

OCR Instructions to the Field re Complaints Involving Transgender Students

Regional Directors:

I am writing to explain the effects of developments on the enforcement of Title IX by the Office for Civil Rights. The recent developments include the following:

- On February 22, 2017, the U.S. Departments of Education and Justice issued a letter withdrawing the statements of policy and guidance reflected in the May 13, 2016 Dear Colleague Letter (DCL) on OCR's enforcement of Title IX with respect to transgender students based on gender identity, as well as a related January 2015 letter, "in order to further and more completely consider the legal issues involved."
- On March 3, 2017, the U.S. District Court for the Northern District of Texas dismissed without prejudice the multi-state lawsuit challenging the May 2016 DCL and dissolved the preliminary injunction (as clarified in October 2016) that had restricted OCR's enforcement of Title IX with respect to transgender individuals' access to "intimate" facilities.
- On March 6, 2017, the U.S. Supreme Court vacated and remanded *Gloucester County School Board v. G.G.*, a case involving Title IX as it relates to transgender students' access to restrooms. The Court said it was remanding the case to the U.S. Court of Appeals for the Fourth Circuit for further consideration "in light of the guidance document issued by the [Departments] on February 22, 2017" (i.e., the letter withdrawing the May 2016 DCL discussed above).

Thus, OCR may not rely on the policy set forth in the May 2016 DCL or the January 7, 2015 letter to a private individual as the sole basis for resolving a complaint. However, as was stated in the February 22, 2017, letter, "withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment." Rather, OCR should rely on Title IX and its implementing regulations, as interpreted in decisions of federal courts and OCR guidance documents that remain in effect, in evaluating complaints of sex discrimination against individuals whether or not the individual is transgender.

OCR may assert subject matter jurisdiction over and open for investigation the following allegations if other jurisdictional requirements have been established (see CPM sections 104-106):

- failure to promptly and equitably resolve a transgender student's complaint of sex discrimination (34 C.F.R. § 106.8(b));
- failure to assess whether sexual harassment (i.e., unwelcome conduct of a sexual nature) or gender-based harassment (i.e., based on sex stereotyping, such as acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, such as refusing to use a transgender student's preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward

people who do not conform to sex stereotypes) of a transgender student created a hostile environment;

- failure to take steps reasonably calculated to address sexual or gender-based harassment that creates a hostile environment;
- retaliation against a transgender student after concerns about possible sex discrimination were brought to the recipient's attention (34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. § 100.7(e)); and
- different treatment based on sex stereotyping (e.g., based on a student's failure to conform to stereotyped notions of masculinity or femininity) (34 C.F.R. § 106.31(b)).

It is the goal and desire of this Department that OCR approach each of these cases with great care and individualized attention before reaching a dismissal conclusion. Please evaluate each allegation separately, searching for a permissible jurisdictional basis for OCR to retain and pursue the complaint. It is permissible, for example, for one allegation in a complaint (such as harassment based on gender stereotypes) to go forward while another allegation (such as denial of access to restrooms based on gender identity) is dismissed.

As always, other requirements in evaluating complaints, as explained in OCR's Case Processing Manual (CPM) apply, including CPM Sections 101, 105 and 106. For example, in establishing whether an allegation includes sufficient information to proceed to investigation, OCR will, consistent with CPM Section 108, "assist the complainant in understanding the information that OCR requires in order to proceed to the investigation of the complainant's allegation(s). This will include explaining OCR's investigation process and the rights of the complainant under the statutes and regulations enforced by OCR. OCR will also specifically identify the information necessary for OCR to proceed to investigation." I also encourage you to contact the Program Legal Group's Title IX team if you have any questions about whether OCR has jurisdiction over a case involving a transgender student or alleged discrimination based on gender identity.

When a complaint or case is dismissed, an appropriate text for a letter of dismissal could be:

On February 22, 2017, OCR and the U.S. Department of Justice (DOJ) issued a letter withdrawing their joint Dear Colleague Letter on Transgender Students, issued on May 13, 2016. OCR and DOJ stated that they were withdrawing the 2016 guidance in order to further and more completely consider the legal issues involved. OCR is therefore dismissing this [complaint/allegation/monitoring] under Sections 104 and 108 of OCR's Case Processing Manual. We remind you however, that there are other statutes and legal provisions that bar discrimination. Additionally, as Betsy DeVos, Secretary of the U.S. Department of Education has stated, each school has a responsibility to protect every student in America and ensure that they have the freedom to learn and thrive in a safe environment. Some States and school districts have found adopted policies and practices that protect all students, including transgender students. The Department's Examples of Policies and Emerging Practices for Supporting Transgender Students, available at www.ed.gov/oese/osh/osh/emergingpractices.pdf, features some of those policies and practices.

Thank you for your continued dedication to OCR's core mission. As Secretary DeVos stated on February 22, 2017, OCR remains committed to investigating all claims of discrimination, bullying and harassment against those who are most vulnerable in our schools. I trust you will apply these instructions in line with the attitude and approach we are proud to foster here in OCR: that OCR exists to robustly enforce the civil rights laws under our jurisdiction, and we will do so in a neutral, impartial manner and as efficiently as possible.

If you have any questions about these instructions, please contact your Enforcement Director, and always feel free to reach out to PLG for assistance in brainstorming how to process a particular complaint.

Sincerely,

/s/

Candice Jackson

Acting Assistant Secretary for Civil Rights

Office for Civil Rights

Department of Education