

**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 the 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 Occupational §  
Safety and Health Administration, §  
§  
Defendants. §

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**PLAINTIFFS' MOTION FOR LEAVE TO FILE ADDITIONAL EXHIBIT**

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Pursuant to LR 56.7, Plaintiffs respectfully move the Court for leave to file as Exhibit W the attached Declaration of E. Todd Presnell in support of Plaintiffs' Application for Preliminary Injunction (ECF Nos. 11, 52). Plaintiffs became aware of Exhibits 1 & 2 to the proposed Exhibit W on the afternoon of Friday, August 19, 2016.

Plaintiffs submit that they have good cause as to why the Court should permit the filing of the proposed Exhibit W. In addition to just having received notice of Exhibits 1 & 2 to the proposed Exhibit W, much of the briefing to date as well as a portion of the hearing held by the Court on Friday, August 12, 2016 focused on the nature and breadth of enforcement actions instituted by Defendants. Plaintiffs believe that the proposed Exhibit W demonstrates not only continued enforcement efforts by Defendants in the face of mounting opposition to its new rules, but an unlimited geographic scope of enforcements by the Defendants.

As to the case *sub judice*, the enforcement measure represented by Exhibit 2 to the proposed Exhibit W occurs within the borders of one of the Plaintiffs—Tennessee. Plaintiffs aver that this new enforcement action affirms their argument that they, and all States, are clearly the object of final agency action on the part of the Defendants, and that all States face imminent and irreparable harm to their sovereign interest to exercise control over their educational institutions, and the intimate facilities within them.

Plaintiffs respectfully submit that the reasons articulated herein are good cause for this supplemental filing, and pray that the Court will enter an order granting leave to file the proposed Exhibit W.

Respectfully submitted this the 19th day of August, 2016,

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 D. LEONIE  
Associate Deputy Attorney General for  
Special Litigation

/s/ Austin R. Nimocks  
AUSTIN R. NIMOCKS  
Associate Deputy Attorney General for  
Special Litigation  
Texas Bar No. 24002695  
Austin.Nimocks@texasattorneygeneral.gov

MICHAEL TOTH  
Senior Counsel for Special Litigation

Office of Special Litigation  
OFFICE OF THE ATTORNEY GENERAL  
OF TEXAS  
P.O. Box 12548, Mail Code 009  
Austin, Texas 78711-2548  
Tel: 512-936-1414

*ATTORNEYS FOR PLAINTIFFS*

### **CERTIFICATE OF CONFERENCE**

Pursuant to Local Civil Rule 7.1.a., the undersigned counsel sought consult with counsel for Defendants via e-mail, though this effort came after normal business hours on Aug. 19, 2016. Plaintiffs acknowledge that Mr. Berwick is still out of the country, as per the notice he filed with the Court (ECF No. 53). Defendants did not have a fair opportunity to respond to Plaintiffs' effort to conference before the motion was filed, but Plaintiffs filed the motion in that it is time-sensitive.

/s/ Austin R. Nimocks  
Austin R. Nimocks

### **CERTIFICATE OF SERVICE**

I, Austin R. Nimocks, hereby certify that on this the 19th day of August, 2016, a true and correct copy of the foregoing document was transmitted via using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Austin R. Nimocks  
Austin R. Nimocks

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

STATE OF TEXAS, *et al*

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al*

Defendants.

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§

CIVIL ACTION NO. 7:16-cv-00054-O

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DECLARATION OF E. TODD PRESNELL

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My name is E. Todd Presnell and I am over the age of 18 and fully competent to make this Declaration. I make the statements herein based on my own personal knowledge, and if called to testify I could and would do so competently as follows:

1. I am an attorney for the Sumner County Board of Education in Sumner County, Gallatin, Tennessee.
2. On or about May 19, 2016, my office received a copy of a letter sent by the American Civil Liberties Union of Tennessee to the Office of Civil Rights, U.S. Department of Education referencing "Discrimination Complaint against Sumner County, Tennessee Schools for violations of Title IX: Discrimination against transgender students." A true and correct copy of the letter is attached hereto as Exhibit 1.
3. On or about August 15, 2016, the Sumner County Board of Education received a letter from the Office of Civil Rights of the U.S. Department of Education. A true and correct copy of the letter received is attached hereto as Attachment 2, except that the name of the minor student and her high school are redacted.
4. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 19<sup>th</sup> day of August, 2016.

