

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

MARY SMITH, *et al.*,

Plaintiffs,

v.

**BOARD OF EDUCATION OF
FREDERICK COUNTY, MARYLAND, *et
al.*,**

Defendants.

Civil Action No. 1:17-cv-02302-ELH

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants, Board of Education of Frederick County, Maryland (the “Frederick BOE”) and its President, Brad W. Young; its Vice President, Liz Barrett; its members, Michael Bunitsky, Colleen Cusimano, Ken Kerr, April Miller, and Joy Schaefer; and the Superintendent of the Frederick County Public Schools, Theresa R. Alban (collectively, “Defendants”), move to dismiss Plaintiff’s Complaint with prejudice.

The Frederick BOE recently adopted a new policy titled “Creating Welcoming and Affirming Schools for Transgender and Gender Nonconforming Students.” Among other things, the policy allows students to use bathrooms, locker rooms, and other facilities in a manner consistent with their gender identities, while giving access to safe and non-stigmatizing alternatives to any student—transgender or cisgender—who feels uncomfortable using gender-segregated facilities. The policy also provides privacy and confidentiality rights for transgender students and directs staff to use students’ preferred names and pronouns in their interactions with students.

Plaintiffs, who apparently equate sharing facilities with transgender students to “the horrors of Nazi death camps,” (Complaint ¶ 24), challenge the new policy under a variety of statutory and constitutional theories. As described in the accompanying Memorandum in Support, not one of Plaintiffs’ theories has merit—there simply is no legal right for students to exclusively share school facilities with other students who were assigned the same sex at birth. Similarly, there is no legal requirement that school districts discriminate against and stigmatize their transgender students. Further, Plaintiffs lack standing to pursue their claims, because they do not allege a concrete and actual or imminent injury in fact.

WHEREFORE, for the foregoing reasons and the reasons stated in the accompanying Memorandum in Support, the Court should grant Defendants’ Motion to Dismiss and dismiss the Complaint with prejudice.

Dated: October 20, 2017

Respectfully submitted,

/s/

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**MEMORANDUM IN SUPPORT OF DEFENDANTS'
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Defendants, Board of Education of Frederick County, Maryland (the “Frederick BOE”) and its President, Brad W. Young; its Vice President, Liz Barrett; its members, Michael Bunitsky, Colleen Cusimano, Ken Kerr, April Miller, and Joy Schaefer; and the Superintendent of the Frederick County Public Schools, Theresa R. Alban (collectively, “Defendants”),¹ submit this Memorandum in Support of their Motion to Dismiss Plaintiffs’ Complaint.

I. INTRODUCTION

It is easy to treat those similar to us the way we would want to be treated; it is more difficult to afford that same reciprocity to those who we perceive to be “different.” The policies at issue in this case facilitate an environment in the Frederick County Public Schools where everyone is treated with the same respect and dignity. The simple question before this Court is whether those policies, which, among other things, permit transgender and gender nonconforming students to use facilities that align with their gender identity, are illegal. Put another way, is there a legal right for students to exclusively share school facilities only with other students who were assigned the same sex at birth? The answer to that question is a resounding no.

In June 2017, the Frederick BOE adopted Policy 443, titled “Creating Welcoming and Affirming Schools for Transgender and Gender Nonconforming Students,”² with the stated purpose of “prevent[ing] discrimination, stigmatization, harassment, and bullying of students who are transgender or who are gender nonconforming and to create school cultures that are safe,

¹ The Complaint also purports to name “Frederick County Public Schools” as a defendant, but the school district does not exist as a legal entity separate from the Board of Education. *See Adams v. Calvert Cty. Pub. Sch.*, 201 F. Supp. 2d 516, 520 n.3 (D. Md. 2002) (“Plaintiff contends that the school district, and not the board of education, is the Defendant. The school district, however, does not exist as a separate entity for purposes of suit. . . . Thus, to be viable at all, the suit against the [the school district] must be treated as a suit against the [board of education].”).

² For simplicity, this memorandum will generally refer to “transgender” students, although the legal analysis of Plaintiffs’ claims is the same with respect to transgender students and other gender non-conforming students.

welcoming, and affirming for all students.” Policy 443, attached hereto as Exhibit 1, at 443.1.³ Among other things, Policy 443 allows students to use bathrooms, locker rooms, and other facilities in a manner consistent with their gender identities. *See id.* at 443.6-443.7. Policy 443 also provides privacy and confidentiality rights for transgender students and directs staff to use students’ preferred names and pronouns in their interactions with students. *Id.* at 443.4-443.5. The Frederick BOE also enacted Regulation 400-36 to further clarify Policy 443, *see* Regulation 400-36, attached as Exhibit 2, and made minor revisions to its existing Policy 437, titled “Bullying—Harassment—Intimidation,” a copy of which is attached as Exhibit 3. Policy 437, Policy 443, and Regulation 400-36 are referred to collectively herein as the “Policies.”

Plaintiffs in this lawsuit have not identified themselves,⁴ but they are purportedly a student at a Frederick County high school (“Minor Plaintiff”) and her mother (“Parent Plaintiff”). Complaint ¶¶ 12-13. They assert that the protections for transgender students in the Policies “evoke imagery from the horrors of Nazi death camps” and are “like a sad chapter from the history of the child cults Soviet Komsomol or Young Pioneers in the failed USSR.” Complaint ¶¶ 24, 90. Plaintiffs challenge various aspects of the Policies under eight separate constitutional, statutory, and common law theories. As described below, each theory fails as a matter of law and should be dismissed with prejudice for failure to state a claim. Plaintiffs’ claims also fail at a

³ Policy 443 is attached to the Complaint as Exhibit C, and thus the Court may properly consider it on a motion to dismiss. *See Philips v. Pitt County Mem. Hops.*, 572 F.3d 176, 180 (4th Cir. 2009) (“We may also consider documents attached to the complaint, . . . as well as those attached to the motion to dismiss, so long as they are integral and authentic.”). The same is true of Regulation 400-36 and Policy 437, both of which are attached to the Complaint and, for convenience, attached as exhibits to this memorandum.

⁴ Despite filing their lawsuit under pseudonyms, Plaintiffs have not moved for leave to proceed under pseudonyms. They are thus violating Federal Rule of Civil Procedure 10(a), which states that “[t]he title of the complaint must name all the parties.” *See Doe v. The New Ritz, Inc.*, Case No. WDQ-14-2367, 2015 U.S. Dist. LEXIS 91845, at *4-5 (D. Md. July 14, 2015) (noting that courts may allow parties to proceed anonymously only in “exceptional circumstances”). Further, they have not provided Defendants with copies of the sealed declarations purportedly attached as exhibits to their Complaint.

more fundamental level—Plaintiffs lack standing, because they do not allege any actionable harm they have suffered as a result of the Frederick BOE adopting the Policies. Indeed, there is no allegation that Minor Plaintiff has ever once used a bathroom or locker room at any Frederick County public school at the same time as a transgender student, or even that Plaintiffs know of any transgender students who attend her high school. Accordingly, and as described more fully below, the Court should dismiss the Complaint with prejudice.

II. FACTUAL BACKGROUND

A. The State and Federal Governments Encourage Schools To Adopt Policies That Protect Transgender Students.

Issues relating to the treatment by schools of their transgender students have gained increased attention over the last few years. For example, in October 2015, the Maryland State Department of Education (“MSDE”) issued a report titled “Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination,” a copy of which is attached as Exhibit 4.⁵ This report noted the clear need for schools to address the problems faced by transgender students:

According to a 2011 report from the National Center for Transgender Equality and the National Gay and Lesbian Task Force, 132 Maryland respondents who expressed transgender identity or gender nonconformity while in grades K-12 reported alarming rates of harassment (81percent), physical assault (38 percent) and sexual violence (16 percent). A staggering 43 percent reported that they had attempted suicide at some point in their life, 27 times the rate of the general population of 1.6 percent. Harassment was so severe that it led 6 percent to leave a school in K-12 settings or leave higher education. In addition, the Gay, Lesbian, and Straight Education Network (GLSEN, 2014) reports that students who experienced high levels of victimization based on gender expression were twice as likely as students who did not experience high levels of victimization to report that they did not plan to pursue post-secondary education.

⁵ When considering a Rule 12(b)(6) motion to dismiss, the Court “may properly take judicial notice of matters of public record.” *Philips*, 572 F.3d at 180. The Court may thus consider this report and other documents published by the Maryland and United States Departments of Education without converting this motion to one for summary judgment.

Rather than focusing on their education, many transgender[] and gender non-conforming students struggle for the ability to come to school and be themselves. The National Center for Transgender Equality reports that 59 percent of transgender students have been denied access to restrooms consistent with their gender identity. Some are denied opportunities to go on field trips or participate in sports. Together with bullying and victim-blaming, these conflicts can lead to disproportionate discipline and involvement in the juvenile justice system.

Id. at 6.

At the federal level, the United States Department of Education (“US DOE”), through its Office for Civil Rights, issued an opinion letter on January 7, 2015, a copy of which is attached as Exhibit 5, and, in partnership with the United States Department of Justice, issued a “Dear Colleague” letter on May 13, 2016, a copy of which is attached as Exhibit 6. These letters state that Title IX’s prohibition on sex discrimination includes discrimination based on gender identity, that schools should use names and pronouns consistent with students’ gender identities and, that schools “must allow transgender students access to [restroom and locker room] facilities consistent with their gender identity.” *Id.*

The Dear Colleague letter attached a separate report from the US DOE’s Office of Elementary and Secondary Education titled “Examples of Policies and Emerging Practices for Supporting Transgender Students,” a copy of which is attached as Exhibit 7 (the “US DOE Report”). The US DOE Report answers a wide range of questions that school districts might have about transgender students and gives examples of how other school districts around the country have approached issues related to transgender students. For example, the US DOE Report positively cites school district policies that encourage the use of students’ preferred names and pronouns, that allow students to access restrooms and locker rooms that are consistent with their gender identities, and that provide alternative facilities for students who might be uncomfortable sharing facilities with transgender students. *Id.* at 5, 7-8.

