or exchange sexual favors in order to receive a benefit or avoid a negative consequence. For example, it would be illegal for a teacher to tell a student that the student must submit to sexual conduct in order to avoid a bad grade on a test.

2. Another type of sexual harassment can occur when unwelcome jokes, comments or visual displays of a sexual nature create a hostile environment or substantially interferes with a student's ability to learn. For example, if a physical education teacher repeatedly made remarks about students' bodies whenever students changed clothes in a locker room, that conduct would likely create a hostile environment and be considered unlawful sexual harassment.

3. Both boys and girls can be victims of sexual harassment. Both boys and girls, as well as men and women, can be considered the harasser. The victim and harasser do not have to be of the opposite sex. Sexual harassment between people of the same sex is just as detrimental and just as illegal as when the victim and harasser are of the opposite sex.

4. The harasser does not have to be the victim's teacher. Sexual harassment can occur because of the words or other actions of other students, or other staff at the state-operated school.

5. The victim does not have to be the person to whom the unwelcome sexual conduct is directed. The victim also may be someone who is affected by such conduct when it is directed toward another person.

6. Sexual harassment does not depend on the victim's having suffered a concrete injury as a result of the harasser's conduct. For example, improper sexual advances which do not result in the loss of some educational benefit to the victim may still constitute sexual harassment.

7. A victim of sexual harassment is not required to tell the harasser that the conduct is unwelcome.

D. Retaliation

The Arizona Department of Education and the state-operated schools covered by this guideline will not retaliate or permit retaliation against an individual who makes a report of sex discrimination or sexual harassment. Retaliation is a serious violation of this guideline. Unlawful retaliation includes taking some kind of negative action against students or staff who file a complaint pursuant to this guideline, or assist in the investigation process. Retaliation not only harms the individuals directly affected by it, but also undermines the confidence of other students in a fair complaint resolution process. Any person found to have retaliated against another individual involved in an investigation of sexual harassment shall be subject to appropriate disciplinary action, up to and including dismissal from employment or student discipline, in accordance with the guidelines of the state-operated school.

II. INDIVIDUALS COVERED BY THE GUIDELINE

This guideline applies to students attending schools operated by Arizona state agencies, for which ADE receives and passes through federal funds for the operation of an education activity or program. As of March 2004, students attending schools operated by the following state agencies are covered by this guideline:

Arizona Department of Corrections
Arizona Department of Juvenile Corrections
Arizona State Hospital
Arizona State Schools for the Deaf and Blind
Arizona State Prison Complex

The prohibitions against sex discrimination described above apply to all teachers, teaching assistants, coaches, administrators, contract employees, guest speakers, volunteers, janitorial or cafeteria staff, and students of state-operated schools.

This guideline does NOT apply to all students in the State of Arizona, but only to those students attending state-operated schools. Students who attend school district schools, accommodation

schools or charter schools should utilize their own school's guidelines and procedures for filing sex discrimination and sexual harassment complaints.

IV. INFORMAL RESOLUTION PROCEDURES

Sometimes problems of sex discrimination and sexual harassment may be resolved informally. Informal resolution may include talking or writing to the person who has taken the action that you believe is discriminatory. However, no law requires a student to try to resolve a problem informally before filing a formal complaint or taking legal action. In the case of sexual harassment, failure to express unwelcomeness to the harasser does not prevent a student from filing a complaint.

A student may report the incident of sex discrimination or sexual harassment to a teacher, administrator or counselor, but is not required to do so. If a teacher or other school employee does receive a report of sex discrimination or sexual harassment, however, that person must report it to the school's Title IX Coordinator, or to ADE's Title IX Coordinator, within three (3) business days so that appropriate investigation and action may be taken.

V. FORMAL COMPLAINT PROCEDURES

A. Confidentiality

Confidentiality will be maintained throughout the entire investigatory process to the extent practicable and as permitted by law. The Family Educational Rights Privacy Act ("FERPA") will be followed if students' educational records are reviewed or disclosed during an investigation. While every effort will made to ensure that information is provided only to people who have a need to know it, students should also be aware that the law imposes obligations to report cases of suspected child sexual abuse or other criminal conduct to the authorities. Nothing in this guideline does, or can, change these reporting obligations imposed by Arizona law.

B. Procedures for Students Attending State Operated Schools That Have an Existing Title IX Grievance Procedure.

Some state-operated schools already have a designated Title IX Coordinator and have established a procedure for students to use to file complaints regarding sex discrimination and sexual

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harassment. Information as to who the Title IX Coordinator is and how you should file a complaint should be readily available at your school.

If your school has such a procedure, you should follow it through to its conclusion. While you may notify the ADE Title IX Coordinator about your Complaint of sex discrimination or sexual harassment, in almost all cases the ADE Title IX Coordinator will allow the administrators at your school to investigate the complaint and attempt to resolve it.

Right to Appeal

If you are dissatisfied with the investigation or resolution of your Complaint of sex discrimination or sexual harassment conducted by your school, you may appeal in writing to the ADE Title IX Coordinator within ten business days of receiving written notice of the outcome of the investigation. Your appeal must state the particular reasons why you believe the school's resolution of the matter was incorrect. You may contact the ADE Title IX Coordinator in writing or by phone at:

ADE Title IX Coordinator/Human Resources Director
Arizona Department of Education
1535 West Jefferson Street, Bin #9
Phoenix, Arizona 85007
(602) 542-3186
humanresources@ade.az.gov

Although you do not have to send a copy of your appeal to your school's Title IX Coordinator, doing so will help ADE review your appeal in a timely manner. The ADE Title IX Coordinator or his/her designee will request information from the school, review your appeal and then notify you of the outcome within ten (10) business days of receiving the necessary information from the school. If additional time is needed to consider the appeal, the parties will be so advised and given an alternative time frame, not to exceed 45 days from the date the appeal was received by ADE.

