UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Board of Education of the Highland Local School District, Plaintiff, vs. 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 United States Attorney General; and Vanita Gupta, in her official capacity as Principal Deputy Assistant Attorney General, Defendants.	Case No: 2:16-cv-524 Judge Algenon L. Marbley Magistrate Judge Kimberly A. Jolson

Memorandum in Opposition to Doe's Motion to Intervene

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INTRODUCTION

Plaintiff Board of Education of Highland Local School District (Highland) brought this lawsuit to defend its policy regulating student access to overnight accommodations, locker rooms, and restrooms based on sex—a policy that affirms the dignity, privacy, and safety of all its students. Highland was forced to take action after Defendants lawlessly announced and began enforcing an agency rule against Highland, and in so doing, began threatening vital federal resources that Highland uses to educate children and provide free and reduced-cost lunches to underprivileged students. This case thus focuses on Highland's policy and the rights of all its students. And as both Highland and Defendants acknowledged at a prior scheduling conference with the Court, Highland's complaint raises pure questions of law that revolve around Defendants' efforts to rewrite Title IX of the Education Amendments of 1972.

Student Doe's guardians now ask that Doe—a Highland student who seeks to access intimate facilities inconsistent with Doe's sex—be allowed to intervene as a Third-Party Plaintiff. But their request is unavailing. Notably, Doe concedes that Doe's Title IX interests are adequately represented by the existing government Defendants, and Doe does not and cannot argue that Doe's constitutional interests will be impaired if Doe does not participate in this case. Therefore, Doe cannot satisfy the requirements of intervention as of right.

Nor should this Court exercise its discretion to allow permissive intervention. Allowing Doe to intervene as a Third-Party Plaintiff will drastically change the nature of this case and strip Highland of its right to litigate the case that it filed. Doe's intervention will transform litigation over a straightforward question of law into a "he said, she said" morass

of hotly contested facts that are ultimately immaterial to deciding whether the term "sex" in Title IX includes "gender identity."

Because Doe cannot meet the requirements for intervention as of right and Doe's addition as a Third-Party Plaintiff would needlessly complicate and delay the litigation, thereby prejudicing the original parties, this Court should deny Doe's motion to intervene.

ARGUMENT

Federal Rule of Civil Procedure 24 requires courts to permit a proposed intervenor to intervene when that individual "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24 (a)(2). It further states that courts "may permit" intervention when an individual "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24 (b)(1)(B). But in exercising this discretion, a court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24 (b)(3). Here, Doe cannot establish the requirements for intervention as of right, and permissive intervention is inappropriate because Doe's intervention would unduly delay the litigation and prejudice the original parties' rights.

I. Doe cannot establish the requirements for intervention as of right.

As Doe's motion explains, in order to intervene as of right, an applicant must establish all of the following four elements: "'(1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's

ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court.'" Doe's Mem. in Support of Mot. to Intervene at 6 (ECF No. 15) (quoting *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)). "Each of these elements is mandatory." *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011). Thus, failing "to satisfy any one of the elements will defeat intervention" of right. *Id.*

Moreover, when an applicant raises distinct interests in support of intervention, the court must analyze those interests separately, and the applicant must satisfy all four elements for at least one of the interests raised. *See Meyer Goldberg, Inc. of Lorain v. Goldberg*, 717 F.2d 290, 292-94 (6th Cir. 1983) (considering two separate interests asserted by a proposed intervenor, and analyzing whether all four factors were met for each one before affirming denial of intervention). Doe proposes to raise two sets of claims—Title IX claims and constitutional claims—if allowed to intervene in this case. Because Doe cannot satisfy all of the intervention factors for any of those claims, the Court should deny Doe's request for intervention as of right.

A. Doe's constitutional claims will not be impaired without intervention in this case.

Doe's asserted interests in this case rest in part on constitutional claims. *See* Doe's Mem. in Support of Mot. to Intervene at 8 (discussing Doe's constitutional claims in the context of adequacy of representation); *see also* Doe's Intervention Mot. Ex. 1 at 23-25, ¶¶ 78-90 (ECF No.15-1); *id.* at 26-27, ¶¶ 101-108. But those constitutional interests cannot satisfy the second and third elements for intervention as of right.

"[Intervention] is concerned with protecting an interest which can only be protected . . . in the current proceeding." *Hatton v. Cty. Bd. of Educ. of Maury Cty., Tenn.*, 422 F.2d 457, 461 (6th Cir. 1970). As stated previously, Doe must show that Doe has a "substantial legal interest *in the case*" and that Doe's "ability to protect *that interest*" will be impaired without intervention. *Mich. State AFL-CIO*, 103 F.3d at 1245 (emphasis added).

The only "substantial legal interest in this case" that Doe asserts in support of intervention is a desire to use intimate "school facilities alongside . . . girls" based on "Title IX's prohibition against sex discrimination." Doe's Mem. in Support of Mot. to Intervene at 7-8. By discussing only Title IX interests to establish this element, Doe implicitly acknowledges that Doe's constitutional claims do not provide Doe with a substantial legal interest in Highland's suit against the federal government.

Indeed, Doe's right to raise constitutional claims—many of which are asserted against parties not currently in this suit—is not affected by any outcome of the existing litigation. The current litigation involves whether Defendants' actions—in announcing their new agency rule and enforcing it against Highland—violate the Administrative Procedure Act, the Spending Clause of the U.S. Constitution, principles of federalism and separation of powers, and the Regulatory Flexibility Act. *See* V. Compl. at 28-45, ¶¶ 132-247 (ECF No. 1) (Claims 1-5). It focuses on whether Highland's policy regulating student access to overnight accommodations, locker rooms, and restrooms based on sex—a policy that affirms the dignity, privacy, and safety of all its students—is consistent with the statutory construction of Title IX and its implementing regulations.

None of these claims or issues touches on whether Doe has an Equal Protection right under the Fourteenth Amendment of the U.S. Constitution that requires Highland to permit Doe to access intimate facilities based on professed gender identity. *See* Doe's Intervention Mot. Ex. 1 at 23-25, ¶¶ 78-90. The outcome of Highland's case will not in any way impair Doe's ability to bring these claims in a separate suit should Doe choose to do so. Similarly, Doe's claim alleging a violation of Doe's right to privacy under the U.S. Constitution is not related in any way to the claims at issue in this lawsuit. *See id.* at 26-27, ¶¶ 101-08. Thus, disposition of this lawsuit without the proposed intervenor will not impair or impede Doe's ability to protect the constitutional rights that Doe asserts. Because Doe's constitutional claims concern matters wholly unrelated to the current case, they are not "direct, significant legally protectable interest[s]" that will be impaired if intervention is denied. *United States v. Detroit Int'l Bridge Co.*, 7 F.3d 497, 501 (6th Cir. 1993).