  
\_\_\_\_\_  
E. Todd Presnell

**EXHIBIT W**



May 19, 2016

Via U.S. Mail and E-mail to [ocr@ed.gov](mailto:ocr@ed.gov) and [ocr.atlanta@ed.gov](mailto:ocr.atlanta@ed.gov)

Office for Civil Rights  
Atlanta Office  
U.S. Department of Education  
61 Forsyth Street S.W., Suite 19T10  
Atlanta, GA 30303-8927

Re: Discrimination Complaint against Sumner County, Tennessee  
Schools for violations of Title IX: Discrimination against  
transgender students

AMERICAN CIVIL  
LIBERTIES UNION  
FOUNDATION  
OF TENNESSEE  
P.O. BOX 120160  
NASHVILLE, TN 37212  
T/ (615) 320-7142  
F/ (615) 691-7219  
WWW.ACLU-TN.ORG

To whom it may concern:

We represent the parents and a student<sup>1</sup> currently attending a Sumner County, Tennessee public high school and write to file this formal complaint on their behalf. Sumner County has a policy and practice of denying transgender students access to the same restrooms, locker room facilities, and educational opportunities that correspond to their gender identity. The school's decision to exclude transgender boys from the boys' facilities and transgender girls from the girls' facilities violates Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a).

Shortly before her 9th grade year in the Sumner County schools, Mary Doe and her parents met with school officials to inform them that she is a transgender girl. The school principal reviewed the school's policies with the family, including a requirement that Mary Doe use either the boy's restroom, restrooms located in the faculty lounge or a restroom designed for special needs children (which she is not). Using the faculty restroom often requires that Mary Doe explain her presence in the faculty lounge to members of the faculty or staff. Using the special needs restroom often requires Mary Doe to enter the classroom where the restroom is located while class is in session and explain her presence to the teacher. Students who are not transgender are not required to use these separate restrooms.

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<sup>1</sup> For the purposes of this Complaint, our client's name has not been identified other than as Mary Doe in the interest of protecting the confidentiality of our clients. The identity of the parents and student represented are contained in a separate attachment along with other identifying information. We ask that this information be kept confidential.

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Atlanta Office  
U.S. Department of Education  
May 19, 2016  
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Mary Doe used the girl's restroom for several months without incident. In January 2016, Mary Doe and her parents were informed that the school had received complaints from students and that she would be prohibited from using the girl's restroom in the future. Neither she nor her parents have ever seen the alleged complaints. In early February 2016, Mary Doe and her parents were given a copy of the Sumner County "Procedural Guidance Regarding Transgender Students" by the Safe Schools Coordinator for Sumner County Schools. [hereinafter "Procedural Guidance"] The document sets forth several rules governing transgender students, not all of which are in compliance with the requirements of Title IX or the federal Constitution.<sup>2</sup>

In addition to the prohibition on the use of gender segregated facilities, Mary Doe was initially not enrolled in the Lifetime Wellness course. The Lifetime Wellness course is part of the required standard curriculum for students and has a physical education component. In the 2015-2016 school year, the Lifetime Wellness course was gender segregated. The parents received some indication from members of the administration that Mary Doe was not allowed to register for this class because of her gender identity. Sumner County disputes this, claiming that Mary Doe was required to retake certain academic classes which conflicted with the Lifetime Wellness course.

After several conversations and meetings, including a meeting with an attorney for the Sumner County School Board and Mary Doe's attorneys, Sumner County confirmed to Mary Doe and her parents that she will not be allowed to use the girls' restrooms or locker rooms and that she will be subjected to discipline should she continue to do so. On May 18, 2016, a revised version of the Procedural Guidance was provided to the parents.<sup>3</sup> The new Procedural Guidelines revises Sumner County's approach to the Lifetime Wellness course, making it a coed class. However, it reiterates the policy that transgender students will not be allowed to use the locker room facilities that correspond with their gender identity.

The Procedural Guidance requires that transgender students use the restroom facilities for the gender assigned at birth or, upon request, a private restroom "as long as it is feasible and doable." (Id. at ¶ 4). Transgender students are prohibited from using locker room facilities corresponding with their gender identity. Although "[i]f the parent/guardian requests for the student to have access to a private place

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<sup>2</sup> A copy of the February 2016 Procedural Guidance Regarding Transgender Students given to the parents is attached as Exhibit "A."

<sup>3</sup> A copy of the May 2016 Procedural Guidance Regarding Transgender Students given to the parents is attached as Exhibit "B."



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May 19, 2016  
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for the student to change clothes, the school will honor that request as long [sic] it is feasible.” (Id. at ¶ 5).