Following the recent change in administration, the US DOE withdrew its opinion letter and Dear Colleague letter, but it did not withdraw the US DOE Report. (*See* February 22, 2017 Dear Colleague Letter, attached as Exhibit 8.) In withdrawing the two letters, the US DOE stated that it believes “there must be due regard for the primary role of the States and local school districts in establishing educational policy.” *Id.*

B. Courts Affirm The Rights Of Transgender Students In Schools.

At the same time as the State and Federal Governments were issuing guidance regarding the treatment of transgender students, lawsuits filed by transgender students worked their way through the courts. Those students challenged policies that excluded them and other transgender students from school activities and from using facilities consistent with their gender identities. In these cases, a number of courts have held that Title IX’s prohibition on discrimination on the basis of sex and the Fourteenth Amendment’s Equal Protection Clause require that school districts allow students to participate in school activities and use facilities such as bathrooms and locker rooms in a manner that is consistent with their gender identities. *See, e.g., Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (holding that “[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX” and that the plaintiff also “demonstrat[ed] a probability of success on his Equal Protection Claim”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017) (granting preliminary injunction allowing transgender students to use restrooms consistent with their gender identity and finding a likelihood of success on the merits of the plaintiffs’ equal protection claim); *Bd. of Educ. of the Highland Local Sch. Dist. V. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016) (granting preliminary injunction allowing a transgender girl to

use the girls' restroom because she was likely to succeed on her Title IX and Equal Protection claims).⁶

C. The Frederick BOE Adopts Policies To “Creat[e] Welcoming and Affirming Schools For Transgender And Gender Nonconforming Students.”

Against this backdrop, and in light of the US DOE's recognition of the “primary role of the States and local school districts in establishing educational policy,” (Exhibit 8), the Frederick BOE adopted Policy 443 in June 2017 “to prevent discrimination, stigmatization, harassment, and bullying of students who are transgender or who are gender nonconforming and to create school cultures that are safe, welcoming, and affirming for all students.” Exhibit 1 at 443.1. The Board continued discussions regarding this Policy over the summer, leading to adoption on August 23, 2017 of the version of Policy 443 that is now before the Court. *See id.*

Policy 443 “is designed to provide an overarching framework and assurances that all students will be safe, welcomed, and affirmed.” *Id.* at 443.3. With respect to privacy and confidentiality, it states:

FCPS respects the rights of students to express their gender identity or expression as they wish. Transgender and gender nonconforming students have the right to discuss and express their gender identity and expression openly and to decide where, when, and with whom to share private information. The fact that a student may wish to use a different name or pronoun at school, or to disclose their transgender or gender nonconforming status to school staff, does not authorize school staff to disclose a student's personally identifiable or medical information. FCPS will ensure all personally identifiable and medical information relating to transgender and gender nonconforming students will be kept confidential according to applicable federal, state and local privacy and student records laws.

⁶ Courts routinely “look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.” *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007). In the Title VII and employment discrimination contexts, a number of Courts have held that discrimination against transgender individuals is discrimination on the basis of sex. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000).

Id. at 443.4. This is consistent with the best practices outlined in the guidance from the MSDE (Exhibit 4 at 11) and the US DOE Report (Exhibit 7 at 4).

Policy 443 also “recognizes the right of every student to be referred to by their preferred name and pronoun” and directs staff who work with students to use students’ preferred names and pronouns, “in every interaction, unless the interaction could compromise student privacy.”

Id. at 443.5(a). This is the approach recommended by both the MSDE and the US DOE. *See* Exhibit 4 at 10; Exhibit 7 at 5.

With respect to gender-segregated facilities, such as bathrooms and locker rooms, Policy 443 states:

Students, including non-binary students, should determine which facilities are consistent with their gender identity. All students must have access to facilities, including rest rooms, locker rooms, or changing facilities, that correspond to their gender identity. Access is provided without any additional complicating procedure.

Any student, regardless of gender or gender identity or expression, who is uncomfortable for any reason using a gender-segregated facility will be provided a safe and nonstigmatizing alternative. Options include, but are not limited to, privacy curtains, provisions to use private restrooms or office restrooms, or a separate changing schedule. These options are provided to any student without question or complicating procedures required. Under no circumstance is any student required or directed to use a private use facility.

Id. at 443.6. Once again, this is the approach recommend by the MSDE and in the US DOE Report. *See* Exhibit 4 at 13-14; Exhibit 7 at 7-8.

The Frederick BOE also adopted Regulation 400-36 to clarify and implement Policy 443. *See* Exhibit 2. Among other things, it clarifies that “FCPS will ensure all personally identifiable and medical information relating to transgender and gender nonconforming students will be kept confidential according to applicable federal, state and local privacy and student records laws.” *Id.* at II(F). It also clarifies how FCPS will involve parents of transgender students:

Every effort shall be made to encourage and support communication between transgender and gender nonconforming students and the student's parent/guardian. School staff may offer to meet jointly with the parent/guardian and the student at school. School staff shall work to both support student needs as well as respect the rights of the parent/guardian to have access to student records in compliance with federal and state law. Parents/Guardians will be contacted any time there is a health or safety concern regarding the student.

Id. With respect to gender-segregated facilities, Regulation 400-36 clarifies that, “[i]f there is a credible basis for believing that the student is not asserting their authentic gender identity for the purpose of being disruptive or infringing on the rights of others, school administration has the responsibility to investigate as they would for any other behavior that is being disruptive and follow up with the student and/or parent accordingly.” *Id.* at II(G).

Finally, the Frederick BOE made minor revisions to its existing Policy 437, which defines and prohibits bullying, harassment, and intimidation. *See* Exhibit 3. Relevant to this matter, the Frederick BOE added “gender expression” to a list of protected classes in Policy 437 that already included sex, sexual orientation, and gender identity. *Id.*

D. Plaintiffs Fail To Allege That The Frederick BOE’s Policies Had A Tangible Effect On Them.

Plaintiffs do not allege that Minor Plaintiff has ever shared a bathroom or locker room with another student, that Defendants have withheld any information about Minor Plaintiff from Parent Plaintiff, or that Plaintiffs have suffered any repercussions for failing to use the proper pronouns to identify a student. Indeed, Plaintiffs do not allege that the new policies have impacted them in any way, other than “anxiety” over how the policies might impact them and self-inflicted exclusion from school activities as a result of that anxiety. *See, e.g.*, Complaint ¶¶ 46, 55, 62, 75.

Plaintiffs allege that “[o]ne child videoed minor Plaintiff and her friends in various stages of undressing in the bath facility during PE and uploaded it to the internet, while in school.”

Complaint ¶45. But they do not allege that this incident related in any way to Policy 443 or to transgender students. In fact, the Complaint implies that this incident occurred before the Frederick BOE adopted Policy 443. Further, Plaintiffs do not allege that the child who videoed Minor Plaintiff was transgender or that there were any transgender students present at the time of this incident. This silence suggests the incident involved a cisgender student, which belies the stereotype of transgender students on which Plaintiffs' arguments rest.⁷ Specifically, Plaintiffs appear to be assuming that transgender and gender non-conforming students can reasonably be expected to engage in misconduct of this sort if they are allowed to use facilities consistent with their gender identities. There is no basis for this offensive assumption.

III. PLAINTIFFS LACK STANDING.⁸

A. Rule 12(b)(1) Legal Standard

Defendant's motion is made, in part, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Standing is a threshold jurisdictional question which ensures that a suit is a case or controversy appropriate for the exercise of the courts' judicial powers under the Constitution of the United States. *Pye v. United States*, 269 F.3d 459, 466 (4th Cir. 2001) "A court does not have subject matter jurisdiction over an individual who does not have standing." *Atlantigas Corp. v. Columbia Gas Transmission Corp.*, 210 Fed. App'x 244, 247 (4th Cir. 2006). "In a Rule 12(b)(1) motion, the court may look beyond the pleadings and 'the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether

⁷ "Cisgender is a term describing individuals whose gender corresponds with the legal sex they were assigned at birth." *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1120 n.9 (N.D. Cal. 2015) (internal citations omitted).

⁸ While Plaintiffs' do not have standing, they may seek to amend the Complaint to add specific allegations of interactions with transgender or gender non-conforming students. As a result, Defendants encourage the Court to also rule on the arguments raised in connection with the Rule 12(b)(6) motion to avoid unnecessary further motions practice and waste of judicial resources. This case turns on whether there is a legal right for students to exclusively share school facilities with other students who were assigned the same sex at birth and the Court will have all of the information it needs to make that determination upon the conclusion of the briefing on this Motion.

in fact subject matter jurisdiction exists.” *Khoury v. Meserve*, 268 F. Supp. 2d 600, 606 (D. Md. 2003). “It is the plaintiff’s burden to prove that jurisdiction in this court is proper.” *Id.*; *see also Richmond, Fredericksburg, & Potomac R.R. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

B. Plaintiffs Do Not Allege A Concrete And Actual Or Imminent Injury In Fact That Is Traceable To The Policies.

“It is well settled that under Article III of the United States Constitution, a plaintiff must establish that a case or controversy exists between himself and the defendant and cannot rest his claim to relief on the legal rights or interests of third parties.” *Smith v. Frye*, 488 F.3d 263, 272 (4th Cir. 2007) (affirming dismissal of a complaint for lack of standing). “Plaintiffs bear the burden of alleging: (1) a concrete and actual or imminent ‘injury in fact;’ (2) causation between the plaintiff’s injury and the defendant’s conduct; and (3) a likelihood that the requested relief will redress the alleged injury.” *Doe v. Blue Cross Blue Shield, of Md., Inc.*, 173 F. Supp. 2d 398, 403 (D. Md. 2001) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). “Plaintiffs must allege that they have been harmed in fact, not that they can imagine circumstances in which they could be affected.” *Id.* “To establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560).

Plaintiffs do not allege (1) that Minor Plaintiff has ever once shared a bathroom or locker room with a transgender student; (2) that Minor Plaintiff has ever interacted in any way with a transgender student; or (3) that Defendants have ever withheld information about Minor Plaintiff from Parent Plaintiff. In other words, Plaintiffs do not allege that the Policies have impacted them in any tangible way. Rather, to establish standing, Plaintiffs rely on the anxiety they have allegedly suffered over the mere possibility that Minor Plaintiff might someday share a bathroom

or locker room with a transgender student. *See, e.g.*, Complaint ¶¶ 46, 55, 62, 75. This is insufficient.

As an initial matter, it is unclear why they would have any such anxiety, because Policy 443 makes clear that Minor Plaintiff is free to use “safe and nonstigmatizing alternative” facilities. *See* Exhibit 1 at 443.6. In any event, apprehension of future harm is insufficient to confer standing. *See, e.g., Chambliss v. CareFirst, Inc.*, 189 F. Supp. 3d 564 (D. Md. 2016) (“[A]n objectively reasonable likelihood of harm is not enough to create standing, even if it is enough to engender some anxiety.”); *Cohen v. Facebook, Inc.*, Case No. 16-cv-4453 (NGG)(LB), 2017 U.S. Dist. LEXIS 76701, at *14-15 (E.D.N.Y. May 18, 2017) (“[P]laintiffs cannot evade the required showing of an actual or imminent injury by alleging present harms incurred as a result of their fear of a hypothetical future harm that is not certainly impending, as doing so would allow parties to repackage their conjectural injury to manufacture standing.”); *Lafferty v. Sch. Bd. of Fairfax Cnty.*, 798 S.E. 2d 164 (Va. 2017) (holding that plaintiffs challenging a school board’s addition of “gender identity” and “gender expression” to its non-discrimination policy lacked standing, because “general distress over a general policy does not alone allege injury sufficient for standing, even in a declaratory judgment action”).

