IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JULIET EVANCHO; ELISSA RIDENOUR; and A.S., a minor, by and through his parent and next friend,	:	Civil Action No. 2:16-cv-01537
	:	Judge Mark R. Hornak
Plaintiffs,	:	
vs.	:	*Electronically Filed*
PINE-RICHLAND SCHOOL DISTRICT; DR. BRIAN R. MILLER, in his official capacity as Superintendent of the Pine-Richland School District; and NANCY BOWMAN, in her official capacity as Principal of Pine-Richland High School,	:	JURY TRIAL DEMANDED
Defendants.	:	

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. PRO. 12(b)(6)

Defendants Pine-Richland School District (the "District"), Dr. Brian R. Miller ("Dr. Miller") and Nancy Bowman ("Principal Bowman") (collectively "Defendants"), by and through their attorneys, the law firm of Maiello, Brungo & Maiello, LLP, file this Brief in Support of their Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. INTRODUCTION

The outcome of this case depends on the answer to a simple question: Is one's sex determined by chromosomes, anatomy, gametes, and reproductive organs, which are objective criteria, or is sex determined by one's profession of a perceived internal, subjective sense of gender identity? Asked another way, is sex determined by biology or is sex determined by thought? Plaintiffs Juliet Evancho ("Ms. Evancho"), Elissa Ridenour ("Ms. Ridenour"), and A.S.

(collectively "Plaintiffs") have shared very private life experiences in establishing their identification as transgender individuals in their action against Defendants. There is no debate that Plaintiffs can never change the immutable fact that they are biologically male and female. Ms. Evancho and Ms. Ridenour are each biologically "male" and A.S. is "female" in the scientific, biological and physiological sense. (Complaint, ¶¶ 21, 46, 61). The representation of Plaintiffs as a gender incongruent with their birth sex is a personal, social and legal decision without any basis in biology.[1]

Plaintiffs challenge the Pine-Richland Board of School Director's (the "School Board") passage of Resolution #2 as a violation of Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681, *et seq*.) ("Title IX") and a violation of their Equal Protection rights under the United States Constitution. Plaintiffs dispute Resolution # 2 as restricting their purported right to use restrooms at the District consistent with their gender identities. Plaintiffs have not alleged that Defendants have failed to recognize their gender identities in any other respect. In fact, Defendants have supported their needs in all but one area – where they are permitted to take care of bodily excretion.[2]

Plaintiffs are currently not permitted to use the restrooms corresponding with their gender identity at the District, but are required to use the restrooms corresponding with their biological sex or a unisex restroom. In recognition of the issue that a male presenting as a female, and vice versa, would be uncomfortable for those student utilizing traditional biologically sex-designated restrooms, the District has ten (10) unisex restrooms positioned throughout its High School

[1] See, *Special Report: Sexuality and Gender, The New Atlantis*, A Journal of Technology & Society, Paul R. McHugh, Ph.D. and Lawrence S. Mayer, Ph.D., Fall 2016, p. 901. ("Nothing in biology suggests that Plaintiffs are anything other than their birth sex. In science, an organism is male or female if it is structured to perform one of the respective roles in reproduction.")

[2] The use of other sex-designated separate facilities (i.e. locker rooms, showers, etc.) are not at issue in this matter.

building. Unlike the situation in *G.G.*(explained below), which Plaintiffs contend is factually similar to the instant case, the entire student body of Pine-Richland High School is permitted to use the unisex restrooms referenced in Resolution #2. Plaintiffs are not restricted or singled out in their restroom usage. Also unlike in *G.G.*, Plaintiffs are not stigmatized by being forced into using a restroom that is designated solely for transgender students[3].

Plaintiffs' use of the unisex restrooms at the District does not cause them to suffer harm nor does it stigmatize them. Plaintiffs and the entire student body are permitted to use the unisex restrooms. This factual scenario is not a violation of the clear language of Title IX, and it is rationally-related to the legitimate interests of the District concerning the passage of Resolution #2. In fact, the Title IX regulations issued by the United States Department of Education ("DOE") allow schools to provide separate, but comparable, toilet, locker rooms and shower facilities on the basis of sex. 34 C.F.R. §106.33.

Plaintiffs' Complaint seemingly suggests that transgender females and transgender males must be treated as females and males in all respects without any recognition of the absolute concrete and certain differences created by biology. Defendants contend that bodily privacy interests arise from physiological differences between men and women, and that sex should be defined in terms of physiology concerning the usage of restrooms, showers and other sex-

[3] See, *G.G. v. Gloucester County Sch. Bd*., 15 cv 00054, 2016 WL 3581852 (E.D. Va. June 23, 2016) Stay Pending Appeal Denied, 15 cv 00054, 2016 WL 3743189 (4th Cir. July 12, 2016) Mandate Recalled, Stay Granted No. 16-273, ___S. Ct. ___, 2016 WL 4131636 (August 3, 2016) (A transgender male student appealed a District Court decision refusing to require the school district to allow him to use the boys' restrooms. The Fourth Circuit Court of Appeals held that the District Court should have given deference to the Department of Education's interpretation of its regulations which indicate that Title IX and its implementing regulations are applicable to transgender students. The Fourth Circuit remanded the case to the District Court which granted the preliminary injunction requiring the school district to allow the student to use the boys' restrooms pending the outcome of the trial. The School District appealed to the United States Supreme Court which granted a stay of the decisions rendered by both the Fourth Circuit and the District Court. A Petition for Certiorari was granted on October 28, 2016, No. 16-273, __S.Ct.__, 2016 U.S. LEXIS 6408. The *G.G.* Board resolution required G.G. (only) to use alternate facilities. The Gloucester County School Board resolution read in relevant part ". . . and students with gender identity issues shall be provided an alternative appropriate private facility." (Compare with the District's Resolution #2).

designated separate facilities. Plaintiffs, in contrast, contend that bodily privacy interests arise from the differences in gender identity, and that sex should therefore be defined in terms of gender identity concerning the usage of the sex-designated facilities at issue. Plaintiffs' claims are based on the false premise that Ms. Evancho and Ms. Ridenour are girls indistinguishable in every respect from a genetic female, and that A.S. is a boy, indistinguishable in every respect from a genetic male. However, the valid privacy concerns of biological female students are not obviated if male students believe they are girls. A male remains a male and a female remains a female, no matter how he or she identifies and presents.