Title IX of the Education Amendments of 1972 (“Title IX”) prohibits discrimination based on sex in any education program, such as a public school, that receives federal financial assistance. Sumner County receives federal financial assistance and is subject to that law. Sumner County’s Procedural Guidance Regarding Transgender Students, and any action taken to enforce it, are unlawful.

On May 13, 2016, the U.S. Department of Justice, Civil Rights Division and the U.S. Department of Education, Office for Civil Rights, issued a joint letter providing “significant guidance” to public schools regarding the requirements of Title IX with regard to the treatment of transgender students. U.S. Department of Justice Civil Rights Division and U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter on Transgender Students* (May 13, 2016). The letter states, “[w]hen 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.” Id. at p. 3.

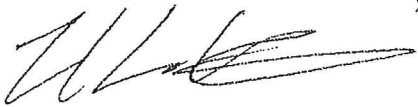
We respectfully request that the Office for Civil Rights find that Sumner County is violating Title IX by prohibiting Mary Doe from using female restrooms and locker rooms. We ask that the Office for Civil Rights take all necessary steps to ensure compliance with the requirements of Title IX. We further ask that Sumner County be required to:

- (1) permit Mary Doe to use the female restrooms and locker rooms on District property and participate in gender segregated activities or classes with other females;
- (2) permit all transgender students to participate in such activities and access such facilities consistent with their gender identity;
- (3) provide training to all relevant school officials including to members of the School Board and school principals regarding the rights of student under Title IX and the United States Constitution, including the rights of transgender students; and
- (4) revise all relevant Sumner County policies or procedures to ensure conformity with the requirements of Title IX.

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Atlanta Office  
U.S. Department of Education  
May 19, 2016  
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Thank you very much for your assistance in this matter. Should you have any questions or wish to speak with our clients, please feel free to contact Thomas H. Castelli at 615-320-7142x303 or [tcastelli@aclu-tn.org](mailto:tcastelli@aclu-tn.org) or Abby R. Rubenfeld at 615-386-9077 or [arubefeld@rubenfeldlaw.com](mailto:arubefeld@rubenfeldlaw.com).

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Castelli', with a long horizontal flourish extending to the right.

Thomas H. Castelli  
Legal Director

Abby R. Rubenfeld  
ACLU-TN Cooperating Attorney  
Rubenfeld Law Office, PC

Procedural Guidance Regarding Transgender Students

1. Katie Brown, Safe Schools coordinator, will be the district contact person for questions/concerns/guidance regarding transgender issues.
2. When a parent/guardian or student informs the school administration that the student is transgender, the principal will schedule and conduct a meeting with the parent/guardian to discuss the student's needs.
3. A written agreement that documents this meeting and the decisions made according to SCS procedures will be signed by the parent and the principal. The principal will file and keep this documentation for future reference and will provide a copy to the parent.
4. Restroom accommodations for transgender students---Students will utilize the restroom for the gender of which they were born. If a parent/guardian requests for the student to have access to private restroom facilities, the school will honor that request as long it is feasible and doable.
5. P.E. or gym accommodations for transgender students---The student will participate in classes for the gender of which they were born. The principal will meet with the P. E. teacher before the student begins classes to design a plan for ensuring that the teacher facilitates mindfulness of the student. If a parent/guardian requests a private place for the student to change clothes, the school will provide a place to the best of its abilities.
6. Virtual P.E. offering for transgender students---If the principal and parent /guardian determine that a high school transgender student's needs are best met through a virtual P.E. course, then that will be arranged through the E.B. Wilson virtual school offerings.
7. Dress code for transgender students---Students will follow the SCS dress code that corresponds with the gender with which they have identified and reported to the principal of the school.
8. Identifying with name and pronoun---Research derived from a report by the American Academy of Pediatrics states, "Around two-years-old, children become conscious of the physical differences between boys and girls. Before their third birthday, most children are easily able to label themselves as either a boy or a girl. By age four, most children have a stable sense of their gender identity." With this information in mind and to avoid any situations that might distract from the educational process, school principals will conference with the parent/guardian to determine the gender that the student will identify with fully before he or she enters school. When an identification of gender by the student is determined and reported to the principal, all school personnel will address the student with the name and pronoun corresponding to that gender identification. If the parent/guardian does not identify a gender for the student, then the school will default to using the gender which is on the student's birth certificate.
9. Regarding school/district identification – Tennessee law requires schools to identify a student (regardless of age) by the name on the student's birth certificate. TCA 49-6-5106 provides that "such student shall be known by such lawful name in all facets of school records, report cards, student testing and any school activities." Schools may change names on student records due to marriage or following a court order, but only

after receipt of a marriage certificate or court order. See more at: <https://www.tn.gov/sbe/topic/frequently-asked-questions#sthash.jivLuUSs.dpuf>.