Plaintiffs’ allegation that “[o]ne child videoed minor Plaintiff and her friends in various stages of undressing in the bath facility during PE” (Complaint ¶45), does not change the analysis. This alleged incident apparently occurred before the Frederick BOE adopted the Policies, so it is not traceable in any way to the Policies. Plaintiffs also attempt to show concrete harm by alleging that “Minor Plaintiff does not participate in sports or other extracurricular activities that could require her to change her clothes or shower at her school because of this anxiety[.]” Complaint ¶ 47. The Supreme Court has rejected this theory of standing, holding that

plaintiffs “cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 416 (2013).

Accordingly, because Plaintiffs have not alleged that they suffered a concrete and actual or imminent injury in fact as a result of the Policies, there is no case or controversy between Plaintiffs and Defendants and the Court lacks jurisdiction over Plaintiffs’ claims.

C. Plaintiffs Lack Standing To Assert A First Amendment Claim.

In addition to their other various constitutional, statutory, and common law theories, Plaintiffs bring a claim under the First Amendment challenging a perceived directive in the Policies for students to use transgender students’ preferred pronouns. In the First Amendment context, “[f]or standing purposes, the plaintiff must show that the regulation presents a credible threat of enforcement against the party bringing suit that is not ‘imaginary or wholly speculative.’” *Abbott v. Pastides*, Case No. 3:16-cv-538-MBS, 2017 U.S. Dist. LEXIS 106839, at *26 (D.S.C. July 11, 2017) (citing *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 302 (1979)). “Plaintiffs may bring a pre-enforcement suit when they can establish that they intend to engage in conduct that is proscribed by a statute, and that there exists some credible threat of enforcement thereunder.” *Id.* “Plaintiffs must articulate a concrete plan to violate the law in question by giving details about their future speech such as when, to whom, where, or under what circumstances.” *Id.* (internal quotations omitted). The allegations must be specific enough so that the court need not speculate on the types of speech or political activity in which the claimants intend to engage.” *Id.* at *27. Plaintiffs do not meet this standard for two reasons.

First, Plaintiffs do not allege an intent to engage in conduct that violates the Policies. There is no allegation that Minor Plaintiff attends school with a student she knows or suspects to be transgender, that she will at any point interact with a transgender student, or that she intends

to use incorrect pronouns when referring to a transgender student. To the extent Plaintiffs are concerned that they will inadvertently use an incorrect pronoun to refer to a transgender student, they acknowledge that they have received confirmation from the Superintendent that mistakes are not prohibited by and would not be punishable under the Policies. *See* ECF No. 1-4 (“Students aren’t subject to discipline when they make mistakes.”). This failure to allege an intent to violate the Policies precludes a First Amendment challenge to the Policies. *See Abbott*, 2017 U.S. Dist. LEXIS 106839, at *26-27 (finding no standing where the speech at issue was not prohibited by the challenged sexual harassment and discrimination policy).

Second, Plaintiffs do not allege a credible threat of enforcement. As described above, there is not even an allegation that Minor Plaintiff attends any class or school activity with any transgender student. There is thus no allegation that she will be in a position to use an incorrect pronoun to refer to a transgender student, much less to be disciplined for it. And the Superintendent has disclaimed any intent to discipline Plaintiffs or other students for using incorrect pronouns to refer to transgender students, unless they are doing so “repeatedly . . . after being instructed about their mistake” or “with malice (like the intent to bully or harass).” ECF No. 1-4. The Fourth Circuit and other courts have previously found no standing in similar challenges to school policies. *See, e.g., Rock for Life-UMBC v. Hrabowski*, 411 F. App’x 541, 548-49 (4th Cir. 2010) (plaintiffs had no standing to challenge sexual harassment policy and student code of conduct, because there was no credible threat that the university would apply those policies to discipline plaintiffs for their anti-abortion message); *Abbott*, 2017 U.S. Dist. LEXIS 106839 at *27-31 (finding no credible threat of enforcement, and thus no standing, where the language of the policy at issue “makes it clear that the policy would not be applied to the speech in which Plaintiffs or similarly situated students intent to participate”).

Accordingly, Plaintiffs lack standing to pursue any of the claims they have asserted in the Complaint, and the Court should dismiss the Complaint on this basis alone.

IV. THE COMPLAINT FAILS TO STATE A CLAIM.

A. Rule 12(b)(6) Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff is obligated to “provide the grounds of his entitlement to relief,” including “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); *see also Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008); *Jackson v. State of Maryland*, No. JFM-10-463, 2010 U.S. Dist. LEXIS 64937, at *2 (D. Md. June 30, 2010). Satisfying this obligation “requires more than labels and conclusions . . . [A] formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Although a court evaluating a motion to dismiss must assume that all facts in the complaint are true, the court need not accept unsupported legal allegations, *Revene v. Charles County Comm’rs*, 882 F.2d 870, 873 (4th Cir. 1989), nor must it accept legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Conclusory assertions are insufficient to satisfy the requirements of Rule 12(b)(6). *See Giarratano*, 521 F.3d at 304.

B. Count One Fails To State A Claim For Violation Of A Constitutional Right To Privacy.

In Count One, Plaintiffs allege a constitutional right to not share bathrooms or locker rooms with transgender students under the substantive due process clause of the Fourteenth Amendment to the United States Constitution and Articles 5 and 24 of the Maryland Constitution’s Declaration of Rights. As described below, no such right exists and, even if it did, Defendants have not violated it.

1. There Is No Constitutional Right To Not Share Restrooms And Locker Rooms With Transgender Students.

“The Due Process Clause guarantees more than fair process, and the ‘liberty’ it protects includes more than the absence of physical restraint.” *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). The Supreme Court has held that, “in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion.” *Id.* at 720. But “the Court has always been reluctant to expand the concept of substantive due process because guide posts for responsible decision-making in this unchartered area are scarce and open-ended.” *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

While Plaintiffs base their constitutional claims on an alleged right to privacy, “there is no general constitutional right to privacy; rather, the ‘right to privacy’ has been limited to matters of reproduction, contraception, abortion, and marriage, and none of these matters is implicated in the present case.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 252 (4th Cir. 1999); *see also Whalen v. Roe*, 429 U.S. 589, 607-08 (1977) (Stewart, J., concurring) (“In *Katz v. United States*, 389 U.S. 347, the Court made clear that although the Constitution affords protection against certain kinds of government intrusions into personal and private matters, there is no general constitutional right to privacy.”) (internal quotation marks omitted).

Two federal courts have previously addressed whether public school students have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth was different than theirs, and both have held that no such right exists. In *Students & Parents for Privacy v. United States Department of Education*, Case No. 16-cv-4945, 2016 U.S. Dist. LEXIS 150011 (N.D. Ill. Oct. 18, 2016) (“*Students & Parents*”), Magistrate

Judge Jeffrey T. Gilbert denied a motion for a preliminary injunction that would have required a school district to segregate restrooms and locker rooms on the basis of students' sex assigned at birth. In an exhaustive analysis that is equally applicable to Plaintiffs' claims here, Magistrate Judge Gilbert stated:

Generally speaking, the penumbral rights of privacy the Supreme Court has recognized in other contexts protect certain aspects of a person's private space and decision-making from governmental intrusion. Even in the context of the right to privacy in one's own body, the cases deal with compelled intrusion into or with respect to a person's intimate space or exposed body. No case recognizes a right to privacy that insulates a person from coming into contact with someone who is different than they are, or who they fear will act in a way that causes them to be embarrassed or uncomfortable, when there are alternative means for both individuals to protect themselves from such contact, embarrassment, or discomfort.

Again, courts are very careful in extending constitutional protection in the area of personal privacy. Although the Supreme Court has recognized fundamental rights in regard to some special privacy interests, it has not created a broad category where any alleged infringement on privacy will be subject to substantive due process protection. In other words, "privacy" is not a magic term that automatically triggers constitutional protection. Instead, the same rules that govern every other substantive due process analysis apply in the privacy context. That means an asserted privacy right is not fundamental unless it is deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it was sacrificed. The list of rights that rise to this level is a short one. This list for the most part has been limited to matters relating to marriage, family, procreation, and the right to bodily integrity.

In assessing the nature and scope of Plaintiffs' constitutional rights, and whether those rights have been infringed, the Court also 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 social order. Our public education system has evolved to rely necessarily upon the discretion and judgment of school administrators and school board members. The Supreme Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.

Even when confronting segregation, perhaps the most intractable problem ever to afflict our public schools, the Supreme Court emphasized that schools have the primary responsibility for elucidating, assessing, and solving problems that arise

during desegregation. Therefore, our Nation's deeply rooted history and tradition of protecting school administrators' discretion require that this Court not unduly constrain schools from fulfilling their role as a principal instrument in awakening the child to cultural values, in preparing him or her for later professional training, and in helping him or her to adjust normally to his or her environment.

It also is important to remember that constitutional privacy rights, whether rooted in the Fourth Amendment or the Fourteenth Amendment, are different in public schools than elsewhere. It is well established that public school students enjoy a reduced expectation of privacy in comparison to the public at large. Of particular relevance to this case, public school locker rooms in this country traditionally have been and remain not notable for the privacy they afford.

Contemporary notions of liberty and justice are inconsistent with the existence of the right to privacy asserted by Plaintiffs and properly framed by this Court. A transgender boy or girl, man or woman, does not live his or her life in conformance with his or her sex assigned at birth. . . . For all these reasons, high school students do not have a fundamental constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs.

Id. at *74-85 (internal citations and quotation marks omitted).

On August 25, 2017, Judge Edward G. Smith of the Eastern District of Pennsylvania confirmed Magistrate Judge Gilbert's analysis in *Doe v. Boyertown Area Sch. Dist.*, Case No. 17-cv-1249, 2017 U.S. Dist. LEXIS 137317 (E.D. Pa. Aug. 25, 2017) ("*Boyertown*"). He noted that "[t]he plaintiffs have not identified and this court has not located any court that has recognized a constitutional right of privacy as broadly defined by the plaintiffs." *Id.* at *135. Judge Smith went on to hold that, "[s]ince this matter does not involve any forced or involuntary exposure of a student's body to or by a transgender person, and the School District has instituted numerous privacy protections and available alternatives for uncomfortable students or to protect against the involuntary exposure of a student's partially clothed or unclothed body, the plaintiffs have not shown that the defendants infringed upon their constitutional privacy rights." *Id.* at *148-49. This analysis is equally applicable here and precludes Plaintiffs' Fourteenth Amendment substantive due process claim.