Thus, to the extent that Doe relies on constitutional claims to support the request for intervention as of right, Doe cannot satisfy the second and third elements and thus is not entitled to intervene.

B. Doe's Title IX interests are adequately represented by Defendants, and Doe has conceded as much.

As mentioned above, Doe raises Title IX interests in support of the pending request to intervene as of right. Doe's Mem. in Support of Mot. to Intervene at 7-8. But when analyzing those Title IX interests, Doe cannot satisfy the fourth factor for intervention as of right.

"[T]he applicant for intervention bears the burden of demonstrating inadequate representation." *Meyer Goldberg*, 717 F.2d at 293. "[T]he presumption of adequacy of

representation . . . arises when the proposed intervenor and a party to the suit have the same ultimate objective." *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987). Here, Doe's "ultimate objective" is the same as Defendants': Doe wants to establish that Title IX's definition of "sex" includes "gender identity" just as Defendants through their recently announced rule seek to establish the same. *Compare* Doe's Intervention Mot. Ex. 1 at 28 (seeking "[a] declaration that Third-Party Defendants violated [Doe's] rights under . . . Title IX of the Education Amendments of 1972"), *with* Dear Colleague Letter on Transgender Students (May 13, 2016) (ECF No. 10-3).

Doe cannot "overcome the presumption of adequate representation." *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005). And Doe rightly concedes as much, stating that "Defendants . . . are more than able to address adequately the question of whether Highland's policy violates Title IX[.]" Doe's Mem. in Support of Mot. to Intervene at 8. Indeed, it would be difficult to conceive of a more powerful advocate on this issue than the federal government. Because Doe has conceded that Defendants are "more than able" to "adequately" address Doe's Title IX interests, Doe admittedly fails to satisfy the fourth element required for intervention as of right.

In addition to Doe's concession, the proposed verified complaint further demonstrates that Defendants have vigorously defended Doe's interests and belies any argument that they would not do so here. In December 2013, Doe's guardian filed a complaint with the U.S. Department of Education's Office of Civil Rights (OCR), alleging "that Highland discriminated . . . based on sex" by requiring Doe "to use a separate gender-neutral bathroom and denying [Doe] access to . . . bathrooms used by . . . female students."

Doe's Intervention Mot. Ex. 1 at 21, ¶ 72. "[I]n August 2014, *OCR amended the complaint* to include an additional allegation, that school staff members subjected [Doe] to harassment and that Highland failed to respond appropriately" to complaints "of harassment by other students." *Id.* at 21, ¶ 73 (emphasis added). Doe indicates that Defendant Department of Education, on its own initiative, added Doe's harassment allegations to Doe's OCR complaint. The Department then conducted an "investigation," *id.* at 22, ¶ 75, and "issued its letter of findings" concluding Highland was "in violation of Title IX," including violations based on the added claims, *id.* at 22, ¶¶ 76, 77. Then, on July 29, 2016, OCR issued its letter of impending enforcement action indicating that within 15 calendar days of its letter, "OCR can take . . . action" to "either [1] initiate administrative proceedings to suspend, terminate, or refuse to grant or continue financial assistance to [Highland] or [2] refer the case to the U.S. Department of Justice for judicial proceedings." Letter of Impending Enforcement Action, OCR, Region XV, at 14-15 (July 29, 2016) (Ex. 1). This vigorous advocacy of Doe's interests belies any suggestion that Defendants will not adequately represent Doe's Title IX interests.

The Sixth Circuit has held that "a movant fails to meet his burden of demonstrating inadequate representation when 1) no collusion is shown between the existing party and the opposition; 2) the existing party does not have any interests adverse to the intervener; and 3) the existing party has not failed in the fulfillment of its duty." *Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000). Doe fails to demonstrate inadequate representation under each of these prongs. First, there is no collusion between Highland and Defendants as their positions are clearly adversarial. Second, Doe has not

shown that Defendants have any interest that is adverse to Doe's. Third, Doe has not claimed that Defendants have failed in the fulfillment of their duties. Thus, Doe has failed to meet the burden that this Circuit requires to prove inadequate representation.

In fact, Doe's only argument that Defendants will not adequately represent Doe's interests is based on speculation that Defendants "will presumably not advance" Doe's constitutional claims. Doe's Mem. in Support of Mot. to Intervene at 8. Because Doe has only asserted that Defendants' representation may be inadequate with regard to Doe's constitutional claims, which are not interests that would be impaired by the current proceeding, *see supra* at 3-5, Doe cannot satisfy the elements for intervention of right.

Because Doe has conceded that Doe's Title IX interests will be "more" than "adequately" represented by Defendants, *see* Doe's Mem. in Support of Mot. to Intervene at 8, Doe is not entitled to intervention of right based on Doe's Title IX interests.

II. This Court should deny permissive intervention.

"Intervention balances two competing interests—judicial economy resulting from the disposition of related issues in a single lawsuit and focused litigation resulting from the need to govern the complexity of a single lawsuit." *Jansen v. City of Cincinnati*, 904 F.2d 336, 339-40 (6th Cir. 1990). Here, that balance weighs against intervention.

A. Doe's involvement would unduly delay the litigation and prejudice Highland's rights.

Permissive intervention is improper where it would cause undue delay or prejudice to the original parties. Fed. R. Civ. P. 24 (b)(3). Courts often deny permissive intervention due to delay and prejudice if allowing intervention would add disputed factual questions and prolong or complicate discovery. *Michigan,* 424 F.3d at 445 (noting that "the [district] court

rightly observed that permitting intervention would have prejudiced the original parties" where "the proposed intervenors' answer would complicate the case by requiring the adjudication of fact intensive issues"); *Kasprzak v. Allstate Ins. Co.*, No. 12-CV-12140, 2013 WL 1632542, at *4 (E.D. Mich. Apr. 16, 2013) (unreported) (denying permissive intervention where "[t]he parties would suffer the costs of extending discovery along with other costs associated with prolonged litigation").