10. Confidentiality--Administration, faculty, and staff of each school where transgendered students are enrolled will be expected to follow confidentiality and FERPA laws regarding the student's identity and needs.
11. Harassment or bullying of any transgender student will not be tolerated and will be addressed according to SCS Board policy.

Procedural Guidance Regarding Transgender Students

1. The Coordinator for the Office of Safe Schools, Healthy Students is the district contact person for questions/concerns/guidance regarding transgender issues.
2. When a parent/guardian or student informs the school administration that the student is transgender, the principal will schedule and conduct a meeting with the parent/ guardian to discuss the student's needs.
3. A written agreement that documents this meeting and the decisions made according to SCS procedures will be signed by the parent and the principal. The principal will file and keep this documentation for future reference and will provide a copy to the parent.
4. Restroom accommodations for transgender students---Students will utilize the restroom for the gender of which they were born. If a parent/guardian requests for the student to have access to private restroom facilities, the school will honor that request as long it is feasible and doable.
5. Lifetime Wellness for transgender students---SCS offers its Lifetime Wellness course on a co-ed basis with no gender class separation. This course includes a physical-education component. Students who need to change clothes before and/or after participating in the physical-education component shall utilize a restroom or locker-room facility for the gender of which they were born. . If a parent/guardian requests for the student to have access to a private facility to change clothes, the school will honor that request as long it is feasible.
6. Online Lifetime Wellness offering for transgender students---If the principal and parent /guardian determine that a high school transgender student's needs are best met through an online Lifetime Wellness course, then that will be arranged through the E.B. Wilson school offerings.
7. Dress code for transgender students---Students will follow the SCS dress code that corresponds with the gender with which they have identified and reported to the principal of the school.
8. Identifying with name and pronoun---Research derived from a report by the American Academy of Pediatrics states, "Around two-years-old, children become conscious of the physical differences between boys and girls. Before their third birthday, most children are easily able to label themselves as either a boy or a girl. By age four, most children have a stable sense of their gender identity." With this information in mind and to avoid any situations that might distract from the educational process, school principals will conference with the parent/guardian to determine the gender that the student will identify with fully before he or she enters school. When an identification of gender by the student is determined and reported to the principal, all school personnel will address the student with the name and pronoun corresponding to that gender identification. If the parent/guardian does not identify a gender for the student, then the school will default to using the gender which is on the student's birth certificate.
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receipt of a marriage certificate or court order. See more at:  
<https://www.tn.gov/sbe/topic/frequently-asked-questions#sthash.jivLuUSs.dpuf>.

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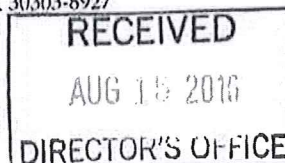
UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

61 FORSYTH ST., SOUTHWEST, SUITE 19T10  
ATLANTA, GA 30303-8927

REGION IV  
ALABAMA  
FLORIDA  
GEORGIA  
TENNESSEE

August 9, 2016

Del R. Phillips III, Ph.D.  
Director of Schools  
Sumner County School District  
695 East Main Street  
Gallatin, TN 37066



Re: Complaint #04-16-1526

Dear Dr. Phillips:

On June 15, 2016, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint alleging discrimination on the basis of sex by Sumner County Schools (District). We have determined that we have the authority to investigate this complaint consistent with our complaint procedures and applicable law.

Specifically, the American Civil Liberties Union of Tennessee (Complainant) alleged that the District discriminated against [REDACTED] (Student), who is transgender and is a 10<sup>th</sup> grade student at [REDACTED] High School (School), on the basis of sex because the District has:

1. prohibited the Student from using the girls' restroom and locker room.
2. subjected the Student to a hostile sexual environment by failing to prevent students from harassing her.
3. not allow the Student to take the required Wellness course.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any program or activity that receives Federal financial assistance from the Department. As a recipient of Federal financial assistance from the Department, the District is subject to Title IX. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

Based on the above, OCR will investigate the following issues:

1. Whether the District by denying the Student access to the girls' bathroom and locker room, subjects her to different treatment on the basis of sex in noncompliance with the Title IX implementing regulation at 34 C.F.R. § 106.31.
2. Whether the District, by failing to address the Student's parents' concerns about other School students' harassing behavior, has subjected the Student to a hostile sexual

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

Complaint #04-16-1526

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environment in noncompliance with the Title IX implementing regulation at 34 C.F.R. § 106.31.