Plaintiffs also assert their constitutional privacy claim under Article 5 and Article 24 of the Maryland Constitution Declaration of Rights. Article 5 incorporates into Maryland law the English common law and statutes, as they existed on July 4, 1776, except where modified by legislative action or subsequent court decisions. Md. Dec. of R. art. 5. It does not grant any privacy rights beyond those found elsewhere in the United States and Maryland Constitutions. “Article 24 . . . is *in pari materia* with the Due Process Clause of the Fourteenth Amendment.” *Doe v. Dep’t of Pub. Safety & Corr. Servs.*, 971 A.2d 975, 982, 185 Md. App. 625, 636 (Md. Ct. Spec. App. 2009). Accordingly, Maryland courts routinely decline to interpret it more broadly than the Fourteenth Amendment. *See id.* And because the privacy right asserted by Plaintiffs is not protected by the Fourteenth Amendment, it is likewise not protected by Article 24.

2. Even If There Were Such A Right, The Policies Do Not Infringe On It.

Even if Plaintiffs did have the right not to share bathrooms and locker rooms with transgender students, they would still need to show that Defendants infringed on that right. There is no allegation, however, that any Minor Plaintiff has ever shared a bathroom or locker room with a transgender student, and nothing in the Policies compels her to do so. Further, the Policies make available to Minor Plaintiff (and all other students) “safe and nonstigmatizing alternative facilities.” As such, and as was the case in *Students & Parents*, “this case does not involve any forced or involuntary exposure of a student’s body to or by a transgender person assigned a different sex at birth” and “Plaintiffs are not suffering a ‘direct’ and ‘substantial’ infringement on any substantive due process right.” *Students & Parents*, 2016 U.S. Dist. LEXIS 150011, at *95.

3. The Policies Do Not Shock The Conscience.

Even if Plaintiffs had the right not to share facilities with transgender students, and even if Defendants had infringed on that right, Plaintiffs would still need to show that Defendants’ actions in enacting the Policies were “so egregious, so outrageous, that it may fairly be said to

shock the contemporary conscience” *Hawkins v. Freeman*, 195 F.3d 732, 738 (4th Cir. 1999) (citing *County of Sacramento v. Lewis*, 423 U.S. 833, 847 n.8 (1998)).

As described above, Defendants enacted the Policies after receiving and in accordance with guidance from both the Maryland and United States Departments of Education. In doing so, they carefully balanced the needs and privacy interests of all students (transgender and cisgender) by, among other things, making “safe and nonstigmatizing alternative” facilities available to all students. Their actions thus do not “shock the conscience.” *See Students & Parents*, 2016 U.S. Dist. LEXIS 15011 at *99 (“Therefore, the Court finds that neither the Restroom Policy nor the Locker Room Agreement shocks the conscience because they represent a careful and sensitive balancing of the interests of all the students in District 211.”).

For all of these reasons, Plaintiffs privacy claims under the Maryland and United States Constitutions fail to state a claim.

C. Count Two Fails To State A Claim For Violation Of Title IX.

In Count Two, Plaintiffs allege that Defendants created a hostile work environment for Minor Plaintiff in violation of Title IX by enacting a policy by which transgender individuals may use bathrooms and locker rooms consistent with their gender identities. “To establish a Title IX claim on the basis of sexual harassment, a plaintiff must show that (1) she was a student at an educational institution receiving federal funds, (2) she was subjected to harassment based on her sex, (3) the harassment was sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity, and (4) there is a basis for imputing liability to the institution.” *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007). Plaintiffs’ Title IX claim fails to state a claim, because the facts alleged do not establish the second or third elements of a Title IX claim.

1. Plaintiffs Have Not Alleged Harassment Based On Sex.

First, Plaintiffs have not alleged that Defendants have in any way harassed or treated Minor Plaintiff differently based on her sex. All students, whether male or female, transgender or cisgender, have the right under the Policies to use the facilities that correspond with their gender identities or to use alternative facilities if they so choose. And the Policies apply equally to the male and female restrooms and locker rooms. As such, the Policies do not discriminate against Plaintiffs in any way based on sex. *See Boyertown*, 2017 U.S. Dist. LEXIS 137317 at *162-67 (“The School District’s similar treatment of all students is fatal to the plaintiffs’ Title IX claim.”); *Students & Parents*, 2016 U.S. Dist. LEXIS 150011 at *101-102 (“Therefore, the alleged discrimination and hostile environment that Girl Plaintiffs claim to experience is not on the basis of their sex, and any discomfort Girl Plaintiffs allege they feel is not the result of conduct that is directed at them because they are female.”).⁹

2. Plaintiffs Have Not Alleged Severe, Pervasive, Or Objectively Offensive Harassment.

Even if allowing transgender students to use facilities that correspond with their gender identities was somehow based on sex, it is not harassment at all, much less the severe, pervasive, or objectively offensive harassment required to maintain a Title IX claim. In the Title IX context:

Harassment reaches the sufficiently severe or pervasive level when it creates an environment that a reasonable person would find hostile or abusive and that the victim herself subjectively perceives to be abusive. Whether gender-oriented harassment amounts to actionable (severe or pervasive) discrimination depends on a constellation of surrounding circumstances, expectations, and relationships. All the circumstances are examined, including the positions and ages of the harasser and victim, whether the harassment was frequent, severe, humiliating, or physically threatening, and whether it effectively deprived the victim of educational opportunities or benefits.

⁹ By contrast, the policy that Plaintiffs would have Defendants adopt—barring transgender students from bathrooms and locker rooms that correspond to their gender identity—would discriminate against transgender students on the basis of sex. *See supra* at 5-6.

Jennings, 482 F.3d at 696 (internal citations omitted).

Here, Plaintiffs have not alleged any harassment whatsoever, as there is no allegation that Minor Plaintiff has ever used a restroom or locker room at the same time as a transgender student. She instead relies on her alleged apprehension about sharing these facilities with transgender students, but “[g]eneralized statements of fear and humiliation are not enough to establish severe, pervasive or objectively offensive conduct.” *Students & Parents*, 2016 U.S. Dist. LEXIS 150011 at *104. And even if Minor Plaintiff were to share a restroom or locker room with a transgender student, “a reasonable person would not find the practice of allowing transgender students to use the locker rooms and bathrooms corresponding to their gender identity to be hostile, threatening, or humiliating.” *Boyertown*, 2017 U.S. Dist. LEXIS 137317 at *178; *see also Students & Parents*, 2016 U.S. Dist. LEXIS 150011 at *105 (“The mere presence of a transgender student in a restroom or locker room does not rise to the level of conduct that has been found to be objectively offensive, and therefore hostile, in other cases.”).

Accordingly, Plaintiffs fail to state a claim for harassment under Title IX.

D. Count Three Fails To State A Claim For Invasion Of Privacy – Intrusion Upon Seclusion.

In Count Three, Plaintiffs assert a common law claim for “intrusion upon seclusion,” based on the prospect that Minor Plaintiff someday might be in a bathroom or locker room at the same time as a transgender student. “The elements of this tort are intentional intrusion upon another person’s solitude, seclusion, private affairs or concerns in a manner which would be highly offensive to a reasonable person.” *Trundle v. Homeside Lending, Inc.*, 162 F. Supp. 2d 396, 401 (D. Md. 2001). “Maryland case law makes clear that intrusion upon seclusion depends upon a person’s reasonable expectation of privacy[.]” *Webb v. Green Tree Servicing, LLC*, Civil

Action No. ELH-11-2105, 2011 U.S. Dist. LEXIS 141806, at *36 (D. Md. Dec. 9, 2011). Plaintiffs' intrusion upon seclusion claim fails for three reasons.

First, Plaintiffs do not allege that any Defendant intruded upon their seclusion. Rather, they speculate that the Policies enacted by Defendants somehow might cause someone else to intrude upon Minor Plaintiff's seclusion in the future. In *New Summit Associates L.P. v. Nistle*, 533 A.2d 1350, 73 Md. App 351 (Md. Ct. Spec. App. 1987), the Court of Special Appeals held that a landlord could not be liable for an intrusion upon seclusion where a tenant discovered peepholes allowing an unknown perpetrator to view her in her private bathroom, because "[t]here was no proof that the invasion of appellee's privacy was committed by any agent, servant, or employee of either of the appellants." *Id.* at 1354. It did not matter that a jury found the landlord negligent in not correcting a known issue of construction workers at the apartment complex carving peepholes, because "[a]bsent evidence of [the landlord's] intentional participation in the invasion, there is no basis upon which [the landlord] can be held liable on this theory." *Id.* Here, Plaintiffs have not alleged that any Defendant has intentionally invaded their privacy. In fact, Plaintiffs have not alleged any invasion of privacy at all; they merely speculate that the Policies might lead to an invasion of Minor Plaintiff's privacy in the future. Moreover, Minor Plaintiff can avoid the supposed invasion of her privacy by availing herself of the safe and non-stigmatizing alternative facilities available to her under Policy 443.

Second, there is no reasonable expectation of privacy in the common areas of a restroom or locker room. As noted in *Boyertown*, cases that have found an intrusion upon seclusion in bathrooms "involved an intrusion into a single bathroom stall and not the presence of someone in the common area of a multi-user facility." *Boyertown*, 2017 U.S. Dist. LEXIS 137317 at *189. "As for locker rooms generally, 'public school locker rooms are not notable for the privacy they

afford.” *Id.* at *190 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995)); *see also Craig v. M&O Agencies, Inc.*, 496 F.3d 1047, 1061 (9th Cir. 2007) (affirming summary judgment on an invasion of privacy claim because the plaintiff “had no reasonable expectation of privacy in the common area of the restroom, where she would expect her conduct to be observed by other individuals in the restroom”). Plaintiffs make no allegation that the Policies would lead to an intrusion upon their seclusion in the private areas of restrooms or locker rooms, such as individual toilet stalls.

Third, the alleged intrusion upon seclusion, *i.e.*, a transgender person using a restroom or locker room at the same time as Minor Plaintiff, is not highly offensive to a reasonable person. Indeed, this was a primary reason why the court in *Boyertown* found no likelihood of success on the merits with respect to a nearly identical invasion of privacy claim:

[T]he court does not find that a reasonable person would be offended by the presence of a transgender student in the bathroom or locker room with them, despite the possibility that the transgender student could possibly be in a state of undress In addition, the mere presence of a transgender student in the common area of the girls’ bathroom washing hands . . . is also not objectively offensive to a reasonable person.”

Boyertown, 2017 U.S. Dist. LEXIS 137317 at *191. Plaintiffs thus fail to state a claim for intrusion upon seclusion.

E. Count Four Fails To State A Claim For Violation Of The First Amendment.

In Count Four, Plaintiffs claim that Defendants are violating their First Amendment rights by requiring Minor Plaintiff to refer to her fellow students with pronouns consistent with their gender identities. In other words, Plaintiffs claim a constitutional right to harass and demean transgender students by using the wrong pronouns. This claim fails for a number of reasons, not the least of which is that no such constitutional right exists.