Please note that ADE may not be in a position to require the school to impose disciplinary conduct on a particular individual. However, ADE will give full and impartial consideration to any appeals filed and will take actions necessary and appropriate to remedy instances of sex discrimination or sexual harassment.

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C. **Procedures for Students Attending State Operated Schools That DO NOT Have an Existing Title IX Grievance Procedure**.

If your school does not already have a Title IX procedure for filing and investigating complaints of sexual harassment or sex discrimination, you should follow these steps to file a Complaint.

Form of Complaint. Complaints of sex discrimination and sexual harassment will be accepted in writing or orally. You may file a Complaint or request a Complaint form by contacting:

ADE Title IX Coordinator/Human Resources Director
Arizona Department of Education
1535 West Jefferson Street, Bin # 9
Phoenix, Arizona 85007
(602) 542-3186
humanresources@ade.az.gov

A complaint need not be made on an official form in order for the ADE Title IX Coordinator to accept it, however.

Content of Complaint. A Complaint alleging sex discrimination or sexual harassment should include the following information: your name, a description of the offending behavior-including times, places, and the name of or identifying information about the alleged perpetrator, and the names or descriptions of any witnesses to the conduct. If you have written documentation supporting your claims, that should be included as well.

Processing of Complaints. The ADE Title IX Coordinator or his/her designee is responsible for overseeing the processing of sex discrimination and sexual harassment complaints.

1. Investigator. After receiving a complaint of sex discrimination or sexual harassment, the ADE Title IX Coordinator shall conduct, or appoint someone to conduct, an investigation of the complaint. Depending on the circumstances, the ADE Title IX Coordinator may appoint an administrator at your school to conduct the investigation.

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2. Timing – Interview of Person Filing Complaint. Specifically, the Title IX Coordinator or his/her designee shall contact the person filing the Complaint within five (5) business days after ADE receives the Complaint. The Title IX Coordinator or his/her designee will attempt to arrange a telephonic or in-person interview with the person filing the Complaint within ten (10) business days after receiving the Complaint. Students who are being interviewed as part of an investigation have the right to have their parents or another adult present at the interview.
3. Objectivity. The complainant is entitled to an investigation conducted by an impartial investigator. Thus, if the people charged with overseeing or investigating sexual harassment complaints are implicated in the complaint, or have any personal or professional stake in the process that would cause a conflict of interest, the Title IX Coordinator shall conduct the investigation and make findings or shall designate someone impartial to do so.
4. Investigation Process. The ADE Title IX Coordinator or his/her designee will interview witnesses and gather relevant documentation to decide whether or not sex discrimination or sexual harassment occurred. The complainant and/or the alleged harasser may have a representative present during any interviews conducted. In determining whether alleged conduct constitutes sex discrimination or sexual harassment occurred, the totality of the circumstances, the nature of the conduct and the context in which the alleged conduct occurred will be considered. Allegations of sexual harassment will be evaluated using a preponderance of the evidence standard-that is, before imposing any sanctions the Title IX Coordinator or his/her designee must conclude that it is more likely than not that the harassment occurred.
5. Timing – Concluding the investigation. Within 30 days of receiving the complaint, the ADE Title IX Coordinator or his/her designee shall make a finding of whether sex discrimination and/or sexual harassment occurred. However, if the Title IX Coordinator or his/her designee believes that more time will be necessary, the Coordinator will advise the parties as to when the Coordinator expects to complete the investigation and will attempt to do so within 60 days of receiving the complaint.
6. Notice of Outcome. Within five (5) business days after concluding the investigation**,** the ADE Title IX Coordinator or his/her designee shall notify the parties to the proceeding of his/her findings about whether or not sex discrimination or sexual harassment occurred.

7. Appeals. A party who is dissatisfied with the investigation or resolution of an allegation of sexual harassment may appeal in writing to the ADE Title IX Coordinator or the Deputy Superintendent of Public Instruction within ten (10) business days of receiving written notice of the outcome of the investigation. The Deputy Superintendent of Public Instruction can be contacted by writing to: Arizona Department of Education, Deputy Superintendent of Public Instruction, 1535 West Jefferson Street, Phoenix, Arizona 85007. The party must specify the particular grounds upon which the appeal is based. The Title IX Coordinator or Deputy Superintendent of Public Instruction will respond to the appeal within ten (10) business days. If additional time is needed to consider the appeal, the parties will be so advised and given an alternative time frame, not to exceed 30 days from the date the appeal was received by ADE.

VI. SANCTIONS

Students or staff members of state-operated schools who have engaged in sex discrimination and sexual harassment shall be disciplined appropriately, up to and including employee discharge or student discipline in accordance with the guidelines of the state-operated school.

VII. OTHER LEGAL REMEDIES

Although students are encouraged to utilize the procedures set forth above, victims of sex discrimination or sexual harassment may also file a complaint with an appropriate government agency, such as the Office for Civil Rights within the U.S. Department of Education, or file a grievance under the relevant collective bargaining agreement or, where allowed, file a civil lawsuit.

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ROUTED TO AND READ BY:

Signature (no initials)	Date	Signature (no initials)	Date

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