Reading into Title IX a prohibition that does not exist creates a breach of the privacy rights of others, a value accorded their personal modesty.[4] Transgender students are protected from discrimination, harassment and bullying, just like any other student. The School Defendants are not seeking to exclude transgender students. The School Defendants are merely seeking to allow privacy from the opposite sex for these necessarily private acts that occur in the restroom. The true issue of this case is one of biology, not a felt or perceived gender. The use of restrooms for private bodily excretions in a facility consistent with biological sex protects the privacy of all and is based upon the real and true differences between the sexes.

[4] Federal courts have recognized in non-school cases a fundamental right to privacy or acknowledged the legitimacy of safety concerns in cases involving individuals undressing, using the restroom or showering in an area to which a member of the opposite birth sex has access. See, *Cumbey v. Meachum*, 684 F. 2d 712 (10th Cir. 1982) (finding prisoner asserted a viable constitutional privacy claim based upon a female guard viewing him while he showered, used the toilet or undressed); *Kastl v. Maricopa Cty. Comm. Coll. Dist.*, 325 F. App'x 492 (9th Cir. 2009) (accepting employer's proffered safety concerns for banning transsexual plaintiff from using the women's restroom as a legitimate business reason under Title VII).

II. FACTUAL BACKGROUND[5]

A. Plaintiffs.

Plaintiffs are Juliet Evancho, Elissa Ridenour and A.S. Ms. Evancho was born as a male as indicated on a Commonwealth of Pennsylvania Birth Certificate[6]. She resides in Allegheny County, attends Pine-Richland High School and is transgender. (Complaint, ¶¶ 12, 18, 21). Ms. Evancho mostly feels welcome and respected at Pine-Richland High School. (Complaint, ¶42).

Plaintiff Elissa Ridenour was also born as a male as indicated on a Commonwealth of Pennsylvania Birth Certificate. She resides in Allegheny County, attends the Pine-Richland High School, and is transgender. (Complaint, ¶¶ 13, 43, 46). Ms. Ridenour likewise reports that she mostly feels welcome and respected at Pine-Richland High School. (Complaint, ¶ 56).

Plaintiff A.S. was born as a female as indicated on a Commonwealth of Pennsylvania Birth Certificate. He resides in Allegheny County, attends Pine-Richland High School and is transgender. (Complaint, ¶¶ 14, 61). Despite a rocky start to his transition to the High School, A.S. now feels comfortable and safe at Pine-Richland High School and has not faced any transphobic harassment or bullying at school. (Complaint, ¶ 73).

B. School District Defendants.

The District is a public school district serving over 4,600 students in kindergarten through twelfth grade who reside in Pine and Richland Townships. The District is a body-politic organized and existing pursuant to the Pennsylvania Public School Code of 1949 (24 P.S. 1 – 101) ("School Code"). The District operates four elementary schools, a middle school and a high school. The

[5] Defendants offer the facts outlined herein as to be viewed in the light most-favorable to Plaintiffs as set forth in their Complaint for resolution of Defendants' Rule 12(b)(6) motion only.

[6] Ms. Evancho originally averred that the gender marker on her birth certificate identified her as a biological male. However, on October 31, 2016, Ms. Evancho presented the District with an amended birth certificate, issued on October 26, 2016, with the gender marker modified to read "Female".

District is governed by nine-elected members of the School Board. The School Board sets policy for the District. The School Board is also responsible for the selection and hiring of a District Superintendent who serves at the pleasure of the School Board (*See* Complaint, ¶ 15).

Dr. Miller is the Superintendent of the District and is a commissioned officer under the laws of the Commonwealth of Pennsylvania. Dr. Miller implements policy for the District as determined by the School Board. After the passage of Resolution #2, Dr. Miller was charged with the implementation of this official Board action (*See* Complaint, ¶ 16).

Principal Bowman is the Principal of Pine-Richland High School, where Plaintiffs are enrolled. As Principal of the High School, Principal Bowman is responsible for the day-to-day operations of the building consistent with Board policy (*See* Complaint, ¶ 17).

C. Resolution #2.

Resolution #2 was approved by the School Board on September 12, 2015 and states in its entirety:

> This resolution agreed to by a majority of the Board of School Directors of the Pine-Richland School District indicates our support to return to the long-standing practice of providing sex specific facility usage. *All students will have the choice of using either the facilities that correspond to their biological sex or unisex facilities.* This practice will remain in place until such time that a policy may be developed and approved.

(Complaint, ¶ 108) (emphasis supplied).

D. Alleged Harm.

Plaintiffs contend that the School Board's action in approving Resolution #2 is a refusal to recognize their gender identities and is an attempt to erase same. (Complaint, ¶ 152). They further claim that by being mandated to use single-stall unisex restrooms, they are isolated and segregated. (Complaint, ¶ 153). They allege that they and "other transgender students" commonly refrain from using the restroom. (Complaint, ¶ 154). They also offer the conclusory statement that Resolution

#2 fosters an unsafe, unhealthy and distressing environment. (Complaint, ¶ 155). Plaintiffs complain of being marginalized and stigmatized. (Complaint, ¶ 156). They allege harmful effects such as lowered self-esteem, embarrassment, humiliation, social isolation and stigma. (Complaint, ¶ 157).