3. Whether the District, by not following its procedures and denying the Student enrollment in the Wellness course, has subjected the Student to differential treatment on the basis of sex in noncompliance with the Title IX implementing regulation at 34 C.F.R. § 106.31.

Because OCR has determined that it has jurisdiction and that the complaint was filed timely, it is opening this allegation for investigation. Please note that opening these allegations for investigation in no way imply that OCR has made a determination with regard to its merit.

During the investigation, OCR is a neutral fact-finder, collecting and analyzing relevant evidence from the complainant, the recipient, and other sources as appropriate. OCR will ensure that its investigation is legally sufficient and is dispositive of these allegations, in accordance with the provisions of *Article III of the Case processing Manual*.

Please read the enclosed document entitled "OCR Complaint Processing Procedures" for information about:

- OCR's complaint evaluation and investigation procedures, including the availability of Early Complaint Resolution (ECR);
- Regulatory prohibitions against retaliation, intimidation, and harassment of persons who file complaints with OCR or participate in an OCR investigation; and,
- Application of the Freedom of Information Act and the Privacy Act to OCR investigations.

OCR intends to conduct a prompt investigation of this complaint. The regulation implementing Title VI, at 34 C.F.R. § 100.6(b) and (c), requires that a recipient of Federal financial assistance make available to OCR information that may be pertinent to reach a compliance determination. This requirement is incorporated by reference by the regulation implementing Title IX, at 34 C.F.R. § 106.71. Pursuant to 34 C.F.R. § 100.6(c) and 34 C.F.R. § 99.31(a)(3)(iii), of the regulation implementing the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, OCR may review personally identifiable records without regard to considerations of privacy or confidentiality.

Accordingly, please forward an unredacted copy of the following information to us within fifteen (15) calendar days from the date of this letter (please provide the requested data in electronic format, if available):

1. Name, title, office address and phone number for the District's Title IX Coordinator.
2. The District's Title IX notice of nondiscrimination and grievance procedures, indicating the publication locations of the same, if not otherwise evident.



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3. A copy of any District or School policy regarding access to, and use of, gender-specific bathrooms and locker rooms in the District.
4. Copies of all correspondence and notes reflecting all communications amongst District staff internally, as well as externally with the Complainant, the Student and/or his parents, regarding the Student's access to bathrooms and locker rooms in the District.
5. Any complaint(s) of harassment filed on behalf or by the Student or the Student's parents received by the District.
6. If applicable, the District's response to the complaint(s).
7. All complaints, e.g., phone calls, emails, letters, etc., received by the School or District regarding the Student using the girls' bathroom or locker room.
8. The high school course catalog for the District, and if different, the School's course catalog.
9. The District's policy and procedures for deferring student enrollment in the Wellness course.
10. A list of the students in the 2015-2016 and 2016-2017 school years, including the Student, whose enrollment in the Wellness course was deferred. For each student, including the Student, please state why and when enrollment was deferred.
11. A statement outlining the District's position in response to the complaint allegations and any additional information the District deems relevant to the investigation of the allegations in this complaint.

Thank you for your cooperation in this matter. In addition to the information requested above, OCR may need to request additional information and interview pertinent personnel. If an on-site visit is determined to be necessary, you will be contacted to schedule a mutually convenient time for the visit.

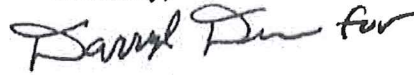
Please notify OCR of the name, address, and telephone number of the person who will serve as the District's contact person during the resolution of this complaint. We would like to speak with this person as soon as possible regarding the information requested in this letter.

Pursuant to Section 302 of OCR's Case Processing Manual, a complaint may be resolved at any time when, before the conclusion of an investigation, the recipient expresses an interest in resolving the complaint. Please contact Pamela Simmons, Senior Attorney, at any time should you wish to discuss a Section 302 voluntary resolution.

OCR is committed to prompt and effective service. If you have any questions, please contact the assigned OCR investigator, Martin Chen, at (404) 974-9357, or via email at [martin.chen@ed.gov](mailto:martin.chen@ed.gov), or me at (404) 974-9374.

Complaint #04-16-1526  
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Sincerely,

A handwritten signature in black ink, appearing to read "G. Anthony Brown". The signature is written in a cursive style with a prominent flourish at the end.