1. The Policies Do Not Prohibit Plaintiffs From Voicing Their Opinion On Any Issue, Including Gender Identity Issues.

In their attempt to manufacture a restriction on their First Amendment rights, Plaintiffs overstate the scope of the Policies. The Policies do not, as Plaintiffs contend, “forc[e] Plaintiff Mary Smith to be silent as to her speech on issues of women’s rights and the public interest.” Complaint ¶ 149. Rather, Policy 443 “recognizes the right of every student to be referred to by their preferred name and pronoun” and directs staff members “to use [preferred names and pronouns] in every interaction, unless the interaction could compromise student privacy.” Exhibit 1 at 443.5(a). Policy 443 does not address the use of preferred names or pronouns by other students. Policy 437 likewise does not explicitly address the use of preferred names or pronouns by other students, but it does generally prohibit bullying, harassment, or intimidation. Its prohibition is limited, however, to intentional conduct that creates a hostile educational environment that is motivated by an actual or a perceived personal characteristic (including gender identity and gender expression) or that is threatening or seriously intimidating. Exhibit 3 at 437(B). It is also limited to conduct that “occurs on school property, at a school activity or event, or on a school bus,” or that “substantially disrupts the orderly operation of a school.” *Id.* In other words, Plaintiffs remain free to voice their opinions on “issues of women’s rights and the public interest,” including issues relating to gender identity, at school and elsewhere.

2. The First Amendment Does Not Give Plaintiffs The Right To Target Transgender Students For Harassment By Intentionally Calling Them By Incorrect Names And Pronouns.

“While students retain significant First Amendment rights in the school context, their rights are not coextensive with those of adults.” *Kowalski v. Berkeley County Schs.*, 652 F.3d 565 (4th Cir. 2011). The Supreme Court has recognized that schools may limit speech, among other reasons, when it “colli[des] with the rights of other students to be secure and to be let alone.”

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969). The Fourth Circuit has thus recognized that “public schools have a ‘compelling interest’ in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying.” *Kowalski*, 652 F.3d at 572. Indeed, “schools have a duty to protect their students from harassment and bullying in the school environment.” *Id.*

Here, Plaintiffs’ right to voice their opinion on gender identity issues is not in question.¹⁰ Rather, Plaintiffs are asking the Court to authorize them to target transgender students for harassment and bullying by using incorrect pronouns when speaking to those students.¹¹ In *Kowalski*, the Fourth Circuit held that, “[g]iven the targeted, defamatory nature of [the plaintiff’s] speech, aimed at a fellow classmate, it created ‘actual or nascent’ substantial disorder and disruption in the school.” *Kowalski*, 652 F.3d at 574. Accordingly, the speech at issue in *Kowalski* was held not to be protected by the First Amendment. *See id.* So too here.

F. Count Five Fails To State A Claim For Violation Of The Fourteenth Amendment.

In Count Five, Plaintiffs allege that Defendants might somehow violate the Fourteenth Amendment by withholding information about a student’s gender identity from the student’s parents. It is unclear why Plaintiffs are asserting this claim or how they contend that they have

¹⁰ Plaintiffs claim that they are forced “to use the gender pronouns that the school or a fellow student demands, regardless of the actual sex of the student.” Complaint ¶ 148. This statement confuses and conflates the separate concepts of sex and gender identity. To the extent Plaintiffs are implying that so-called “actual sex” is a fixed trait that can never change, they are mistaken. Indeed, in 2015, the Maryland General Assembly passed a law making it easier for transgender individuals to receive new birth certificates with sex designations that differ from the sex designated on their original birth certificates. *See* Md. Code, Health § 4-211(b).

¹¹ A recent nationwide survey of more than 10,000 students between the ages of 13 and 21 highlighted the psychological harm that transgender students face when subjected to such harassment and bullying. For example, “LGBTQ students who experience victimization and discrimination are more likely to have lower educational aspirations, lower grades, and higher absenteeism. They are also more likely to experience school discipline, which can result in pushing students out of school, and at times, into the criminal justice system.” *See* 2015 National School Climate Survey, GLSEN, *available at* <https://www.glsen.org/article/2015-national-school-climate-survey> (last visited Oct. 11, 2017).

standing to do so, because there is no allegation that Minor Plaintiff is transgender or that Defendants have withheld information about her gender identity from Parent Plaintiff. In any event, Count Five fails to state a claim.

First, the Policies simply do not say that the Frederick County Public Schools may withhold information about transgender students from the students' parents. Plaintiffs base their claim on alleged statements by board members at an August 9, 2017, meeting of the Frederick BOE. *See* Complaint ¶¶ 154-161. The alleged statements are misquoted, taken out of context, and do not accurately reflect the discussion at that meeting. They are also irrelevant, because the text of the Policies governs how the school handles issues in the future, not statements allegedly made by board members in the process of drafting and adopting the Policies.

Policy 443 states that “FCPS will ensure all personally identifiable and medical information relating to transgender and gender nonconforming students will be kept confidential according to applicable federal, state and local privacy and student records laws.” Exhibit 1 at 443.4 (emphasis added). The Family Educational Rights and Privacy Act (“FERPA”) requires that federally-funded schools give parents “the right to inspect and review the education records of their children.” 20 U.S.C. § 1232g(a)(1)(A). Maryland regulations likewise provide that “[r]ecords of a student maintained under the provisions of this title, including confidential records, shall be available to that student’s parent or parents . . . or legal guardians in conference with appropriate school personnel.” COMAR 13A.08.02.04(C). Plaintiffs even concede in the Complaint that the Frederick BOE stated at the meeting on August 9, 2017, that the Policy and its implementing regulation would “compl[y] with ‘FERPA and state law’ to ‘Respect parental rights’ because ‘they have to, it is the law.’” Complaint ¶ 159.

Regulation 400-36 elaborates on parents' right to receive information about transgender students. It states:

Every effort shall be made to encourage and support communication between transgender and gender nonconforming students and the student's parent/guardian. School staff may offer to meet jointly with the parent/guardian and the student at school. School staff shall work to both support student needs as well as respect the rights of the parent/guardian to have access to student records in compliance with federal and state law. Parents/Guardians will be contacted any time there is a health or safety concern regarding the student.

Exhibit 2 at II(F). In other words, Regulation 400-36 encourages dialogue between transgender students and their parents and guardians. It also includes a footnote referencing Regulation 400-20, which contains the Frederick BOE's policies and procedures for parents obtaining copies of student records in compliance with the relevant FERPA and COMAR provisions. *See* Exhibit 2 at III(F) n.2. Plaintiffs are thus challenging an imagined policy that is the opposite of what Defendants enacted.

Second, even if Policy 443 or Regulation 400-36 did require the Frederick County Public Schools to withhold information from parents, Parent Plaintiff's right to receive educational records is governed by the relevant FERPA and COMAR provisions. There is no authority extending the Fourteenth Amendment to give parents a constitutional right to access educational records. *See Fay v. S. Colonie Cent. Sch. Dist.*, No. 83-CV-1026, 1985 U.S. Dist. LEXIS 18223, at *17 n.6 (N.D.N.Y. July 3, 1985) ("That no constitutional right of access to these school documents exists is supported further by the fact that Congress passed FERPA in order to assure that parents were granted access to their children's 'educational records.'").

G. Count Six Fails To State A Claim, Because Policies 443 and 447 Do Not Violate The Separation of Powers Doctrine.

Plaintiffs' Count Six appears to challenge the authority of the Frederick BOE to enact policies such as Policy 443 based on various articles in the Maryland Constitution and English

common law notions of the separation of powers. Count Six has no basis in law, because the Maryland Constitution and the Maryland General Assembly have together delegated to the Frederick BOE the authority to enact policies such as Policy 443.

Section 1 of Article 8 of the Maryland Constitution provides that “[t]he General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.” The General Assembly has done that, mandating that “[t]here shall be throughout this State a general system of free public schools according to the provisions of this article.” Md. Code, Educ. § 1-201.

In furtherance of its creation of a “general system of free public schools,” the General Assembly created county boards of education, including the Frederick BOE, and vested them with the authority to manage and set policies for the county school systems. *See* Md. Code, Educ. § 4-108. Specifically, the General Assembly mandates that each county board:

- (1) To the best of its ability carry out the applicable provisions of this article and the bylaws, rules, regulations, and policies of the State Board;
- (2) Maintain throughout its county a reasonably uniform system of public schools that is designed to provide quality education and equal educational opportunity for all children;
- (3) Subject to this article and to the applicable bylaws, rules, and regulations of the State Board, determine, with the advice of the county superintendent, the educational policies of the county school system; and
- (4) Adopt, codify, and make available to the public bylaws, rules, and regulations not inconsistent with State law, for the conduct and management of the county public schools.

Id. (emphasis added).

In other words, the General Assembly has delegated to the Frederick BOE the authority to provide equal educational opportunity for all children, transgender and cisgender, and to

determine the educational policies of the Frederick County Public Schools. That is precisely what the Frederick County BOE did when it enacted the Policies. And Maryland courts have long recognized the validity of the state's delegation of authority to local school boards. *See, e.g., Wiley v. Board of County School Comm'rs*, 51 Md. 401, 404-05 (1879) (“Where the Legislature has confided the power of determining as to the wisdom and expediency of an act authorized to be done, to a board of public functionaries, with them the decision of the question must rest.”). Accordingly, Plaintiffs' claim that the Policies violate principles of separation of powers has no merit.

H. Count Seven Fails To State A Claim, Because Allowing Transgender Students To Use Facilities Consistent With Their Gender Identities Does Not Violate Applicable Building Codes.

In Count Seven, Plaintiffs claim that the Frederick BOE exceeded its authority by purporting to modify applicable building codes, citing four statutes that all relate in some form to the construction of school facilities.¹² This argument is frivolous. Nothing in any of the four statutes cited “mandat[es] bathrooms and locker rooms to be identified by and used by members of the male and female sex and not, from time to time, by self-actualization or identity of students.” Complaint ¶ 177. Building codes simply have no bearing on whether transgender students may use facilities consistent with their gender identities, nor do they provide any basis for a cause of action against Defendants. *See Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 605 (Me. 2014) (A statutory requirement to provide bathrooms that are “separated according to sex” “does

¹² Maryland Code, Educ. § 2-205 outlines the powers and duties of the State Board of Education and specifies that “the State Board shall establish standards and guides for planning and constructing school building projects.” Md. Code. Educ. § 2-205(1)(1). Maryland Code., Educ. § 4-117(b)(1) requires that construction or remodeling of buildings by county school boards “shall conform to all applicable State and county building, electrical, fire, and plumbing regulations and codes.” Maryland Code, Educ. § 5-301 relates to the funding of public school construction and capital improvements. Maryland Code, Pub. Safety § 12-503 generally requires the Maryland Department of Housing and Community Development to adopt the International Building Code; it does not impose requirements on any other individuals or entities.

not purport to establish guidelines for the *use* of school bathrooms. Nor does it address how schools should monitor which students use which bathroom, and it certainly offers no guidance concerning how gender identity relates to the use of sex-separated facilities.”) (emphasis in original).