Ms. Evancho and Ms. Ridenour allege that "having to use the boys' restroom" is uncomfortable and scary. Additionally, the use of unisex restrooms is unacceptable as it makes them feel "isolated and marginalized." (Complaint, ¶¶ 160, 61, 169, 170). A.S. claims that "having to use the girls' restroom causes great distress", and he feels "uncomfortable and dehumanized" in using the unisex restrooms. (Complaint, ¶¶ 174, 175). Plaintiffs offer generally that transgender individuals have a high probability of suffering from suicide, depression and anxiety. (Complaint, ¶ 88). The potential end result of alleged mental health issues does not create a causal relationship between the failure to permit access to sex specific bathrooms and Plaintiffs' needs to transition fully. All Plaintiffs have offered is a history of symptoms of early mental health issues in their Complaint. (Complaint, ¶¶ 24-27, 33, 46-48, 61-62, 66, 72) These conclusory allegations of harm need not be accepted by this Court.

III. ARGUMENT

A. The Official Capacity Claims Against Dr. Miller and Principal Bowman are Duplicative of the Claim Against the District and Must be Dismissed.

Plaintiffs have named Dr. Miller and Principal Bowman as Defendants in their official capacities only. (Complaint, ¶¶ 16 – 17). A claim against a public official in his or her official capacity "generally represents another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (quoting *Monell v. New York City Dep't of Sec. Servs*., 436 U.S. 658, 690 n. 55 (1978)). Plaintiffs' Complaint does not allege any claims for liability for the individual actions of either Dr. Miller or Principal Bowman.

Thus, the official capacity claims raised in the Plaintiffs' Complaint are duplicative of the suit against the District.

Courts in this District have also found that such redundant official capacity claims, pursuant to 42. U.S.C. § 1983, unnecessarily clutter a case, are likely to be confusing to a jury and have exercised their discretion to dismiss the same. *Hordych v. Borough of North East*, No. 10-16E, 2010 U.S. Dist. LEXIS 41308, at *25-26 (W.D. Pa. Apr. 27, 2010); *Swedron v. Baden Borough*, 08cv1095, 2008 U.S. Dist. LEXIS 94891, at *12-13 (W.D. Pa. Nov. 21, 2008); *Fogelsong v. Somerset County*, No. 13-77, 2013, U.S. Dist. LEXIS 29767, 2013 WL 795064, at *9 (W.D. Pa. March 4, 2013). This practice of the courts of the Western District has been approved by the Third Circuit. See *Cuvo v. De Biasi*, 169 F. App'x, 688, 693 (3d Cir. 2006) (affirming District Court's dismissal of claims against officers in their official capacities finding such claims redundant where their public entity employer was also sued).

Thus, for the reasons set forth more fully above, Defendants respectfully request that this Court dismiss Plaintiffs' claims against Dr. Miller and Principal Bowman with prejudice. Since Plaintiffs have not asserted any claims against said Defendants in their individual capacities, dismissal of the claims against Dr. Miller and Principal Bowman would remove them from this action entirely.

B. Plaintiffs Have Failed to State a Title IX Claim Upon Which Relief Can Be Granted.

1. The United States District Court for the Western District of Pennsylvania has held that sex-based classifications related to natal/birth sex are permissible under Title IX and do not discriminate "on the basis of sex."

In *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), Judge Kim R. Gibson was presented with the question of whether the University of Pittsburgh-Johnstown engaged in unlawful discrimination under Title IX and violated the Equal Protection Clause of the

United States Constitution when it prohibited a transgender male student from using restrooms and locker rooms designated for men on campus. The Court concluded that "[t]he simple answer is no." *Id*. at 661.

In *Johnston*, the District Court found that the plaintiff failed to allege plausible claims for relief under Equal Protection and Title IX as a matter of law. *Id*. at 661. The Court, accepting all facts as true, found that Johnston identified as a transgender male. He understood his male gender identity at a very early age, informing his parents that he was a boy at the age of nine. Johnston transitioned to living in accordance with his male gender identity and began to hold himself out as a male in all aspects of life. *Id*. at 662. Similar to Plaintiffs in the instant matter, Johnston underwent counseling related to his gender identity and received hormone treatment. *Id*. At the time of admission, he listed his sex as "female", but began taking classes and, at all times thereafter, consistently lived as a male. *Id*.

While at the University, Johnston consistently used the men's restrooms on campus. *Id* at 663. Following his enrollment in a men's weight training class, which was only attended by men, University officials informed Johnston that he could no longer use the men's locker room. *Id*. Johnston initially agreed to use a unisex facility, but later began to again use the men's locker room. He received a number of citations for disorderly conduct from campus police and was eventually brought up on disciplinary charges. *Id*. He was subsequently expelled as a result of the disciplinary infractions and lost his scholarship. *Id*.

In analyzing Johnston's Title IX claims, the Court held that Johnston had not alleged facts in violation of Title IX as the separation of sex-segregated restrooms and locker room facilities based on a student's natal or birth sex was permissible. "On a plain reading of the statute, the term 'on the basis of sex' in Title IX means nothing more than male and female, under the traditional

binary conception of sex consistent with one's birth or biological sex." *Id*. at 676 (citing *Etsitty v. Utah Transit Auth.*, 502 F. 3d 1215, 1222. (10th Cir. 2007)). As Judge Gibson held, "the exclusion of gender identity from the language of Title IX is not an issue for this Court to remedy. It is within the province of Congress—and not this Court—to identify those classifications which are statutorily prohibited." *Id.* Thus, Plaintiffs' claims alleging sex-based discrimination under Title IX should likewise be dismissed.