Here, Highland's constitutional and statutory claims present pure questions of law that should be decided by this Court without adding the fact-intensive claims that Doe's guardians hope to bring. Highland's claims are primarily focused on the actions of Defendants in promulgating an unlawful agency rule that redefines the term "sex" under Title IX to include "gender identity." These claims are rooted in the Administrative Procedure Act, the Spending Clause of the U.S. Constitution, and the language and history of Title IX. In contrast, Doe's legal guardian's proposed verified complaint places in issue an array of hotly contested facts that are ultimately immaterial to deciding whether the term "sex" in Title IX includes "gender identity."

For example, the proposed complaint presents unsettled medical issues as if they are undisputed facts. *See* Doe's Intervention Mot. Ex. 1 at 6-7, ¶¶ 15-18 (defining and describing gender identity and gender dysphoria); *id.* at 7-9, ¶¶ 19-21, 24-25 (asserting the course of treatment for children with gender dysphoria). A determination of these issues will likely involve a battle of the experts, which will increase the time of discovery and the costs of litigation for all parties.

Further, the proposed complaint places in issue Doe's medical history. *See*, *e.g.*, *id.* at 10, ¶ 29 (listing various medical and mental health professionals who examined and treated Doe); *see also id.* at 12, ¶ 34 (asserting, among other things, that "Doe suffers from a host of physical conditions"). These fact-specific medical allegations will likely necessitate significant discovery.

Also, the proposed complaint makes numerous irresponsible and unfounded allegations blaming Doe's tragic mental health history on Highland's policy regulating access to restrooms. *See id.* at 13, ¶ 38 (alleging that "after nearly an entire school year of being excluded from the bathroom routine . . . the buildup of psychological distress became too great . . . [Doe] was hospitalized for suicidal ideation . . ."); *see also id.* at 14, ¶ 41 (connecting Doe's suicide attempt to "the school's refusal to permit [Doe] to use the girls' bathrooms"). These allegations will require significant discovery.

Finally, Doe includes numerous baseless allegations claiming that Highland personnel repeatedly turned a blind eye to harassment. *See*, *e.g.*, *id.* at 18, ¶ 59 (alleging that Doe "asked the assistant principal for help" but that he took no action other than telling "[Doe] to be strong and ignore [another student's comment]"); *id.* at 18, ¶ 60 (alleging that Superintendent Dodds performed only "a cursory 'investigation'" in response to a complaint from Doe's guardian regarding Principal Winkelfoos.). Since nothing can be further from the truth, given that Highland and its personnel deeply care for Doe and Doe's well-being, Highland will need to extensively contest those allegations, thereby prolonging and complicating the case.

In short, the proposed complaint creates numerous highly contentious issues of fact that have nothing to do with the questions of law before this Court. These factual disputes,

and the protracted discovery and litigation that will accompany them, weigh heavily against granting permissive intervention because they will complicate and unduly delay the litigation and prejudice Highland's rights. *See, e.g.*, *Redland Ins. Co. v. Chillingsworth Venture, Ltd.*, 171 F.R.D. 206, 208 (N.D. Ohio 1997) (denying permissive intervention where "[a]llowing movants to intervene would only serve to complicate and delay this litigation"); *cf. Orrand v. Hunt Constr. Grp., Inc.*, No. 13-CV-900, 2014 WL 3895555, at *6 (S.D. Ohio Aug. 8, 2014) (granting intervention where proposed intervenor did "not intend to conduct discovery" or "seek to introduce new facts or issues" and where "the briefing of any additional issues will result in minimal additional time and expense.").

B. Highland has no objection to Doe's participating in this case as amicus curiae.

Doe has already conceded that Defendants are more than able to address Doe's Title IX interests—Doe's only interests that could possibly be affected by the outcome of this lawsuit. That concession weighs against allowing Doe to participate as a party because doing so will be needlessly duplicative of Defendants' advocacy. But should this Court desire to allow Doe to present arguments supporting those interests, Highland has no objection to Doe's participating in this case as an amicus curiae. *See Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (noting with approval *Bradley,* 828 F.2d at 1194, and explaining that in that case the court affirmed the denial of motions to intervene permissively and as of right in part because "the district court has already taken steps to protect the proposed intervenors' interests by inviting [their counsel] to appear as amicus curiae in the case"); *Ohio v. EPA*, 313 F.R.D. 65, 71-72 (S.D. Ohio 2016) (denying intervention where it "would

necessarily complicate this case and delay the proceedings," but noting that the court "welcomes, and will consider, amicus briefs submitted" by the proposed intervenors).

CONCLUSION

For the foregoing reasons, Highland respectfully asks that this Court deny the motion to intervene.

Date: August 10, 2016

Respectfully submitted,

s/ James A. Campbell
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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2016, I filed the foregoing Memorandum in Opposition to Doe's Motion to Intervene through the Court's ECF system, which will serve notice on all counsel who have entered an appearance in this case. Because Defendants have not yet entered an appearance, I have served Defendants via U.S. Certified Mail, Return Receipt Requested, as follows:

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s/ James A. Campbell
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EXHIBIT 1

UNITED STATES DEPARTMENT OF EDUCATION
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July 29, 2016

Via Regular U.S. Mail and E-Mail to Andrew@rwblawoffice.com

Andrew J. Burton, Esq.
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Re: OCR Docket #15-14-1076

Dear Mr. Burton:

Pursuant to Article III, Section 305 of its *Case Processing Manual*, the U.S. Department of Education Office for Civil Rights issues this Letter of Impending Enforcement Action in Complaint 15-14-1076. The complaint, filed on December 23, 2013, against Highland Local Schools (District), alleged that the District discriminated against a student (the Student) based on sex. Specifically, the complaint alleged that the District discriminated against the Student, on the basis of sex, by denying the Student access to restrooms consistent with the Student's gender identity. On August 29, 2014, the Complainant amended the complaint to include allegations that District staff subjected the Student to harassment and the District failed to respond appropriately when the Student and Student's parent reported to the District that the Student was being subjected to harassment, including bullying based on sex, by other students.

After opening the Complaint for investigation, OCR issued data requests to the District and reviewed its responses. OCR conducted interviews and an on-site visit, and reviewed other relevant information regarding the case. At the conclusion of the investigation, OCR informed the District of its determination that the District is in violation of Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. § 106.31. Specifically, OCR determined that the District 1) failed to assess whether a hostile environment based on sex existed when students made derogatory comments about the Student and staff continued to refer to the Student by the wrong name or pronouns; and 2) denied the Student access to restrooms consistent with the Student's gender identity.