G. Anthony Brown, Esq.  
Acting Team Leader

Enclosure

## OCR COMPLAINT PROCESSING PROCEDURES

### LAWS ENFORCED BY OCR

OCR enforces the following laws:

- Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color or national origin;
- Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex;
- Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability;
- Age Discrimination Act of 1975, which prohibits discrimination on the basis of age;
- Title II of the Americans with Disabilities Act of 1990 which prohibits discrimination on the basis of disability;
- Boy Scouts of America Equal Access Act, part of the No Child Left Behind Act of 2001, which prohibits denial of access to or other discrimination against the Boy Scouts or other Title 36 U.S.C. youth groups in public elementary schools, public secondary schools, local education agencies, and state education agencies that have a designated open forum or limited public forum.

### EVALUATION OF THE COMPLAINT

OCR evaluates each complaint that it receives in order to determine whether it can investigate the complaint. OCR makes this determination with respect to each allegation in the complaint. For example, OCR must determine whether OCR has legal authority to investigate the complaint; that is, whether the complaint alleges a violation of one or more of the laws OCR enforces. OCR must also determine whether the complaint is filed on time. Generally, a complaint must be filed with OCR within 180 calendar days of the last act that the complainant believes was discriminatory.<sup>1</sup> If the complaint is not filed on time, the complainant should provide the reason for the delay and request a waiver of this filing requirement. OCR will decide whether to grant the waiver. In addition, OCR will determine whether the complaint contains enough information about the alleged discrimination to proceed to investigation. If OCR needs more information in order to clarify the complaint, it will contact the complainant; the complainant has 20 calendar days within which to respond to OCR's request for information.

OCR will dismiss the complaint if OCR determines that:

- OCR does not have legal authority to investigate the complaint;
- The complaint fails to state a violation of one of the laws OCR enforces;
- The complaint was not filed timely and that a waiver will not be granted;

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- The complaint is unclear or incomplete and the complainant does not provide the information that OCR requests within 20 calendar days of OCR's request;
- The allegations raised by the complaint have been resolved;
- The complaint has been investigated by another Federal, state, or local civil rights agency or through a recipient's internal grievance procedures, including due process proceedings, and the resolution meets OCR regulatory standards or, if still pending, OCR anticipates that there will be a comparable resolution process under comparable legal standards;
- The same allegations have been filed by the complainant against the same recipient in state or Federal court;
- The allegations are foreclosed by previous decisions of the Federal courts, the U.S. Secretary of Education, the U.S. Department of Education's Civil Rights Reviewing Authority, or OCR policy determinations.

## OPENING THE COMPLAINT FOR INVESTIGATION

If OCR determines that it will investigate the complaint, it will issue letters of notification to the complainant and the recipient. Opening a complaint for investigation in no way implies that OCR has made a determination with regard to the merits of the complaint. During the investigation, OCR is a neutral fact-finder. OCR will collect and analyze relevant evidence from the complainant, the recipient, and other sources as appropriate. OCR will ensure that investigations are legally sufficient and are dispositive of the allegations raised in the complaint.

## INVESTIGATION OF THE COMPLAINT

OCR may use a variety of fact-finding techniques in its investigation of a complaint. These techniques may include reviewing documentary evidence submitted by both parties, conducting interviews with the complainant, recipient's personnel, and other witnesses, and/or site visits. At the conclusion of its investigation, OCR will determine with regard to each allegation that:

- there is insufficient evidence to support a conclusion that the recipient failed to comply with the law, or
- a preponderance of the evidence supports a conclusion that the recipient failed to comply with the law

OCR's determination will be explained in a letter of findings sent to the complainant and recipient. Letters of findings issued by OCR address individual OCR cases. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

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## RESOLUTION OF THE COMPLAINT AFTER A DETERMINATION OF NONCOMPLIANCE

If OCR determines that a recipient failed to comply with one of the civil rights laws that OCR enforces, OCR will contact the recipient and will attempt to secure the recipient's willingness to negotiate a voluntary resolution agreement. If the recipient agrees to resolve the complaint, the recipient will negotiate and sign a written resolution agreement that describes the specific remedial actions that the recipient will undertake to address the area(s) of noncompliance identified by OCR. The terms of the resolution agreement, if fully performed, will remedy the identified violation(s) in compliance with applicable civil rights laws. OCR will monitor the recipient's implementation of the terms of the resolution agreement to verify that the remedial actions agreed to by the recipient have been implemented consistent with the terms of the agreement and that the area(s) of noncompliance identified were resolved consistent with applicable civil rights laws.

If the recipient refuses to negotiate a voluntary resolution agreement or does not immediately indicate its willingness to negotiate, OCR will inform the recipient that it has 30 days to indicate its willingness to engage in negotiations to voluntarily resolve identified areas of noncompliance, or OCR will issue a Letter of Finding to the parties providing a factual and legal basis for a finding non-compliance.