2. Title IX and its implementing regulations permit separate sex-based facilities.

"Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." *Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167, 175 (2005). For example, the statute itself contains an exception that permits covered institutions to "maintain separate living facilities for the different sexes." 20 U.S.C. § 1686. In addition, a DOE regulation states that covered institutions "may provide separate toilet, locker room, and shower 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." 34 C.F.R. § 106.33.

As it currently stands, Title IX and its implementing regulations authorize schools such as the District to separate living facilities, restrooms, locker rooms and shower facilities on the basis of biological sex. Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843-44 (1984), where Congress has expressly delegated to an agency the power to "elucidate a specific provision of the statute by regulation", that agency's regulations should be accorded controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. See also *Neal v. Board of Trustees*, 198 F.3d 763, 770 (9th Cir. 1999); *Kelley v. Board of Trustees, Univ. of Ill*., 35 F.3d 265, 270 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995) (deferring to 34 C.F.R. § 106.41 and noting that "where Congress has specifically delegated to an

agency the responsibility to articulate standards governing a particular area, we must accord the ensuing regulation considerable deference"). Thus, the Title IX regulation at 34 C.F.R. § 106.33 providing for separate sex-based facilities must be given *Chevron* deference.

The District has clearly complied with Title IX and its implementing regulations through the approval of Resolution #2. But, as it did so, it was nonetheless sensitive to Plaintiffs' gender transition, accommodating their requested name changes and pronoun use according to their gender identification, and establishing communication between the school, student and family in the event the student became a target of bullying and/or harassment. The District has made a good-faith effort to accommodate Plaintiffs and assist them in their transition, balancing its concern for their well-being with its responsibilities to all students. (Complaint, ¶¶ 38, 42, 53, 54, 56, 64, 65, 68 – 71, 73). The District has acted legally in implementing a Resolution that provides all students with physiological privacy and safety in restrooms and other sex-designated facilities. The School Board, in approving Resolution #2, was clearly complying with the unambiguous language of Title IX and its implementing regulations.

a. The meaning of the term "sex" under Title IX.

Title IX and its prohibition against discrimination "on the basis of sex" is physiologically grounded. It covers every human being. "On the basis of sex" is unambiguous and needs no interpretation. "Sex", as referenced in discrimination statutes, is sex-fixed, binary and genetically-determined sex, rooted in the nature of human reproduction and the irrefutable fact that we are a species of male and female. *Bibby v. Phila. Coca Cola Bottling Co*., 260 F. 3d 257, 261 (3d Cir. 2001). "Sex" is generally understood to mean "whether a person is anatomically male or female." Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*. 101 Colum. L. Reve. 392, 394 (2001).

"Gender" is "whether a person has qualities that society considers masculine or feminine." Ibid. "Sex" is not determined by psychology or one's subjective perception of identity.

The realities underpinning Title IX's recognition of separate living facilities, restrooms, locker rooms and shower facilities are reflected in the plain language of the statute and regulations, which are not ambiguous. The text of Title IX and its regulations allowing for separation of each facility "on the basis of sex" employs the term "sex" as was generally understood at the time of its enactment.

Title IX was enacted in 1972, and its regulations were promulgated in 1975 and readopted in 1980, which was during a time period when virtually every dictionary definition of "sex" referred to the physiological distinctions between males and females, particularly with respect to their reproductive functions.[7]

> [E]ven today, the term 'sex' continues to be defined based on the physiological distinctions between males and females. See, e.g., *Webster's New World College Dictionary* 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); *The American Heritage Dictionary* 1605 (5th ed. 2011) ("Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"); *Merriam-Webster's Collegiate Dictionary* 1140 (11th ed. 2011) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures").

[7] *G.G. v. Gloucester County School Board*, supra J. Niemeyer concurring in part and dissenting in part, 736-737 (collecting various dictionary definitions of "sex") (e.g., The Random House College Dictionary, 1206 (rev. ed. 1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); Webster's New Collegiate Dictionary, 1054 (1979) ("the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); American Heritage Dictionary, 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); Webster's Third New International Dictionary, 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . ."); The American College Dictionary, 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished . . . ")).

G.G. at 736-737, J. Niemeyer, (concurring in part and dissenting in part). "On the basis of sex" is unambiguous and needs no interpretation. "On a plain reading of the statute, the term 'on the basis of sex' in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex." *Johnston*, supra at 676, citing, *Etsitty v. Utah Transit Auth*., 502 F. 3d 1215, 1222 (10th Cir. 2007). Thus, Title IX's allowance for the separation of living facilities, restrooms locker rooms, and shower facilities "based on sex" rests on the universally accepted concern for bodily privacy that is founded on the distinct biological differences between the sexes.

b. Department of Education Guidance redefining "sex" under Title IX is not entitled to deference and violates the Administrative Procedures Act.

On January 7, 2015, James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights ("OCR"), issued a guidance document which states, in pertinent part, "[w]hen a school elects to separate or treat students differently on the basis of sex [for the purpose of providing restrooms, locker rooms and other facilities], a school generally must treat transgender students consistent with their gender identity." *Ferg-Cadima Letter*, p. 2, citing, OCR's December 2014 "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities", at Q. 31 ("Guidance") (Attached as Exhibit A). Prior to this Guidance, the DOE had not offered its interpretation of §106.33 as applied to transgender individuals. The Guidance further states that the OCR encourages schools to offer "gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities." *Ferg-Cadima* letter, p.2. The District, through Resolution #2, provides unisex single-stall restrooms for all of its students.