On March 29, 2016, OCR conducted a telephone conference with the District's counsel[1] and provided a summary of OCR's violation determinations. On March 30, 2016, OCR provided the District with a proposed Resolution Agreement (Agreement) with terms designed to resolve the District's non-compliance. OCR advised the District that under the *Case Processing Manual*, OCR and the recipient have a period of up to 90 calendar days, from the date that proposed terms of the resolution agreement are shared with the recipient, within which to reach final agreement, provided the *Case Processing Manual* for reference, and advised that the 90 days would expire on June 28, 2016.

During the negotiation period, OCR made attempts to discuss its Title IX violation determinations and possible resolution terms with the District to address sex-based harassment issues involving the Student and students and staff and access to restrooms consistent with the Student's gender identity:

- On April 7, 2016, OCR attempted to reach the District via telephone. On April 8, 2016, the District returned OCR's call explaining that the proposed Agreement was clear and that the Superintendent planned to advise the District's Board of Education (Board) of the proposed Agreement, at the April 20, 2016, Board meeting.
- On April 26, 2016, OCR attempted to reach the District by telephone and left the District a voicemail message.
- On May 3, 2016, the District left OCR a voicemail message stating that the Board met on April 20, 2016, and decided it needed to review the proposed Agreement further and the next Board meeting was May 18, 2016.
- On May 6, 2016, OCR reached the District and was informed that some Board members at the April 20, 2016, Board meeting wanted more time to discuss the entire proposed Agreement. At that time, OCR reiterated the 90-day time period for negotiations and offered to meet with the Board to explain, discuss, and answer any questions regarding OCR's investigation determinations and proposed resolution terms. The District indicated OCR's offer to meet would be shared with Board members and the District would follow up with OCR not later than May 11 or 12, 2016, prior to the May 18 Board meeting.
- On May 11 and 12, 2016, OCR left voicemails for the District following up on the previous May 6 call. On May 12, 2016, the District left a voicemail message for OCR stating that the Board met on May 11 and the next Board meeting would be June 8, 2016.
- On May 13, 2016, OCR e-mailed the District noting the 90-day negotiation period would expire on June 28, 2016, and that OCR may end the negotiations period at any time prior to the expiration of the 90-calendar-day period when it is clear that agreement will not be reached (e.g., the recipient has refused to discuss any resolution). On the same day, May 13, 2016, the District e-mailed thanking OCR for the information.
- On May 31, 2016, OCR e-mailed the District to follow up on OCR's offer to meet with the Board before the 90 days to negotiate expired. On June 3, 2016, the District replied that the Board did not need to meet with OCR and that it would be making decisions

[1] On January 23, 2014, the law firm of Renwick, Welsh & Burton LLC notified OCR that it represented the District, its officials, and its employees in this matter.

regarding the proposed resolution agreement at the next regular Board meeting on June 9, 2016. OCR responded the same day acknowledging the District's e-mail response.

On June 10, 2016, the District filed a lawsuit in the U.S. District Court, Southern District of Ohio, Eastern Division, Case No. 16-524. This complaint, verified and signed by Superintendent William Dodds, states that the District decided that it will not accept OCR's proposed Agreement. Based on this information, OCR issued a letter on June 10, 2016, declaring an impasse in the negotiations, pursuant to OCR's *Case Processing Manual*, at Section 303(b)(2)(i).

The District did not respond to OCR's June 10 letter. Because a resolution agreement was not reached during the 10-day impasse period, OCR issued its Letter of Findings to the District on June 28, 2016, pursuant to OCR's *Case Processing Manual*, at Section 303(b)(3).

As of the date of this letter, OCR has not received any further communications from the District regarding the Title IX violation determinations or possible terms to resolve the District's violation of civil rights laws. As a result, OCR issues this Letter of Impending Enforcement Action pursuant to Section 305 of its *Case Processing Manual*.

Jurisdiction

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688, and Title IX's implementing regulation at 34 C.F.R. Part 106. Title IX prohibits discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. 34 C.F.R. § 106.1. As a recipient of Federal financial assistance from the Department, the District is subject to Title IX.

Legal Standards

Sex-Based Harassment

Sex-based harassment is a form of sex discrimination prohibited by the Title IX regulation at 34 C.F.R. § 106.31. Harassment of a student on the basis of sex can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. Districts have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. 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.

A school may violate Title IX and the Title IX implementing regulation if: (1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program; (2) the school knew or reasonably should have known about the harassment; and (3) the school fails to take appropriate responsive action reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. These steps are the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.

Schools also provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in sex-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the school is responsible for the discriminatory conduct whether or not it has notice. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and impartial. What constitutes a reasonable response to harassment will differ depending upon circumstances. However, the response must be tailored to stop the harassment, eliminate the hostile environment if one has been created, and address the problems experienced by the student who was harassed. The school must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate, or providing more systemic remedies to prevent its reoccurrence. Steps to address harassment should be designed to minimize the burden on the harassed student.

A school may receive requests to correct a student's education records to make them consistent with the student's gender identity. 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 C.F.R. § 106.31(b)(4). 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. 34 C.F.R. § 106.8(b).

Restroom Use

Under Title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The regulation implementing Title IX, at 34 C.F.R. § 106.31(a), provides, in relevant part, that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, or other education program or activity operated by a recipient which receives Federal financial assistance. The regulation implementing Title IX, at 34 C.F.R. § 106.31(b), further provides that a recipient may not, on the basis of sex, deny any person such aid, benefit or services; treat an individual differently from another in determining whether the individual satisfies any requirement or condition for the provision of such aid, benefit, or service; provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; subject any person to separate or different rules of behavior; or otherwise limit any person in the enjoyment of any right, privilege or opportunity.

All students, including transgender students, are protected from sex-based discrimination under Title IX. OCR treats a student's gender identity as the student's sex for purposes of Title IX and its implementing regulation.

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. The regulation implementing Title IX, at 34 C.F.R. § 106.33, provides that a recipient may provide separate toilet facilities on the basis of sex, but such facilities provided for students of one sex shall be

comparable to such facilities provided for students of the other sex.[2] Consistent with Title IX, a school may not require transgender students to use such 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.