If, after the issuance of the Letter of Finding of non-compliance, the recipient continues to refuse to negotiate a resolution agreement with OCR, OCR will issue a Letter of Impending Enforcement Action and will again attempt to obtain voluntary compliance. If the recipient remains unwilling to negotiate an agreement, OCR will either initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant or continue Federal financial assistance to the recipient, or will refer the case to the Department of Justice. OCR may also move immediately to defer any new or additional Federal financial assistance to the institution.

## RESOLUTION OF THE COMPLAINT PRIOR TO THE CONCLUSION OF THE INVESTIGATION

### **Early Complaint Resolution (ECR):**

Early Complaint Resolution allows the parties (the complainant and the institution which is the subject of the complaint) an opportunity to resolve the complaint allegations quickly; generally, soon after the complaint has been opened for investigation. If both parties are willing to try this approach, and if OCR determines that Early Complaint Resolution is appropriate, OCR will facilitate settlement discussions between the parties and work with the parties to help them understand the legal standards and possible remedies. To the extent possible, staff assigned by OCR to facilitate the Early Complaint Resolution process will not be the staff assigned to the investigation of the complaint. OCR does not approve, sign or endorse any agreement reached between the parties as a result of Early Complaint Resolution, and OCR does not monitor the agreement. However, if the recipient institution

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does not comply with the terms of the agreement, the complainant may file another complaint with OCR within 180 days of the date of the original discrimination or within 60 days of the date the complainant learns of the failure to comply with the agreement, whichever date is later.

### **Resolution of the Complaint Prior To the Conclusion of an Investigation**

A complaint may also be resolved before the conclusion of an investigation, if the recipient expresses an interest in resolving the complaint. If OCR determines that the resolution of the complaint before the conclusion of an investigation is appropriate, OCR will attempt to negotiate an agreement with the recipient. OCR will notify the complainant of the recipient's request and will keep the complainant informed throughout all stages of the resolution process. The provisions of the resolution agreement that is reached must be aligned with the complaint allegations and the information obtained during the investigation, and must be consistent with applicable regulations. A resolution agreement reached before the conclusion of an investigation will be monitored by OCR.

## APPEAL OF OCR'S DETERMINATIONS

OCR is committed to a high quality resolution of every case. OCR affords an opportunity to the complainant to submit an appeal of OCR's letter finding insufficient evidence of a violation. The appeal process provides an opportunity for complainants to bring information to OCR's attention that would change OCR's decision. The appeal process will not be a *de novo* review of OCR's decision (i.e., OCR will not review the matter as if no previous decision had been rendered).

If the complainant disagrees with OCR's decision, he or she may send a written appeal to the Director of the Enforcement Office (Office Director) that issued the determination. If the complainant has documentation to support the appeal, the documentation must be submitted with the complainant's appeal. In an appeal, the complainant must explain why he or she believes the factual information was incomplete, the analysis of the facts was incorrect, and/or the appropriate legal standard was not applied, *and* how this would change OCR's determination in the case. Failure to do so may result in the denial of the appeal.

In order to be timely, an appeal (including any supporting documentation) must be submitted within 60 days of the date of the determination letter. The Office Director may exercise discretion in granting a waiver of the 60-day timeframe where:

1. the complainant was unable to submit the appeal within the 60-day timeframe because of illness or other incapacitating circumstances and the appeal was filed within 30 days after the period of illness or incapacitation ended; or
2. unique circumstances generated by agency action have adversely affected the complainant.

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A written response to an appeal will be issued. A decision of the Office Director constitutes the agency's final decision. Such a decision will inform the complainant that he or she "may have the right to file a private suit in federal court whether or not OCR finds a violation."

## ADDITIONAL INFORMATION

### **Right to File a Separate Court Action**

The complainant may have the right to file suit in Federal court, regardless of OCR's findings. OCR does not represent the complainant in case processing, so if the complainant wishes to file a court action, he or she must do so through his or her own attorney or on his or her own through the court's pro se clerk's office.

If a complainant alleges discrimination prohibited by the Age Discrimination Act of 1975, a civil action in Federal court can be filed only after the complainant has exhausted administrative remedies. Administrative remedies are exhausted when either of the following has occurred:

- 1) 180 days have elapsed since the complainant filed the complaint with OCR and OCR has made no finding; or
- 2) OCR issues a finding in favor of the recipient. If this occurs, OCR will promptly notify the complainant and will provide additional information about the right to file for injunctive relief.