In direct response to the *G.G.* litigation[8], on May 13, 2016, the DOE and the United States Department of Justice ("DOJ") issued a joint guidance letter to all public schools, colleges and universities in the country receiving federal financial assistance, reiterating the federal government's previously stated position that, pursuant to Title IX, all public schools are obligated to treat transgender students consistent with their gender identity in all respects, including name and pronoun usage, restroom access and overnight accommodations. In the joint guidance, the DOE and DOJ sought to "clarify" that Title IX's prohibition on sex-based discrimination "encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status." *Dear Colleague Letter on Transgender Students*, May 13, 2016, Catherine E. Lhamon, Assistant Secretary for Civil Rights, U.S. Dept. of Education, and Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights, U.S. Dept. of Justice (the "2016 DCL") (attached as Exhibit B)[9].

The 2016 DCL by the DOE and DOJ attempts to impose their discordant reading of "sex" to provide that "[a] school may provide separate facilities on the basis of sex, but must allow transgender students' access to such facilities consistent with their gender identity." Id. at pg.3. These agencies' argument for a different meaning of "sex", and assertion that "sex" is ambiguous, is an effort by the agencies to reach a desired political outcome without resorting to the proper political process. The 2016 DCL is not an interpretation of an ambiguous term but an amendment to a statute without appropriate and required notice and comment rule-making. In the 2016 DCL, the DOE and DOJ effectively change the definition of the statutory term "sex" in Title IX. The

[8] The letter was issued only twenty-four days after the Fourth Circuit's decision in *G. G.* supra.

[9] The 2016 DCL has been challenged by a number of states in a federal lawsuit and is subject to a nationwide injunction against its interpretation of "sex" and enforcement. See *Texas v. United States of America*, No. 7:16-cv-00054 (N.D. Tex. August 21, 2106) (Judge Reed O'Connor Order granting nationwide injunction) (Judge Reed O'Connor October 18, 2016, Order denying Defendants' request to limit grant of preliminary injunction to just plaintiffs and further clarifying reach of nationwide injunction).

Guidance and 2016 DCL are not rules entitled to deference as asserted by Plaintiffs in this litigation. If anything, they would be merely persuasive but only so long as the interpretation provided is not inconsistent with the text of the statute.

There is a place for social change. However, while all attempts to effect such change through the legislative process have failed to date, that does not give an unelected agency the ability to effect wide-ranging change with the stroke of its pen. Such pen strokes are required to be put before the legislative notice and rule-making process. In this instance, the DOE and the DOJ, with the providence of the Executive Branch, are in clear violation of the Administrative Procedures Act ("APA"), 5 U.S.C. §706. "An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies . . . must always 'give effect to the unambiguously expressed intent of Congress.'" *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007).

The APA requires that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The APA's straight-forward instruction to this Court is to "decide all relevant questions of law" and "determine the meaning of Agency action", not to defer to an agency's viewpoint on a political, social and legal issue. In *United States v. Mead*, the Supreme Court held that *Chevron* deference only applies where Congress affirmatively had delegated interpretative authority to an agency. See, 533 U.S. 218, 229-34 (2001).

Legislative rules "create new rights, impose new obligations, or change existing law[,]" *Equity in Athletics v. DOE*, 639 F.3d 91, 105 (4th Cir. 2011), and must go through notice-and-comment rulemaking. 5 U.S.C. § 553; *Perez v. Mortg. Bankers Ass'n*, __ U.S. ___, 135 S. Ct. 1199, 1204 (2015). They must be published in the Federal Register, and public comment must be

considered before the rule is enacted. 5 U.S.C. § 553. In this instance, the DOE and DOJ's new rule repudiated 34 C.F.R § 106.33 which explicitly allows for the provision of separate restrooms, locker rooms and shower facilities on the basis of biological sex. "[I]f a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first and . . . must itself be legislative." *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992) ("NFP"). Such rules must go through notice and comment rulemaking.

NFP involved a regulation which banned all abortion counseling in Title X programs. Contrary to this regulation, a new rule, which did not go through notice-and-comment, allowed doctors in those programs to provide such counseling. *Id*. at 228-29. The Court held that the new rule was legislative and violated APA rulemaking requirements. *Id*. at 229. There was "no hint in the agency's statement of basis and purpose accompanying the [original] regulation, and certainly not in the regulation itself, to suggest that doctors would be exempt from the Title X abortion counseling ban." *Id*. at 232. Agency actions are not mere interpretative rules unless they are "consistent with its language and original purpose." *Id*. at 234. When "an agency . . . pronounces that for purposes of its regulation war is peace, it has made a substantive change", and such a change requires notice-and-comment. *Id*. at 235.

Regarding the instant matter, the DOE and DOJ took similar action as that which was found violative of an agency's power in the *NFP* case. Thus, this Court owes no deference to those agencies' interpretation and must, on its own, decide all relevant questions of law. For this reason, as well as those set forth more fully above, Defendants respectfully request that this Court dismiss Plaintiffs' Title IX claims with prejudice.

C. Plaintiffs Have Failed to State an Equal Protection Claim Upon Which Relief Can Be Granted.

"To state a claim under the Equal Protection Clause, a §1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class." *Shoemaker v. City of Lock Haven*, 906 F. Supp. 230, 238 (M.D. Pa. 1995) (citations omitted). In other words, a plaintiff must demonstrate that he or she received different treatment from that received by other individuals similarly situated. *Kuhar v. Greensburg—Salem Sch. Dist.*, 616 F.2d 676, 677, n. 1 (3d Cir.1980). "In order for [individuals] to be deemed similarly situated, the individuals with whom a plaintiff seeks to be compared must have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the [defendant's] treatment of them for it." *Jones v. Hosp. of Univ. of PA*. 2004 WL 1773725, at *6 (E.D. Pa. August 5, 2004). Similarly situated [students] must "have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish the school's treatment of them for it." *Bailey v. United Airlines*, Civ. A. No. 97-5223, 2002 WL 1397476, at *9 (E.D. PA. June 26, 2002).