I. Count Eight Fails To State A Claim For “Unconstitutionality of State Statutes And Board of Education Policies 437 and 443.”

It is unclear what Plaintiffs are alleging in Count Eight. This count is titled “Unconstitutionality of State Statutes and Board of Education Policies 437 and 443,” but Plaintiffs do not specify which statutes they claim are unconstitutional and do not specify the provisions in the Maryland or United States Constitutions that these statutes and policies purportedly violate.

Plaintiffs specifically refer in Count Eight to Maryland Code, Education § 7-424. This statute requires county boards of education to provide reports on incidents of bullying, harassment, or intimidation against students attending public schools, including incidents that are motivated by gender identity. *See* Md. Code, Educ. § 7-424. Plaintiffs do not explain how this statute might be unconstitutional or why the alleged unconstitutionality of this statute would have any bearing on the challenged Policies.

Plaintiffs also refer in Count Eight to Maryland Code, Education § 7-301. This statute generally requires children in Maryland between the ages of 5 years old and 18 years old to attend public schools, subject to numerous exceptions. Plaintiffs do not explain how this statute might be unconstitutional and, in fact, courts have already affirmed its constitutionality. *See, e.g., Battles v. Anne Arundel County Bd. of Educ.*, 904 F. Supp. 471, 475-76 (D. Md. 1995) (compulsory education law does not violate the First Amendment); *In re Jeannette L.*, 71 Md.

App. 70, 81-84, 523 A.2d 1048, 1054-56 (1987) (compulsory education law is not unconstitutionally vague). Count Eight, therefore, fails to state a claim.

V. CONCLUSION

Defendants have balanced numerous perspectives to enact Policies that create equal educational opportunity for all students, regardless of their gender identities. Plaintiffs, on the other hand, want the Court to turn existing protections against discrimination on their head and to hold that only cisgender students have the right to use safe, non-stigmatizing facilities in the Frederick County Public Schools. As described above, each of their constitutional, statutory, and common law theories fails to state a claim. Therefore, the Court should dismiss the Complaint with prejudice.

Dated: October 20, 2017

Respectfully submitted,

/s/

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

MARY SMITH, *et al.*,

Plaintiffs,

v.

**BOARD OF EDUCATION OF
FREDERICK COUNTY, MARYLAND, *et
al.*,**

Defendants.

Civil Action No. 1:17-cv-02302-ELH

**INDEX OF EXHIBITS TO DEFENDANT’S MEMORANDUM IN
SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS’ COMPLAINT**

| Exhibit | Description |
|----------------|---|
| 1 | Policy 443 – Creating Welcoming and Affirming Schools for Transgender and Gender Nonconforming Students |
| 2 | Regulation 400-36 – Creating Welcoming and Affirming Schools for Transgender and Gender Nonconforming Students |
| 3 | Policy 437 – Bullying – Harassment - Intimidation |
| 4 | Maryland State Department of Education, <i>Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination</i> |
| 5 | United States Department of Education Opinion Letter dated January 7, 2015 |
| 6 | “Dear Colleague” Letter dated May 13, 2016 |
| 7 | United States Department of Education, <i>Examples of Policies and Emerging Practices for Supporting Transgender Students</i> |
| 8 | “Dear Colleague” Letter dated February 22, 2017 |

Exhibit 1

| | |
|---|---|
| POLICY | BOARD OF EDUCATION OF FREDERICK COUNTY, MARYLAND |
| CREATING WELCOMING AND AFFIRMING SCHOOLS FOR TRANSGENDER AND GENDER NONCONFORMING STUDENTS | POLICY 443 |

443.1 Purpose

Gender identity is a protected status in Frederick County Public Schools (FCPS). The purpose of this policy is to prevent discrimination, stigmatization, harassment, and bullying of students who are transgender or who are gender nonconforming and to create school cultures that are safe, welcoming, and affirming for all students. This policy is also designed to ensure that all students have the opportunity to express themselves and live authentically.

Bullying, harassment, and intimidation based on perceived or real sex, sexual orientation, or gender identity or expression is prohibited in FCPS (see Board Policy 437). FCPS addresses bullying, harassment, and intimidation in compliance with its disciplinary policies and regulations, which includes education and providing students and staff with appropriate resources and supports. The Board of Education (Board) acknowledges that the transfer of students who are victims of bullying, harassment, or intimidation to a different school is not a preferred mode of responding and such response should only be considered in consultation, agreement, or at the request of the victim and his/her parent or legal guardian.

443.2 Definitions

*Bullying/Harassment/Intimidation*¹ - Intentional conduct, including verbal, physical, or written conduct, or intentional electronic communication that creates a hostile educational environment by substantially interfering with a student's educational benefits, opportunities, or performance, or with a student's physical or psychological well-being and is: (a) motivated by an actual or a perceived personal characteristic of sex, sexual orientation, gender identity, or gender expression; or (b) threatening or seriously intimidating; and (c) occurs on school property, at a school activity or event, or on a school bus; or (d) substantially disrupts the orderly operation of a school.

Gender Expression - The manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerisms.

Gender Identity - A person's deeply held sense or psychological knowledge of their own gender, which can include being female, male, another gender, or no gender. Gender identity is an innate and largely inflexible part of a person's identity. One's gender identity can be the same or different than the gender assigned at birth. The responsibility for determining an individual's gender identity rests with the individual.

¹ Board Policy 437 *Bullying – Harassment - Intimidation*

Gender Nonconforming – A term for people whose gender expression differs from stereotypical expectations, such as “feminine” boys, “masculine” girls, and those who are perceived as androgynous. This includes people who identify outside traditional gender categories or identify as multiple genders. Other terms that can have similar meanings include gender diverse or gender expansive.

Non-binary/Genderqueer – Terms used by those who identify with neither, both, or a combination of genders.

Sexual Orientation – A person’s romantic and/or physical attraction to people of the same or opposite gender or other genders. Transgender and gender nonconforming people may have any sexual orientation.

Transgender – An adjective describing a person whose gender identity or expression is different from that traditionally associated with an assigned gender at birth.

Transition – The process in which a person goes from living and identifying as one gender to living and identifying as another. Transition is a process that is different for everyone, and it may or may not involve social, legal, or physical changes. There is no one step or set of steps that an individual must undergo in order to have their gender identity affirmed and respected.

443.3 Policy Statement

Flexibility – This policy is designed to provide an overarching framework and assurances that all students will be safe, welcomed, and affirmed. Depending on privacy needs or a transgender student’s own personal transition, school staff are authorized to work with students (and their families, if students explicitly wish) to provide options that may support a student’s needs.

443.4 Privacy/Confidentiality

FCPS respects the rights of students to express their gender identity or expression as they wish. Transgender and gender nonconforming students have the right to discuss and express their gender identity and expression openly and to decide where, when, and with whom to share private information. The fact that a student may wish to use a different name or pronoun at school, or to disclose their transgender or gender nonconforming status to school staff, does not authorize school staff to disclose a student’s personally identifiable or medical information. FCPS will ensure all personally identifiable and medical information relating to transgender and gender nonconforming students will be kept confidential according to applicable federal, state and local privacy and student records laws.

443.5 Use of Preferred Name/Official Records

(a) Names/Pronouns

FCPS recognizes the right of every student to be referred to by their preferred name and pronoun. All staff who work with students will have access to a current and complete list of preferred names and pronouns for all students and will use them in

every interaction, unless the interaction could compromise student privacy (see Section 443.4).

(b) Student Records

Each school is required to maintain an official student record of each student, which includes the legal name of the student and birth gender. Official student records can be modified as stipulated under Maryland law ² and/or in accordance with Maryland State Department of Education (MSDE) guidelines.

443.6 Access to Gender-Segregated Facilities

Students, including non-binary students, should determine which facilities are consistent with their gender identity. All students must have access to facilities, including rest rooms, locker rooms, or changing facilities, that correspond to their gender identity. Access is provided without any additional complicating procedure.

Any student, regardless of gender or gender identity or expression, who is uncomfortable for any reason using a gender-segregated facility will be provided a safe and nonstigmatizing alternative. Options include, but are not limited to, privacy curtains, provisions to use private restrooms or office restrooms, or a separate changing schedule. These options are provided to any student without question or complicating procedures required. Under no circumstance is any student required or directed to use a private use facility.

443.7 Participation in Sports and Physical Education Classes

Students are permitted participation in FCPS sports and physical education classes in a manner consistent with their gender identity. The gender identity of student-athletes is not required to be disclosed to coaches, teammates, opponent's coaches, or anyone else if not authorized by the student. If special events, such as out-of-state tournaments or competitions specify particular disclosures, those will be discussed in advance and confidentially with the student.

443.8 Overnight Field Trips

The comfort of all students is paramount in the decisions around overnight field trips. Maximizing students' social integration may be achieved by applying these guidelines:

- Make arrangements in consultation with the student. If the transgender or gender nonconforming student's parents or guardians are involved and supportive, they may also be consulted.
- Be sensitive to the need to maintain the student's privacy and not disclose or require disclosure of the student's transgender or gender nonconforming status to the other students or their parents without the consent of the transgender or gender nonconforming student and/or the student's parent.
- Allow students the opportunity to room with others according to their gender identity.
- Make efforts to accommodate any student who desires greater privacy; however, no student should be isolated.

² §4-211(f), General Article, *Annotated Code of Maryland*

443.9 Other Activities

Dress codes designated for school events like dances, graduations, and other ceremonies shall be gender neutral.