Findings of Fact

Background

Currently 11 years old, the Student is enrolled in the District's elementary school and completed fourth grade during the 2015-2016 school year. During kindergarten, the Student began exhibiting behavior indicating gender identification different from the Student's sex assigned at birth. During the summer between kindergarten and first grade, the Student transitioned and consistently began identifying with the Student's gender identity. Prior to the Student entering first grade in the 2012-2013 school year, the Student's parent met with the elementary school Principal (Principal) to notify the District of the Student's gender transition and gender identity and requested that the Student be treated consistently with the Student's gender identity for all educational purposes. The Student's parent provided the District with a note from a physician explaining that the Student was transgender. Specifically, the parent requested that the Student be referred to by the Student's preferred name and pronouns in school, school documents, and records; and be permitted to use school restrooms consistent with the Student's gender identity. The Student's preferred name was legally changed in November 2013 and the parent presented the District with a judgment entry from the court granting the name change.

The District operates one elementary school (grades K-5), one middle school (grades 6-8), and one high school (grades 9-12). The District reported to OCR for its 2013-2014 Civil Rights Data Collection (CRDC) a total student population of 1,750 and that 827 students attend the elementary school. The District reported to the Ohio Department of Education (ODE) in the fall enrollment headcount from October 2015 a total student population of 1,855 students and that 865 students attend the elementary school. The District's elementary school is a one-level building.

District Policies

During the investigation, OCR obtained the District's publicly available policies concerning Title IX prior to its March 18, 2015 onsite. The District maintained bylaws and policies which include its notice of nondiscrimination (AG 2260) that prohibits discrimination, including discrimination on the basis of "[s]ex, including sexual orientation and transgender identity", and posts its policy and administrative guideline (AG) prohibiting such discrimination on its website. AG 2260 also states that OCR considers gender-based harassment to be a form of sex discrimination. AG 2260 designates the Superintendent as the person to handle inquiries regarding the nondiscrimination policies of the District or to address any complaint of discrimination, and it provides a contact address and telephone number for the Superintendent.

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[2] This Complaint focuses on access to restrooms and allegations of sex-based harassment.

In an interview with OCR on March 18, 2015, the Superintendent stated that the District's grievance procedures did not cover discrimination based on transgender status; however, later in the interview, the Superintendent acknowledged the District's grievance procedures, available at http://www.neola.com/highlandlcl-oh/, included policy documents that referenced discrimination based on transgender identity. OCR confirmed the publicly available policies referenced discrimination based on transgender identity on the date OCR issued its Letter of Finding, June 28, 2016.

On June 30, 2015, OCR representatives again confirmed with the Superintendent the District's Title IX policies. The District's Title IX grievance procedure applying to students is explained in Bylaw and Policy 5517, entitled "Anti-Harassment," and its corresponding Administrative Guideline. The grievance procedure, which applies to complaints alleging harassment carried out by employees, other students, or third parties, provides for the adequate, reliable, and impartial investigation of complaints, and gives both parties the right to produce witnesses and other evidence. The procedures provide for written notice of the outcome of the investigation to both parties and an assurance that the school will take steps to end harassment and "rectify the problems" and later states that the District will take action to prevent the harassment from reoccuring.

Sex-Based Harassment

Student Incidents

The Student's parent reported to OCR that the District failed to respond appropriately when District staff were made aware that during the 2012-2013, 2013-2014, and 2014-2015 school years the Student was being subjected to frequent and repetitive harassment by other students on the bus, at recess, and at lunch for failure to conform to gender stereotypes, including taunting, name-calling, questions about the Student's anatomy, intentional use of the Student's old name, and references to the Student's sex assigned at birth. The parent stated that, when harassment occurred by other students, the parent and/or the Student would notify the Principal and/or Superintendent of the harassment.

The documentation established that in 2014 the parent complained of the above-described harassment to District staff at least five times. One incident from February 2014, involved a student in the lunchroom yelling, "You ARE a [the Student's birth sex]!" to the Student, loud enough for other students to hear it. The student also went around the lunchroom telling everyone of the Student's sex assigned at birth. The incident was reported to the Principal and the Superintendent and the Student reported that the elementary school Assistant Principal (Assistant Principal) told the Student to be strong and ignore the comments. When interviewed by OCR on March 18, 2015, the Assistant Principal did not deny or admit making the statement, but told OCR that he took additional steps to address the incident. The Assistant Principal informed OCR that he recalled telling the Student to stay away from those types of students and stated that he believed he would have sought out the student involved and spoken with the student, but the Assistant Principal could not recall who the student was or provide specific details about his response during his interview with OCR. In its responses to OCR's January 17, 2014, August 29, 2014, and March 19, 2015, data requests on January 31, 2014, September 19,

2014, and April 2, 2015, the District provided no documentation to establish whether and how the incident was investigated or addressed. After OCR's inquiries during the Assistant Principal interview on March 18, 2015, the District did not provide any additional information that it investigated or addressed the lunchroom incident.

On August 7, 2014, prior to the start of the school year, the parent notified the Principal and Superintendent that neighborhood schoolchildren who typically rode the school bus with the Student during the school year were harassing the Student by calling the Student a "faggot," and she was concerned that the Student would be harassed on the bus once school started. The following day the Principal assured the parent via e-mail that the District would respond immediately and enforce the elementary school student handbook if this occurred, stating, "We will zero tolerance for any such behavior and enforce our discipline procedures as appropriate." On the second day of school, August 15, 2014, the parent notified the Principal, Superintendent, and Assistant Principal that the same schoolchildren at the bus stop were harassing the Student and the Student's sibling and calling the Student "gay" while the students waited for the bus. The Student's parent provided the administrators with the first names and bus routes for three of the students involved. On August 15, 2014, the Principal initially responded that if the behavior occurs on the bus or at school the school would address it.

That same day the parent informed the Principal, Superintendent, and Assistant Principal that she was not satisfied with this response as the behavior occurred while students were waiting for the school bus at their designated bus stop. The Principal replied that "[t]he matter will be addressed with the students once we identify them and never said we wouldn't speak with them." The next day, August 16, 2014, the parent notified the Principal, Superintendent, and Assistant Principal via e-mail that the other students were using the Student's old name in a harassing manner. The parent provided the bus number and first name of one student and identified one student witness. On August 18, 2014, the Principal e-mailed the parent and stated that he and the Assistant Principal "took care of the situation this morning;" however, the only documentation the District provided to OCR concerning its response was a student discipline log with an August 18, 2014, entry, on which the District had redacted student identifying information. The entry stated, "Talked to about [Student]; reminded to BE NICE to students on bus."