Plaintiffs seek to set forth claims for violation of their rights guaranteed by the Fourteenth Amendment. More specifically, Plaintiffs assert that Defendants have denied them access to sex segregated restroom facilities on the basis of gender identity, and that Defendants put in place a "policy" to effectuate this alleged discriminatory purpose.

1. <u>The United States District Court for the Western District of Pennsylvania has held that sex-based classifications related to natal/birth sex are permissible and not a violation of Equal Protection.</u>

In the *Johnston* case, supra, the plaintiff alleged that the University of Pittsburgh violated the Equal Protection Clause by "treat[ing] [p]laintiff differently from other similarly situated students on the basis of his sex, including his transgender status and perceived failure to conform

to gender stereotypes." 97 F.Supp. 3d at 666. Specifically, Johnston's complaint averred that non-transgender male students were permitted to use the men's locker room and restroom facilities on campus while he was denied access to the men's locker rooms and restrooms. *Id*. at 667-668. The University defendants argued that Johnston had not raised a cognizable claim for a violation of Equal Protection under the law. Judge Gibson viewed the issue as "relatively narrow with well-settled applicable legal principles" and dismissed Johnston's Equal Protection claim. *Id.* at 668.

While conducting his legal analysis, Judge Gibson identified two important, but competing, interests: 1) Johnston's interest in performing life's most basic and routine functions in an environment consistent with his gender identity; and 2) the University's related interest of providing its students a safe and comfortable environment for performing these same basic functions. *Id*. Judge Gibson, writing in 2015, recognized that society's views of gender, gender identity, sex, and sexual orientation have significantly evolved and that the legal landscape is transforming as it relates to gender identity, while also recognizing society's long-held tradition of performing such functions in sex-segregated basis based on biological sex or birth sex. *Id.*

The *Johnston* Court, citing to Supreme Court precedent, acknowledged that not all classifications based on sex are constitutionally impermissible. "The heightened review standard our precedent establishes does not make sex a proscribed classification . . . Physical difference between men and women, however, are enduring; '[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" *Id*. at 669 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)); see also *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 75, (1998) ("[T]he statute (Title VII) does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition

of harassment on the basis of sex requires neither asexuality nor androgyny . . ."). As such, separating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause. Thus, "while detrimental gender classifications by the government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes." *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 478 (1981) (Stewart, J., concurring). This same legal framework is applicable to the facts of this matter.

As in the present matter, the *Johnston* plaintiff asserted discrimination "on the basis of sex." Judge Gibson held that the term "sex" in the context of Equal Protection and anti-discrimination statutes had been defined as biological sex assigned to a person at birth. *Id*. at 670-71, citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("sex like race and national origin, is an immutable characteristic determined solely by the accident of birth."). Finding that Johnston's birth sex was female, the Court found his claims for sex discrimination were not cognizable as the law permits distinctions between male and female on the basis of birth sex. *Id.* at 671. Plaintiffs in the instant matter have self-identified in their Complaint their sex assigned at birth. For these same reasons, Plaintiffs' Equal Protection claims are not cognizable as distinctions between male and female for biological differences are permissible.

Furthermore, under the Fourteenth Amendment, no State shall "deny to any person within its jurisdiction the equal protection of the laws." *Shuman ex rel. Shertzer v. Penn Manor School Dist.*, 422 F.3d 141, 151 (3d Cir. 2005) (quoting U.S. Const. amend. XIV, § 1.). However, this broad principle "must coexist" with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. *Romer v. Evans*,

517 U.S. 620, 631 (1996). As a result, the Supreme Court has "attempted to reconcile the principle with the reality" by prescribing different levels of scrutiny depending on whether a law "targets a suspect class." *Id.* Laws that do not target a suspect class are subject to rational basis review, and courts should "uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id*. By contrast, laws that target a suspect class, such as race, are subject to strict scrutiny. See *City of Richmond v. J.A. Croson, Co*., 488 U.S. 469, 493, 109 S. Ct. 706, 102 L. Ed. 854 (1989).

In the instant matter, the Plaintiffs allege that discrimination based on transgender status warrants heightened scrutiny. (Complaint, ¶ 205 – 210). However, as held by the Court in *Johnston*:

> First, neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, Plaintiff's discrimination claim is reviewed under the rational basis standard. This finding is consistent with numerous other courts that have considered allegations of discrimination by transgender individuals.
>
> Nevertheless, even if a heightened standard of review were to apply, the result would be the same as under rational basis here. Here, [the University's] policy of segregating its bathroom and locker room facilities on the basis of birth sex is 'substantially related to a sufficiently important government interest.' Specifically, [the University] explained that is policy is based on the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex. This justification has been repeatedly upheld by courts.

97 F. Supp. 3d at 669 – 670. Thus, whether this Court applies rational basis review or the heightened standard of review urged by Plaintiffs, Plaintiffs have still failed to plead an Equal Protection Claim upon which relief can be granted.

2. The Constitutional right to bodily privacy.

Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms and shower facilities on the basis of biological sex in

order to address privacy and safety concerns arising from the biological differences between males and females. An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia and other private parts are not exposed to persons of the opposite biological sex. Indeed, courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind. See, e.g., *Doe v. Luzerne Cnty*., 660 F.3d 169, 176-77 (3d Cir. 2011) (recognizing that an individual has "a constitutionally protected privacy interest in his or her partially clothed body" and that this "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex"); *Brannum v. Overton Cnty. Sch. Bd*., 516 F.3d 489, 494 (6th Cir. 2008) (explaining that "the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex"); *Beard v. Whitmore Lake Sch. Dist*., 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies"); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (explaining that "[t]he right to bodily privacy is fundamental" and that "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1989) (recognizing that, even though inmates in prison "surrender many rights of privacy," their "special sense of privacy in their genitals" should not be violated through exposure unless "reasonably necessary" and explaining that the "involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating").