443.10 Training and Professional Development

All FCPS personnel who work directly with students are required to participate in, or have access to, annual training that includes:

- The importance of privacy for all students, as well as an overview of the legal and other implications of disclosing gender identity to parents.
- Terms, concepts, and current developmental understandings of gender identity, gender expression, and gender diversity in children and adolescents.
- Developmentally appropriate strategies for communication with students and parents about issues related to gender identity and gender expression that protect student privacy.
- Developmentally appropriate strategies for preventing and intervening in bullying incidents, including cyberbullying.
- Classroom management practices, curriculum, and resources that educators can integrate into their classrooms to foster a more gender-inclusive environment for all students.
- This policy.

| | | | |
|-------------------------|--|------------------|------------------|
| Legal Reference | Title IX, Education Amendments of 1972, 20 U.S.C. 1681 | | |
| | U.S. Constitution, Equal Protection Clause, 14 th Amendment and 1 st Amendment | | |
| | FERPA 20 U.S.C. 1232 | | |
| | COMAR 13A.08.02 "Student Records"/FCPS Regulation 400-20 <i>Student Records</i> | | |
| | HIPPA 45 C.F.R. 160 | | |
| | COMAR 13A.01.04.03 "School Safety" | | |
| | §7-424, Education Article, Annotated Code of Maryland | | |
| | COMAR 13A.06.03 "Interscholastic Athletics in the State" | | |
| Source Documents | GLSEN (Gay, Lesbian and Straight Education Network) <i>Model District Policy on Transgender and Gender Nonconforming Students</i> , Revised February 2016 | | |
| | MSDE (Maryland State Department of Education) <i>Providing Safe Spaces for Transgender and Gender Nonconforming Youth: Guidelines for Gender Identity Non-Discrimination</i> , October 2015 | | |
| | NSBA (National School Boards Association) <i>2016 Transgender Students in Schools: Frequently Asked Questions and Answers for Public School Boards and Staff</i> , Version 9.0 Updated March 9, 2017 | | |
| | MPSSAA (Maryland Public Secondary Schools Athletic Association) <i>Guidance for Participation of Transgender Youth in Interscholastic Athletics</i> , Revised August 2016 | | |
| Policy History | Reviewed: | Adopted: 6/14/17 | Revised: 8/23/17 |

Exhibit 2

| | |
|--|------------------------|
| FREDERICK COUNTY PUBLIC SCHOOLS | Reg. No. 400-36 |
| Subject: Creating Welcoming and Affirming Schools for Transgender and Gender Nonconforming Students | Issued: 8/10/17 |
| Preparing Office: Office of the Superintendent | Amended: |

Policy 443

I. Definitions

Gender Expression - The manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerisms.

Gender Identity - A person’s deeply held sense or psychological knowledge of their own gender, which can include being female, male, another gender, or no gender. Gender identity is an innate and largely inflexible part of a person’s identity. One’s gender identity can be the same or different than the gender assigned at birth. The responsibility for determining an individual’s gender identity rests with the individual.

Gender Nonconforming – A term for people whose gender expression differs from stereotypical expectations, such as “feminine” boys, “masculine” girls, and those who are perceived as androgynous. This includes people who identify outside traditional gender categories or identify as multiple genders. Other terms that can have similar meanings include gender diverse or gender expansive.

Non-binary/Genderqueer – Terms used by those who identify with neither, both, or a combination of genders.

Sexual Orientation – A person’s romantic and/or physical attraction to people of the same or opposite gender or other genders. Transgender and gender nonconforming people may have any sexual orientation.

Transgender – An adjective describing a person whose gender identity or expression is different from that traditionally associated with an assigned gender at birth.

Transition – The process in which a person goes from living and identifying as one gender to living and identifying as another. Transition is a process that is different for everyone, and it may or may not involve social, legal, or physical changes. There is no one step or set of steps that an individual must undergo in order to have their gender identity affirmed and respected.

II. Purpose

To execute the intent of Board Policy 443 *Creating Welcoming and Affirming Schools for Transgender and Gender Nonconforming Students*, the following procedures are developed for implementation in all schools within Frederick County Public Schools (FCPS).

III. Procedures

A. Identification and Support of Transgender and Gender Nonconforming Students

1. School staff shall accept a student's and/or parent/guardian's assertion of a student's transgender or gender nonconforming status that supports the definitions above and is treated as a sincerely held part of the student's core identity.
2. If notified, school staff will offer to convene a support team for the student, which may consist of the parents/guardians, student, classroom teacher(s), administrator, school counselor, school psychologist, school social worker, and/or other staff members as appropriate for this collaboration. Staff will seek input from the student and/or the student's parent/guardian regarding the composition of the team and invite any representatives of the parent/guardian's choosing. The goal of such meeting is to collaborate on how best to support the student in day-to-day activities at school to ensure he/she feels welcomed and safe, and that appropriate accommodations are provided for the student.
3. The support team will then develop a student-specific support plan to provide the student with safe and equitable access to school facilities and activities.

B. Student Records

Each school is required to maintain an official student record of each student, which includes the legal name of the student and birth gender. Official student records can be modified as stipulated under Maryland law ¹ and/or in accordance with Maryland State Department of Education (MSDE) guidelines.

C. Use of Preferred Name

FCPS recognizes the right of every student to be referred to by their preferred name and pronoun. All staff who work with students will have access to a current and complete list of preferred names and pronouns for all students and will use them in every interaction, unless the interaction could compromise student privacy.

D. Diplomas

The high school diploma is considered an official student record and may only be modified as stipulated under III. B. As with all students, if a transgender student has a legal name change after graduation and requests a new diploma to reflect the change, FCPS will provide the new diploma upon legal verification of the name change and a photo ID which matches the name. A diploma replacement fee will be charged to cover the expense of printing the diploma and any associated mailing fees.

E. Other Student Lists

It is an expectation that internally generated and shared school lists of students (e.g. honor roll, graduation programs) will identify transgender or gender nonconforming students by the students' preferred name and gender. Additionally, school documents such as

¹ §4-211(f), General Article, *Annotated Code of Maryland*

yearbooks, school newspapers, and communications to outside media should identify transgender or gender nonconforming students by the students' preferred name and gender, including using pronouns corresponding to the student's gender identity.

F. Privacy/Confidentiality

FCPS respects the rights of students to express their gender identity or expression as they wish. Transgender and gender nonconforming students have the right to discuss and express their gender identity and expression openly and to decide where, when, and with whom to share private information. The fact that a student may wish to use a different name or pronoun at school, or to disclose their transgender or gender nonconforming status to school staff, does not authorize school staff to disclose a student's personally identifiable or medical information. FCPS will ensure all personally identifiable and medical information relating to transgender and gender nonconforming students will be kept confidential according to applicable federal, state and local privacy and student records laws.²

Every effort shall be made to encourage and support communication between transgender and gender nonconforming students and the student's parent/guardian. School staff may offer to meet jointly with the parent/guardian and the student at school. School staff shall work to both support student needs as well as respect the rights of the parent/guardian to have access to student records in compliance with federal and state law. Parents/Guardians will be contacted any time there is a health or safety concern regarding the student.

G. Access to Gender-Segregated Facilities

Students, including non-binary students, should determine which facilities are consistent with their gender identity. All students must have access to facilities, including rest rooms, locker rooms, or changing facilities, that correspond to their gender identity. Access is provided without any additional complicating procedure.

Any student, regardless of gender or gender identity or expression, who is uncomfortable for any reason using a gender-segregated facility will be provided a safe and nonstigmatizing alternative. Options include, but are not limited to, privacy curtains, provisions to use private restrooms or office restrooms, or a separate changing schedule. These options are provided to any student without question or complicating procedures required. Under no circumstance is any student required or directed to use a private use facility. If there is a credible basis for believing that the student is not asserting their authentic gender identity for the purpose of being disruptive or infringing on the rights of others, school administration has the responsibility to investigate as they would for any other behavior that is being disruptive and follow up with the student and/or parent accordingly.

H. Participation in Sports/Physical Education Classes

Students are permitted participation in FCPS sports and physical education classes in a manner consistent with their gender identity. The gender identity of student-athletes is not required to be disclosed to coaches, teammates, opponent's coaches, or anyone else if not authorized by the student. If special events, such as out-of-state tournaments or competitions specify particular disclosures, those will be discussed in advance and confidentially with the student.

² FCPS Regulation 400-20 *Student Records* (parental rights to review student records)

Any concerns may be addressed to the Supervisor of Athletics and Extracurricular Activities who will ensure fair and consistent treatment, and compliance with the Maryland Public Secondary Schools Athletic Association (MPSSAA) rules.

I. Overnight Field Trips

The comfort of all students is paramount in the decisions around overnight field trips. Maximizing students' social integration may be achieved by applying these guidelines:

- Make arrangements in consultation with the student. If the transgender or gender nonconforming student's parents or guardians are involved and supportive, they may also be consulted.
- Be sensitive to the need to maintain the student's privacy and not disclose or require disclosure of the student's transgender or gender nonconforming status to the other students or their parents without the consent of the transgender or gender nonconforming student and/or the student's parent.
- Allow students the opportunity to room with others according to their gender identity.
- Make efforts to accommodate any student who desires greater privacy; however, no student should be isolated.

J. Dress Codes

Dress codes designated for school events like dances, graduations, and other ceremonies shall be gender neutral.

K. Training

All FCPS personnel who work directly with students are required to participate in, or have access to, annual training that includes:

- The importance of privacy for all students, as well as an overview of the legal and other implications of disclosing gender identity to parents.
- Terms, concepts, and current developmental understandings of gender identity, gender expression, and gender diversity in children and adolescents.
- Developmentally appropriate strategies for communication with students and parents about issues related to gender identity and gender expression that protect student privacy.
- Developmentally appropriate strategies for preventing and intervening in bullying incidents, including cyberbullying.
- Classroom management practices, curriculum, and resources that educators can integrate into their classrooms to foster a more gender-inclusive environment for all students.
- Board Policy 443 *Creating Welcoming and Affirming Schools for Transgender and Gender Nonconforming Students*.

Approved:

original signed by

Theresa R. Alban
Superintendent

Exhibit 3

| | |
|---|---|
| POLICY | BOARD OF EDUCATION OF FREDERICK COUNTY, MARYLAND |
| BULLYING – HARASSMENT - INTIMIDATION | POLICY 437 |

437 Purpose

The Board of Education of Frederick County (Board) is committed to establishing and promoting a safe, non-threatening environment for all students to learn. Therefore, the Board believes that bullying, harassment, intimidation, discrimination, or hazing are both morally wrong and offensive and will not tolerate such conduct on the part of any employee, supervisor, manager, administrator, student, or visitor. It is the Board’s intent to provide to all employees and students a work and learning environment free from such acts.

A. Bullying/Harassment/Intimidation

The Board prohibits bullying, harassment, or intimidation of any person on school property or at school-sponsored functions or by the use of electronic technology at a public school or affecting the school setting. Furthermore, the Board prohibits reprisal or retaliation against individuals who report acts of bullying, harassment, or intimidation or who are victims, witnesses, bystanders, or others with reliable information about an act of bullying, harassment, or intimidation. The Board acknowledges that the transfer of students who are victims of bullying, harassment, or intimidation to a different school is not a preferred mode of responding and such response should only be considered in consultation, agreement, or at the request of the victim and his/her parent or legal guardian.

B. Definitions

As used in this policy, “bullying, harassment, or intimidation” means intentional conduct, including verbal, physical, or written conduct, or intentional electronic communication that creates a hostile educational environment by substantially interfering with a student’s educational benefits, opportunities, or performance, or with a student’s physical or psychological well-being and is:

- motivated by an actual or a perceived personal characteristic including race, national origin, marital status, sex, sexual orientation, gender identity, gender expression, religion, ancestry, physical attributes, socioeconomic status, familial status, physical or mental ability, or disability; or
- threatening or seriously intimidating; and
- occurs on school property, at a school activity or event, or on a school bus; or
- substantially disrupts the orderly operation of a school.