On September 2, 2014, the parent notified the Assistant Principal that one of the same students was again harassing the Student on the bus by "making vulgar faces at [the Student] and sticking out and wiggling her tongue constantly, making sure to get [the Student's] attention." The Assistant Principal informed the parent that he would speak with the student about the behavior and confirmed to the parent that he had addressed the conduct with the student; however, the parent reported to the Assistant Principal that harassing conduct continued even after the administrator spoke with the student. The District provided OCR with a student discipline log which included an entry dated September 4, 2014, that stated, "Discussed sticking tongue out at [the Student] on bus; instructed to not say anything or do anything to any students if it isn't nice" but the identifying information of the student involved was redacted. The bus driver confirmed to OCR that the Assistant Principal moved the involved student's seat on the bus.

In January 2015, the parent notified the Assistant Principal again that another student on the bus was harassing the Student by calling the Student by the Student's old name, referring to the

Student's sex assigned at birth, and making comments about the Student's genitalia. During an interview with OCR on April 29, 2015, the bus driver confirmed that she heard this comment and reported it to District administrators. The Assistant Principal e-mailed the parent and informed the parent that he had spoken with the student involved, who admitted to making these comments earlier in the year but denied making the comments in January 2015, and notified the transportation director to move the student's seat away from the Student.

District staff told OCR that they addressed each incident as it happened; however, there was insufficient documentation for OCR to corroborate the District's efforts. In most of the incidents, District administrators reported that they told the students to stop the harassment and sometimes moved seats on the bus. The only documentation the District provided to OCR concerning its investigation or response was a set of e-mails to the parent and a discipline log which had names redacted and for the most part failed to indicate any steps that were taken. When investigating the bus incidents, administrators said they did not speak with the bus driver to find out whether she was aware of any of the harassment. In one instance, the District informed OCR that discipline was levied against the harassing student.

The Student's parent stated that the harassment by other students impacted the Student. According to the parent, there have been days when the Student does not want to go to school or ride the bus because of the way other students acted towards the Student, especially during the 2014-2015 school year. In May 2014, the Student's parent reported to the District that the Student had been hospitalized for self-harm and asked the Principal and the Student's teachers to look out for any concerning depressive behavior. The Student's parent reported that the Student missed some days of school because the Student felt humiliated and embarrassed by the behavior of some students. The parent reported to OCR that when the Student is being harassed, the Student tends to become defiant and act out, which leads to the Student being disciplined. Irrespective of the harassment the parent believed the Student experienced and the Student's feelings of being ostracized, the Student's parent continued to insist that the Student continue to go to school.

Name and Pronoun Use

Since notifying the District of the Student's gender identity prior to the start of the Student's first-grade year in 2012-2013, the parent requested that all of the Student's records correctly identify the Student's preferred name and gender identity. The Superintendent and Principal reported to OCR that some District staff have mistakenly used the Student's old name and the wrong pronouns. The Principal told OCR that when the Student started kindergarten, the Student identified with the Student's birth sex and name, and the Student's new legal name is a shorter version of the Student's old name. Therefore, the Principal stated there have been some mistakes in using the Student's old name and wrong pronouns by those who knew the Student in kindergarten. The Superintendent and Principal said that, each time the parent brought to their attention that District staff were using the wrong name or pronouns with the Student, the administrators would speak with the staff person about it.

When OCR spoke to District staff, certain teachers and staff stated that they had on occasion mistakenly used the wrong pronouns and name with the Student or when referring to the Student.

One staff member reported only referring to the Student as "the Student" or by the Student's name, and informed the principal she would not use pronouns consistent with the Student's gender identity when referring to or speaking with the Student because she disagrees with such a practice. Another District staff member told OCR that she did not use pronouns consistent with the Student's gender identity as she had difficulty recognizing the Student in this way.

The parent told OCR that the use of the Student's old name and incorrect pronouns has impacted the Student, as there have been days when the Student has not wanted to go to school or has tried to avoid going to certain classes because of this practice.

First Grade (2012-2013)

The Principal informed OCR that he communicated the Student's name change by e-mail and during staff meetings; however, the District did not provide OCR a copy of the e-mail.

In March 2013, the District initially agreed with the parent to use the Student's gender identity on the Student's Individualized Education Program (IEP) during an IEP team meeting. However, in June 2013, the Principal informed the parent that the District must use the Student's sex assigned at birth in the Education Management Information System (EMIS)[3] reporting system, and that the Student's gender would be changed back to the Student's sex assigned at birth in the IEP. OCR reviewed the Student's March 2013 IEP, prepared by the District, which used the Student's preferred and legal name in the student information section but used the Student's birth name throughout the rest of the document. The 2013 IEP lists the Student's sex assigned at birth, not the Student's gender identity.

On April 19, 2013, and again on June 5, 2013, the parent requested that the District use the Student's gender identity on teachers' class lists, and that they not use the Student's birth middle name, which was gender-specific and identified the Student's birth sex.

Second Grade (2013-2014)

The Principal told OCR that during the 2013-2014 school year the Student's name change was clearly communicated to staff via e-mail and in staff meetings, and reminders were provided in several staff meetings that pronouns consistent with the Student's gender identity are to be used with the Student. The District has not provided any copies of such e-mails in any of its data responses to or communications with OCR. The District provided OCR an undated typewritten note, which stated, "During the 2013-2014 school year, any staff member that had [the Student] in class was informed of [the Student's] transgender status per parent/guardian request. The staff members involved were told that [the Student] is a transgender student and will be identifying as a [gender identity]." The typed note provided the name and title of the Principal. The District did not indicate how this undated note was used or distributed.

In November 2013, three special education-related District documents, generated after the parent notified the District of the Student's legal name change, all used the Student's birth name (a

[3] The EMIS guidelines, available at http://education.ohio.gov/Topics/Data/EMIS/EMIS-Documentation/Current-EMIS-Manual, do not state that districts must report the sex assigned on a student's birth certificate.

notice, parental consent form, and an evaluation report). As previously noted, the parent provided the District with documentation of the Student's legal name change in November 2013. Subsequently in February 2014, three special education-related assessments included the Student's new legal name with no use of pronouns. The Student's 2014 IEP listed the Student's legally changed name and used pronouns consistent with the Student's gender identity; however, the document listed the Student's birth sex. According to the parent, during the spring 2014 annual IEP meeting, school staff continued to use the Student's birth name.

Third Grade (2014-2015)

The parent complained to the Superintendent and Principal on August 27, 2014, that at least four District staff continued to use the wrong pronouns and refer to the Student's sex assigned at birth. In September 2014, the parent reported to the Principal that two additional District teachers continued to use the Student's old name with the Student.