Moreover, separating restrooms based on "acknowledged differences" between the biological sexes serves to protect this important privacy interest. See *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (noting "society's undisputed approval of separate public restrooms for men and women based on privacy concerns"). Indeed, the Supreme Court recognized, when

ordering an all-male Virginia college to admit female students, that such a remedy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex." *United States v. Virginia*, 518 U.S. 515, 550, n.19 (1996). Such privacy was and remains necessary because of the inherent "[p]hysical differences between men and women" which, as the Supreme Court explained, are "enduring" and render "the two sexes . . . not fungible," *Id*. at 533 (distinguishing sex from race and national origin). The protections against sex discrimination in civil rights statutes and Equal Protection analyses define sex as biological differences between males and females not because of "one's sense of oneself as belonging to a particular gender," as Plaintiffs contend.

Additionally, "[t]he heightened review standard our precedent establishes does not make sex a proscribed classification. Physical differences between men and women, however, are enduring: "[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Ballard v. United States*, 329 U.S. 187, 193 (1946). Thus, the District's recognition of the physical differences between the sexes and classification of use of restrooms based upon those differences for the protection of the privacy interests of all District students is not a violation of Equal Protection.

3. The District's approval of Resolution #2 does not violate the Equal Protection Clause.

The District's approval of Resolution #2 comports with the required procedures of the School Code and is an official action of the District. The School Board took action on Resolution #2 at a regularly scheduled public meeting held on September 12, 2016. (Complaint, ¶ 141). This action occurred after six months of study by the School Board on the issue of transgender students' transition needs. (Complaint, ¶¶ 105, 106, 120). On September 13, 2016, Dr. Miller and Principal Bowman implemented the School Board's directive. (Complaint, ¶ 142).

Plaintiffs argue that the passage of Resolution #2 overturned a "policy" that had previously been in place at the District that respected their gender identity and assert that such alleged prior "policy" was consistent with Title IX and Equal Protection. (Complaint, ¶¶ 38, 53, 54, 55, 74). However, Plaintiffs have not (because they cannot) direct this Court's attention to any District policy which had overturned the District's long-standing designation of separate restroom facilities on the basis of biological sex. Instead, the Plaintiffs attempt to conflate the decision of District administrators to permit such actions to occur in the High School as a "policy" of the District. (Complaint, ¶¶ 38, 53, 54, 55, 74). To the contrary, official policy of the District can only be established through action of the School Board. Final policy with respect to any subject matter must first be sanctioned or ordered by the School Board. The Supreme Court has instructed that "policy" is made when a decision-maker possessing final authority over the subject matter issues an official proclamation, policy or edict. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986).

Resolution #2 is consistent with Title IX's approved exceptions to sex-based distinctions in educational programs and services (see 34 C.F.R. §106.33). Additionally, Resolution #2 is in concert with the School Code which requires school boards to provide "suitably constructed water closets (bathrooms) used separately by the sexes" (see 24 P.S. 7-740). Often, public education becomes a petri dish of societal challenges, conflicts and changes. Students bring to school each day their own unique family, religious and personal experiences. The challenge for school districts is to provide educational access and to maintain a safe learning environment for all.

In recognition of this important role that schools play in our society, the District approved Resolution #2. Courts must consider the need to preserve the discretion of schools to craft individualized approaches to difficult issues that are appropriate for their respective communities. Schools "have the difficult task of teaching the shared values of a civilized order." *Doninger v.*

Niehoff, 527 F.3d 41, 54 (2d Cir. 2008) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 683(1986)). "The nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995). On more than one occasion, the Supreme Court has recognized the importance of school officials' "comprehensive authority . . . consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Independent Community School Dist*., 393 U.S. 503, 507 (1969); see also *New Jersey v. T. L. O*., 469 U.S. 325, 342, n. 9 (1985) ("The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities"); 74 F.3d at 1193 ("The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace . . . the common law, too, recognizes the school's disciplinary authority.") See Restatement (Second) of Torts § 152 (1965). *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

Thus, the District invoked its authority, responsive to community concerns, to formulate a workable policy that focuses on promoting a positive and safe learning environment for all District students while ensuring the legitimate privacy interests of its students from the intimate and unintended exposure to the opposite sex. The District's decision to maintain sex-designated communal restrooms, changing areas and showers on the basis of biological sex, and offer access to multiple single-stall unisex units for any student who is not comfortable with such communal facilities, is the reasoned approach.

Resolution #2 treats all similarly situated individuals in the same manner. All students are separated according to their biological sex in their use of restroom facilities. All students have

the option of using unisex restrooms. Plaintiffs are not similarly situated to cisgender females and cisgender males. For these reasons, as well as those outlined more fully above, Defendants respectfully request this Court to dismiss Plaintiffs' Equal Protection claim with prejudice.

IV. CONCLUSION

WHEREFORE, Defendants Pine-Richland School District, Dr. Brian R. Miller and Nancy Bowman respectfully request that this Court dismiss all of Plaintiffs' claims with prejudice.