### **Prohibition against Intimidation or Retaliation**

An institution under the jurisdiction of the Department of Education may not intimidate, threaten, coerce, or retaliate against anyone who asserts a right protected by the civil rights laws that OCR enforces, or who cooperates in an investigation. Anyone who believes that he or she has been intimidated or retaliated against should file a complaint with OCR.

### **Investigatory Use of Personal Information**

In order to investigate a complaint, OCR may need to collect and analyze personal information such as student records or employment records. No law requires anyone to give personal information to OCR and no formal sanctions will be imposed on complainants or other persons who do not cooperate in providing information during the complaint investigation and resolution process. However, if OCR is unable to obtain the information necessary to investigate a complaint, we may have to close the complaint.

The Privacy Act of 1974, 5 U.S.C. § 552a, and the Freedom of Information Act (FOIA), 5 U.S.C. § 552, govern the use of personal information that is submitted to all Federal agencies and their individual components, including OCR. The Privacy Act of 1974 protects individuals from the misuse of personal information held by the Federal government. It applies to records that are maintained by the government that are retrieved by the individual's name, social security number, or other personal identifier. It regulates the collection, maintenance, use and dissemination of certain personal information in the files of Federal agencies.

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The information that OCR collects is analyzed by authorized personnel within the agency and will be used by the government only for authorized civil rights compliance and enforcement activities. However, in order to investigate or resolve a complaint, OCR may need to reveal certain information to persons outside the agency to verify facts or gather additional information. Such details could include the name, age, or physical condition of the person who is the alleged subject of discrimination. Also, OCR may be required to reveal information requested under FOIA, which gives the public the right of access to records of Federal agencies. OCR will not release any information about a complainant to any other agency or individual except in the one of the 11 instances defined in the Department's regulation at 34 C.F.R. § 5b.9(b).

OCR does not reveal the name or other identifying information about an individual (including individuals who file complaints or speak to OCR) unless (1) such information would assist in the completion of an investigation or for in enforcement activities against an institution that violates the laws, or; (2) unless such information is required to be disclosed under the FOIA or the Privacy Act. OCR will keep the identity of complainants confidential except to the extent necessary to carry out the purposes of the civil rights laws, or unless disclosure is required under the FOIA, the Privacy Act or otherwise by law; or (3) such information is permitted to be disclosed under both the FOIA and the Privacy Act and OCR determines disclosure would further an interest of the Department and the United States.

However, OCR can release certain information about your complaint to the press or general public, including the name of the school or institution; the date your complaint was filed; the type of discrimination included in your complaint; the date your complaint was resolved, dismissed or closed; the basic reasons for OCR's decision; or other related information. Any information OCR releases to the press or general public will not include your name or the name of the person on whose behalf you filed the complaint except as noted in the paragraph above.

FOIA gives the public the right of access to records and files of Federal agencies. Individuals may obtain items from many categories of records of the Federal government, not just materials that apply to them personally. OCR must honor requests for records under FOIA, with some exceptions. Generally, OCR is not required to release documents during the case evaluation and investigation process or enforcement proceedings, if the release could reasonably be expected to interfere with the affect the ability of OCR to do its job. 5 U.S.C. § 552(b)(7)(A). Also, a Federal agency may refuse a request for records if their release would or could reasonably be expected to result in an unwarranted invasion of privacy of an individual. 5 U.S.C. § 552(b)(6) and (7)(C). Also, a request for other records, such as medical records, may be denied where disclosure would be a clearly unwarranted invasion of privacy.



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

STATE OF TEXAS, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 7:16-cv-00054-O
	§	
UNITED STATES, et al.,	§	
	§	
Defendants.	§	

**[PROPOSED] ORDER**

Before the Court is Plaintiffs’ Motion for Leave to File Additional Exhibit, filed Aug. 19, 2016. Plaintiffs seek leave to file an additional Exhibit (“Exhibit W”) in support of their Application for Preliminary Injunction (ECF Nos. 11, 52). Plaintiffs indicate that counsel for Defendants have not consented to the motion.

The Court finds that Plaintiffs’ Motion is well-taken, and should be and is hereby **GRANTED**. It is **ORDERED** that the proposed Exhibit W attached to Plaintiffs’ motion is a proper supplemental filing and, per this order, is hereby considered properly filed of record as evidence supporting Plaintiffs’ Application for Preliminary Injunction (ECF Nos. 11, 52).

**SO ORDERED** on this **19th day of August, 2016**.

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Reed O’Connor  
United States District Judge