In January 2015 the parent reported that another District staff person continued to use the Student's old name with the Student. During interviews with OCR in March 2015, the Principal, Superintendent, and Assistant Principal told OCR they felt that District staff were using the correct name and pronouns with the Student.

On April 16, 2015, the parent reported to the Superintendent and OCR that the school's e-mail system continued to use the Student's previous name and provided a screen shot demonstrating the use of the Student's previous name. The Superintendent responded to the parent on the same day and informed the parent that the District would make the correction immediately. The parent confirmed to OCR that the Student's name was corrected on the Student's e-mail account.

Fourth Grade (2015-2016)

In September 2015, the parent reported to OCR that the Student's previous name was used on the "scoreboard" link for the school's typing club, which allowed the Student's entire class to see typing scores of their classmates and the Student's previous name. The parent reported this and that the teacher had used the wrong name and pronouns to the Principal, who assured the parent that the name would be fixed and that action would be taken concerning the teacher. In an interview with OCR on September 18, 2015, the Principal confirmed to OCR that the name was changed and that no students viewed the previous name in the system. In addition, the Student was moved to a different computer lab class.

PowerSchool-Generated Student Records

The District uses PowerSchool, a database system used to maintain student information such as students' names, parent information, demographics, attendance records, student schedules, and student grades. According to District administrators, District teachers, administrators, and secretaries all have access to PowerSchool. During OCR's on-site visit at the District on March 18, 2015, the Principal showed an OCR staff member that the Student's current legal name was correctly listed in PowerSchool. However, the Student's gender was listed as the sex assigned at birth, not the Student's gender identity.

Restroom Use

Prior to the Student's first-grade year (2012-2013), the parent requested that the Student be permitted to use the restrooms at school consistent with the Student's gender identity. District administrators refused the request and, instead, required the Student to use the individual-user restroom in the Student's first-grade classroom, which was also available and used by the Student's classmates, and an individual-user restroom in the office area of the Student's school. Specifically, the Superintendent informed OCR that the Student could use the restrooms consistent with the Student's gender identity only if the Student's birth certificate identified the Student's gender identity. [4]

Every subsequent school year thereafter—2013-2014, 2014-2015, and 2015-2016—the parent has requested that the Student be permitted to use restrooms consistent with the Student's gender identity, and the District has denied the request. Prior to the start of the 2013-2014 school year, the Superintendent informed the parent that the Student could use the restrooms consistent with the Student's gender identity only if the Student's birth certificate identified the Student's gender identity. In the District's January 31, 2014, data request response, the District provided OCR with typewritten notes labeled "Phone conversations between [Superintendent] and [parent] referencing RR use." An August 13, 2013, entry on the typewritten notes confirmed that the parent again requested the Student be provided access to restrooms consistent with the Student's gender identity and the Superintendent wrote, "I told her that would not be changing." An entry dated "December 19th or 20th 2013" stated, "Spoke to her in response to her request that [the Student] be allowed to use the [gender identity] restroom. I shared with her that we would not be making that change at this time. She was concerned with the distance from class to office for restroom and I offered an alternative (no closure)." The typewritten notes further confirm that the Superintendent and Principal discussed the matter.

During the Student's second-grade year (2013-2014), the Student was required to use an individual-user restroom in the office area of the Student's school. The parent told OCR that each time the Student's classmates lined up for a restroom break, they would see that the Student did not use the restrooms with them. The parent reported that the Student said that many times classmates asked the Student why the Student did not use the restroom with them, and the Student complained about feeling separated from peers, alone, and left out.

During the Student's third-grade year (2014-2015), the Student was required to use an individual-user restroom in the office area or a teachers' lounge restroom, which was closer to the Student's homeroom and the gymnasium. Meeting notes dated September 10, 2014, and provided by the District to OCR on September 19, 2014, indicate that in 2014 the parent raised concerns about the distance the Student traveled from the class to the office when the Student used the restroom. The parent reported to OCR in a June 22, 2016, interview that the teachers' lounge and office restrooms made available to the Student were farther from the Student's classrooms than the restrooms classmates used. In addition, the parent said that the Student expressed feeling uncomfortable entering the teachers' lounge.

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[4] The Student has a State of Ohio birth certificate. Ohio law does not permit a person to change the sex assigned on the person's birth certificate. See Ohio Revised Code § 2705.15 (2006)

The parent notified the school and OCR that at the start of the Student's fourth-grade year (2015-2016), for a short period of time the Student refused to use the restroom while at school. The parent conveyed that the Student did not want to draw attention from other students as being different and not being permitted to use the restrooms consistent with the Student's gender identity. During the 2015-2016 school year, the District added another teacher restroom that the Student could use that was closer to the Student's classroom. However, this restroom remained locked. Therefore, when the Student had to use the restroom, the Student had to either go to the office or faculty restrooms farther away or notify one of the teachers or staff, who escorted the Student to a faculty restroom closer to the Student's classroom, entered the keypad restroom code to unlock the door, waited for the Student, and then escorted the Student back to the classroom.

The District acknowledged to OCR that it prohibits the Student from using District restrooms consistent with the Student's gender identity. On March 18, 2015, the Superintendent confirmed having told the parent that if the Student's birth certificate identified the Student's gender identity, the Student could use the restrooms consistent with the Student's gender identity. The Superintendent also stated that the District's basis for this decision is that it assigns sex-segregated facilities, like restrooms and locker rooms, based on the sex identified on a student's birth certificate. However, the District cited to no written policy outlining this policy or practice. In response to OCR's inquiries on March 18, 2015, the Superintendent also stated he was unaware that Ohio law does not permit a person to change the sex on the person's birth certificate. In addition, the District's counsel told OCR that the District is concerned that, if it allowed the Student to use restrooms consistent with the Student's gender identity, when the Student's birth certificate identifies the opposite sex, then other students may say they want to go to a different restroom than what is identified on their birth certificate.

Analysis and Conclusions

Sex-Based Harassment

Based on the preponderance of evidence standard, OCR has determined that the District failed to assess whether a hostile environment based on sex existed for the Student in violation of the Title IX regulation, at 34 C.F.R. §§ 106.8(b) and 106.31. The evidence shows District staff used the Student's previous name and pronouns inconsistent with the Student's gender identity after the District was notified of the Student's transgender status in the early part of the 2012-2013 school year through the 2015-2016 school year. While the District stated that it informed the appropriate staff during the 2013-2014 school year to use the Student's preferred and then legally changed name, along with the correct gender identity pronouns, a few staff acknowledged calling the Student by the former birth name and using pronouns inconsistent with the Student's gender identity.