RESPECTFULLY SUBMITTED,

MAIELLO, BRUNGO & MAIELLO, LLP

/s/ Christina Lane
Christina Lane, Esquire
Pa. I.D. #83677
cll@mbm-law.net
Alfred C. Maiello, Esquire
Pa. I.D. #00801
acm@mbm-law.net
Michael L. Brungo, Esquire
Pa. I.D. #46555
mlb@mbm-law.net
Roger W. Foley, Jr., Esquire
Pa. I.D. #73936
rwf@mbm-law.net
Gary H. Dadamo, Esquire
Pa. I.D. #93292
ghd@mbm-law.net
Peter J. Halesey, Esquire
Pa. I.D. #313708
pjh@mbm-law.net

(*Attorneys for Defendants)*

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 14th day of November, 2016, I have filed the foregoing **Brief in Support of Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)** with the Clerk of Courts via the District Court Electronic Case Filing System which will send notification of such filings to the following counsel of record:

Omar Gonzalez-Pagan, Esquire
Lambda Legal Defense and Education Fund, Inc.
120 Wall Street, 19th Floor
New York, NY 10005

Christopher R. Clark, Esquire
Kara N. Ingelhart, Esquire
Lambda Legal Defense and Education Fund, Inc.
105 West Adams Street, Suite 2600
Chicago, IL 60603

Tracie L. Palmer, Esquire
David C. Williams, Esquire
Kline and Specter, P.C.
1525 Locust Street
Philadelphia, PA 19102

MAIELLO, BRUNGO & MAIELLO, LLP

/s/Christina Lane
Christina Lane, Esquire
Pa. I.D. #83677
Alfred C. Maiello, Esquire
Pa. I.D. #00801
Michael L. Brungo, Esquire
Pa. I.D. #46555
Roger W. Foley, Jr., Esquire
Pa. I.D. #73936
Gary H. Dadamo, Esquire
Pa. I.D. #93292
Peter J. Halesey, Esquire
Pa. I.D. #313708

(*Attorneys for Defendants)*

MARCH 21, 2016 REGULAR BOARD MEETING

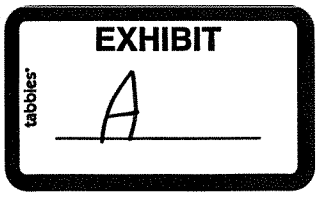
PRESIDENT'S STATEMENT AT BEGINNING OF MEETING

This reflects a little bit the honoring of Mr. Schweers. This is my seventh year on the Pine-Richland School Board and one of the things I have learned from this district is the intense pride that it takes in caring for its special needs students. I have also known ... I have also seen in my six years here that no matter how contentious the issue we face, no matter the challenges we face, no matter how deeply held to convictions, the community has always found a way to come together. And in that vein, I want to discuss a topic brought forward by some community members at the last board meeting – mainly that of transgender students and the use of restrooms at the high school.

Dr. Miller sent out a communication about ten days ago explaining the current practice. The board, the administration are continuing to work through this. But we are not alone. There are boards around the country, around the county that are struggling with this issue. It involves difficult balances between privacy rights, parental rights, civil rights, protections for students who are very at risk. Courts and legislatures, despite their protestations of people on the opposite poles of this issue, are also struggling with this and the legal environment, at least in Pennsylvania, can best be described as unsettled. And there is a reason for this. We often find that legislators and courts before enacting legislation and/or handing down major decisions look for some sort of public consensus. It appears that we are now, at least in this area, in a consensus-building phase. To the extent that we may be a little late to the discussion, as some have charged, it appears to be related to the concerns for protection of the most vulnerable students involved. But the time is now mandatory that we have this discussion. You will see on our agenda that the Student Services Committee will be scheduling a meeting to discuss this issue so that we can engage our community and hope to reach some sort of consensus.

We, as a board, have elected two goals – well, three goals – two of them are applicable to this. One is to maintain civil discourse; the other is to encourage diverse points of view. And we intend to pursue that as we work out way through this issue. As we hope to find a way to bring our community together to do what is best for our community and most importantly what is best to protect all of our students.

Thank you.



U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

Dear Colleague Letter on Transgender Students
Notice of Language Assistance

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

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

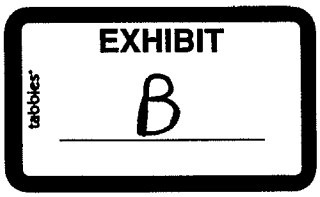
給英語能力有限人士的通知: 如果您不懂英語，或者使用英语有困难，您可以要求獲得向大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊，請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339),或電郵: Ed.Language.Assistance@ed.gov。

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

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

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

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



U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

May 13, 2016

Dear Colleague:

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

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

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

Terminology

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

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

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

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

Compliance with Title IX

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

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

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

1. Safe and Nondiscriminatory Environment

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

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

2. *Identification Documents, Names, and Pronouns*

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

3. *Sex-Segregated Activities and Facilities*

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

- **Restrooms and Locker Rooms**. A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.[14] A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.[15]

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

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

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

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

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

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

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

4. *Privacy and Education Records*

Protecting transgender students' privacy is critical to ensuring they are treated consistent with their gender identity. The Departments may find a Title IX violation when a school limits students' educational rights or opportunities by failing to take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth.[25] Nonconsensual disclosure of personally identifiable information (PII), such as a student's birth name or sex assigned at birth, could be harmful to or invade the privacy of transgender students and may also violate the Family Educational Rights and Privacy Act (FERPA).[26] A school may maintain records with this information, but such records should be kept confidential.

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

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

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

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

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

* * *

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

Sincerely,

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education

/s/

Vanita Gupta
Principal Deputy Assistant Attorney General for Civil Rights
U.S. Department of Justice

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

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

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

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

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

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

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

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

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

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

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

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

[13] *See* 34 C.F.R. § 106.31.

[14] 34 C.F.R. § 106.33.

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

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

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

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

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

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

equal single-sex school or coeducational school").

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

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

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

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

[25] 34 C.F.R. § 106.31(b)(7).

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

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

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

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

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

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

[32] 34 C.F.R. § 99.20.

[33] 34 C.F.R. §§ 99.20-99.22.

[34] *See* 34 C.F.R. § 106.31(b)(4).

[35] 34 C.F.R. § 106.8(b).