Staff and students using the wrong names and pronouns could constitute harassment. The District's Title IX grievance procedure provides for a formal complaint procedure, which states that an investigation will include interviews with the complainant, respondent, and witnesses and consideration of any documentation or information reasonably believed to be relevant to the

allegations. While the District took some steps to respond to the incidents involving staff and students toward the Student, it failed to adequately investigate the complaints lodged by the parent. Dealing with incidents individually may be insufficient to assess whether a hostile environment exists. When behavior implicates civil rights laws, school administrators should look beyond simply disciplining the perpetrators. A school's responsibility is to eliminate the hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. For instance, according to the bus driver, the District did not interview the driver regarding the alleged incidents of harassment on the bus in 2014. Moreover, the District merely moved students' seats on the bus and did not provide any other alternatives to the Student. There also is no record of support services, such as a bus monitor, counseling, or other appropriate measures, being offered to the Student in the materials produced to OCR by the District. Although administrators stated that the District investigated each incident reported by the parent and the Student, the materials produced to OCR by the District are sparse and do not provide documentation recording the District's efforts to investigate and respond to the harassment. The District did not dispute that the Student was harassed by other students at any time during OCR's investigation.

With regard to the use of pronouns inconsistent with the Student's gender identity and use of the Student's preferred and legally changed name, the District failed to provide OCR materials adequately substantiating the District's efforts to inform and to instruct staff to use the Student's preferred and then legally changed name and to use pronouns consistent with the Student's gender identity. Although the frequency of using the incorrect name or pronouns with respect to the Student declined from 2012-2013 to 2015-2016, the continued use of the Student's name may have contributed to a hostile environment based on sex for the Student.

Without an adequate investigation of the reported incidents of alleged harassment and consideration of the totality of the impact of the alleged incidents, the District failed to assess whether the reported harassing conduct created a hostile environment for the Student. Specifically, OCR concludes that the District, in violation of the Title IX regulation at 34 C.F.R. §§ 106.8(b) and 106.31, failed to promptly and equitably respond to the complaints of sex-based discrimination made on behalf of the Student and failed to assess whether the reported incidents were sufficiently serious to deny or limit the Student's ability to participate in or benefit from the educational program and, therefore, could not determine if responsive actions were reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

Restroom Use

Based on the facts in this investigation, once the parent notified the school of the Student's gender identity, the school was required to begin permitting the Student access to sex-segregated restroom facilities in a manner consistent with the Student's gender identity. During the 2013-2014, 2014-2015, and 2015-2016 school years, the District denied the Student access to student restrooms consistent with the Student's gender identity. Denying access to the restroom consistent with the Student's gender identity required the Student to make choices about privacy, particularly whether and how to respond to other students' questions about why the Student used different restrooms. The Student reported that having to deal with these questions, along with

having to use adult office staff and faculty restrooms, made the Student feel ostracized and generally was difficult for the Student, adversely impacting the Student's ability to participate in the school's program. Accordingly, OCR finds, by a preponderance of the evidence, that the District treated the Student differently on the basis of sex in its educational programs and activities without legitimate reason: in determining whether the Student satisfies any requirement or condition for the provision of benefits or services; by providing the Student different benefits or benefits in a different manner; and by subjecting the Student to separate or different rules of behavior, or otherwise limiting the Student in the enjoyment of rights, privileges or opportunities, in violation of the Title IX regulation, at 34 C.F.R. § 106.31.

Attempts to Resolve the Complaint

OCR's *Case Processing Manual* provides specific timeframes for negotiations. From the date that the proposed terms of the resolution agreement are shared with a recipient, OCR and the recipient have a period of up to 90 calendar days within which to reach final agreement. OCR may end the negotiations period when it is clear that agreement will not be reached (e.g., the recipient has refused to discuss any resolution). At such time, OCR shall issue an impasse letter that informs the recipient that OCR will issue a letter of finding(s) if a resolution agreement is not reached within 10 calendar days. If the recipient does not enter into a resolution agreement within 30 calendar days of the date of the letter of findings(s), OCR will follow the *Case Processing Manual* procedures for issuance of a Letter of Impending Enforcement Action. In this case OCR initiated a 90-day negotiation period on March 29, 2016, and issued an Impasse Letter on June 10, 2016, and a Letter of Findings on June 28, 2016.

OCR has unsuccessfully attempted to engage in negotiations with the District. Specifically, on March 29, 2016, OCR notified the District of its determination that the District failed to comply with the Title IX regulations. On March 30, 2016, OCR provided the District with a proposed resolution agreement designed to resolve the District's non-compliance. At that time, OCR advised the District that under the *Case Processing Manual* OCR and the recipient have a period of up to 90 calendar days, from the date that the proposed terms of the resolution agreement are shared with the recipient, within which to reach final agreement, and provided District with a link to the *Case Processing Manual* for reference, and advised that the 90 days would expire on June 28, 2016.

As detailed above at p. 2, OCR attempted work with the District to resolve this matter by communicating with the District on April 8, May 6, May 12, May 13, May 31, and June 3, 2016. OCR issued an Impasse Letter on June 10, 2016, and a Letter of Findings on June 28, 2016.

In accordance with the *Case Processing Manual*, OCR is issuing this Letter of Impending Enforcement Action as a result of the District's failure to enter into a resolution agreement within 30 days of receiving OCR's Letter of Findings.

Based on the District's failure to resolve the identified areas of noncompliance, OCR will either initiate administrative proceedings to suspend, terminate, or refuse to grant or continue financial assistance to the District or refer the case to the U.S. Department of Justice for judicial proceedings to enforce any rights of the United States under its laws. OCR can take this action

after 15 calendar days of the date of this letter if a resolution of this matter is not reached. OCR remains willing to resolve this matter. If you wish to do so, please contact me.

This Letter of Impending Enforcement Action is not intended and should not be construed to cover any other issue regarding the District's compliance with any other regulatory provision not addressed in this letter. This letter is not a formal statement of OCR policy and 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.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, OCR will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

Please be advised that the District may not retaliate against an individual who asserts a right or privilege under a law enforced by OCR or who files a complaint, testifies, or participates in an OCR proceeding. If this occurs, the individual may file a retaliation complaint with OCR.

If you have any questions about this matter, please do not hesitate to contact me at 216-522-2677.

Sincerely,

Meena Morey Chandra
Regional Director for the Office for Civil Rights