C. Prevention, Intervention, Remediation, and Consequences

All schools must implement best practices as part of a whole-school program inclusive of prevention, intervention/remediation, and consequences.

D. Delegation of Authority

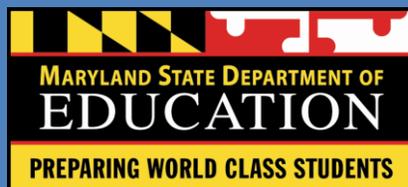
The Superintendent has developed regulations implementing this policy, inclusive of reporting procedures which are outlined in FCPS Regulation 400-48 Bullying – Harassment - Intimidation Complaint Process for Students.

| | | | |
|------------------------|--|------------------|------------------|
| Legal Reference | §7-424.1, Education Article, <i>Annotated Code of Maryland</i> | | |
| | | | |
| Policy History | Reviewed: 2017 | Adopted: 9/22/10 | Revised: 6/14/17 |

Exhibit 4

PROVIDING SAFE SPACES FOR TRANSGENDER AND GENDER NON- CONFORMING YOUTH: GUIDELINES FOR GENDER IDENTITY NON-DISCRIMINATION

*A guide to laws,
regulations, and
best practices for
use in schools.*



October 2015



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Acknowledgements

We would like to recognize all the advocacy groups, institutions, and persons who shared their time and expertise in the creation of this document. Your contributions were invaluable to our work and instrumental in helping us complete this guide. Thank you.

The United States Department of Education, Office of Civil Rights

Maryland Department of Health and Mental Hygiene

Maryland Public Schools Student Service Directors, Coordinators and Specialists from Baltimore County, Caroline County, Charles County, Harford County, and Prince George's County who provided written feedback and edits for the guide.

Advocates for Children and Youth

Equality Maryland

FreeState Legal Project

Gay Lesbian and Straight Education Network (GLSEN) Baltimore

National Center for Lesbian Rights

National Center for Transgender Equality

PFLAG (formerly known as Parents, Families, and Friends of Lesbians and Gays) Columbia-Howard County

Prince George's County Lesbian, Gay, Bisexual, Transgender, Questioning (LGBTQ) Task Force

-With special thanks to the parents of transgender children and the transgender students who graciously provided feedback and support for this guide.

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Section I

INTRODUCTION

PROVIDING SAFE SPACES FOR TRANSGENDER AND GENDER NON-CONFORMING YOUTH: GUIDELINES FOR GENDER IDENTITY NON-DISCRIMINATION

Maryland schools have a history of commitment to educating all students to reach their highest potential. School safety is a vital component of that commitment. Safety and prevention efforts, long the hallmark of Maryland's success, have provided students with safe, respectful, engaging, and welcoming environments in which to grow and learn. In growing numbers transgender and gender non-conforming students are becoming more comfortable with who they are and are more visible in schools. Providing schools with information, support, and best practices is an important step in assuring welcoming, caring, respectful and affirming environments for all students.

It is the hope of the Maryland State Department of Education that this document may provide technical guidance and assistance as each Maryland school system works to support the rights of all students, including those who are transgender and gender non-conforming.

These guidelines are designed to serve as suggestions for consideration for school systems and administrators who may want to develop their own transgender policy, procedures, and/or guidelines.

The Need

In “Growing Up LGBT (Lesbian, Gay, Bisexual, Transgender) in America,” the Human Rights Campaign Foundation’s groundbreaking survey of more than 10,000 LGBT youth, 42 percent of gender non-conforming youth report “frequently” or “often” being called names and 40 percent report being excluded by peers “frequently” or “often”. More than half of gender non-conforming youth reported “never participating” in the majority of activities listed in the survey (e.g., sports, church/religious youth groups and service organizations) out of fear of discrimination.

Additional research indicates that 80 percent of transgender students feel unsafe at school because of who they are. According to data from Center for Disease Control’s Youth Risk Behavior Survey (2011), the percentage of gay, lesbian, and bisexual students (across sites) who did not go to school at least one day during the 30 days before the survey because of safety concerns ranged from 11 percent to 30 percent of gay and lesbian students and 12 percent to 25 percent of bisexual students.

The Journal of Adolescent Health (2015) reported that compared with non-transgender youth, transgender youth had an elevated probability of being diagnosed with depression (50.6 percent vs. 20.6 percent); suffering from anxiety (26.7 percent vs. 10 percent); attempting suicide (17.2 percent vs. 6.1 percent); and engaging in self-harming activities without lethal intent (16.7 percent vs. 4.4 percent).

The need for protections for transgender and gender non-conforming students is clear. According to a 2011 report from the National Center for Transgender Equality and the National Gay and Lesbian Task Force, 132 Maryland respondents who expressed transgender identity or gender nonconformity while in grades K-12 reported alarming rates of harassment (81 percent), physical assault (38 percent) and sexual violence (16 percent). A staggering 43 percent reported that they had attempted suicide at some point in their life, 27 times the rate of the general population of 1.6 percent. Harassment was so severe that it led 6 percent to leave a school in K-12 settings or leave higher education. In addition, the Gay, Lesbian, and Straight Education Network (GLSEN, 2014) reports that students who experienced high levels of victimization based on gender expression were twice as likely as students who did not experience high levels of victimization to report that they did not plan to pursue post-secondary education.

Rather than focusing on their education, many transgendered and gender non-conforming students struggle for the ability to come to school and be themselves. The National Center for Transgender Equality reports that 59 percent of transgender students have been denied access to restrooms consistent with their gender identity. Some are denied opportunities to go on field trips or participate in sports. Together with bullying and victim-blaming, these conflicts can lead to disproportionate discipline and involvement in the juvenile justice system.

Vocabulary

Discussion regarding the needs of transgender and gender non-conforming students is best held when there is mutual understanding of key concepts and a shared vocabulary. The key concepts and vocabulary used in this document include:

- **Sex** -the genetic and anatomical characteristics with which people are born, typically labeled “male” or “female”.
- **Gender** –the attitudes, feelings, and behaviors that a given culture associates with a person’s biological sex.
- **Gender Identity**- A person’s deeply held internalized sense or psychological knowledge of their gender regardless of the biological sex they were assigned at birth.
- **Cisgender**- Students whose sex assigned at birth correspond to their gender identity

- **Transgender-** Students whose internalized knowledge and sense of who they are as either male or female does not match their sex assigned at birth.
- **Gender Expression** – The manner in which a student represents or expresses gender to others, often through manner of speech and word choices, manner of dress and hairstyle, the wearing (or not wearing) of cosmetics, and other distinctive cultural markers of gender.
- **Gender Non-Conforming-** An umbrella term for students whose gender expression differs from stereotypical expectations of the sex they were assigned at birth. Students who do not identify with either traditional gender categories or identify as both genders are often called gender non-conforming, gender diverse, or gender expansive.
- **Transition-** The process through which transgender people begin to live as the gender with which they identify, rather than the one typically associated with their sex assigned at birth. Transitions may include any combination of physical social and medical processes.
 - Social transition may include changing names, pronouns, hairstyle, and clothing.
 - Medical transition may include medical components like hormone therapy and gender affirming surgeries. Not all transgender individuals seek medical care as part of their transition, especially minors.

Section II

Non-Discrimination Guidelines

Non-Discrimination Guidelines for All

A safe and supportive school environment minimizes stigmatization, protects all students from harassment and bullying, and does not single out students by gender. It may help to create a gender neutral environment. These non-discrimination guidelines are not intended to address every situation that might occur with respect to transgender or gender non-conforming students. In all cases, the goal is to provide equal educational opportunity and healthy development of students. When developing transgender policy or procedure, school systems and administrators may want to consider the following:

- Review dress codes to describe what the school considers appropriate clothing without referencing gender.
 - **Old Practice:** male: pants and shorts must cover their underwear; female: pants, shirts or dresses must cover their underwear
 - **New Practice:** “All outer clothing must completely cover underwear”
- Consider gender neutral dress codes for class or yearbook photos, honor society ceremonies, graduation ceremonies, or dances.
- Review dress codes to describe what the school considers appropriate clothing
 - Permit all students to wear any clothing that is appropriate for students under the school dress code, regardless of the student’s gender or gender identity. This includes school extracurricular activities, as well as events, such as school dances, choral concerts, the wearing of uniforms, or graduation.
 - If a school has two separate gender-specific dress codes, any student should be permitted to dress consistently with the dress code for either gender. So long as the student is compliant with one of the dress codes, the student should not be subject to discipline or a requirement to change clothing on the grounds that the student is wearing the “wrong” dress code for the student’s gender or gender identity.
- Eliminate gender based sorting of students
 - **Old Practice:** boys line up over here
 - **New Practice:** birthdays between January and June; everybody who is wearing something green, etc.
- Include the categories of sexual orientation, gender identity, and gender expression in all of your non-discrimination materials.
- Provide staff training that addresses student diversity and builds the capacity of all staff to understand and appreciate student sexual orientation, gender identity, and gender non-conforming as part of regular training and/or continuing education. Resources for training can be found in the resources section (e.g.,PFLAG, GLSEN, Free State Legal) at the end of this document.

- Modify forms that allow families and students the ability to self-identify their gender and preferred names and pronouns. Multiple federal and state agencies have adopted a two-part question that asks separately about current gender identity and sex assigned at birth.
- Design classroom lessons that expand understandings of gender diversity and look for entry points in the curriculum to address gender diversity.
- Include questions specific to LGBT students in school climate surveys.
- Post anti-bullying and anti-discrimination policies around the school and share them with the school community.
- Select a restroom in your school that is designated for only one user at a time as a gender neutral/unisex restroom.
- Provide access to a single use/gender neutral restroom for any student who has a need or desire for increased privacy, regardless of the underlying reason.

Non-Discrimination Guidelines for Name and Gender

Equal education in a non-discriminatory environment may be supported by the following guidelines:

- Address every student by a name and pronoun that corresponds to the student's gender identity.
- Privately ask students how they want to be addressed in class and whether this will be different when in correspondence to the home or at conferences with the student's parents or guardians.
- Train all teachers, staff, and school administrators to use the student's preferred name, pronouns and gender.
- Use the student's preferred name for classroom rosters, identification badges, announcements, certificates, newspapers, newsletters, yearbooks and any other record where the use of the legal name is not specifically required by law.
- Create a process so a student or parent/legal guardian may request a change of name and/or gender so that a student may be registered in school under a name and gender that corresponds with the student's gender identity.
 - Provide a means to protect the student's previous identity once a legal name change has occurred and current records are amended to show the change.
 - Store historical records where they are safe from inadvertent disclosure.
 - Implement practices that safeguard confidential information from inadvertent disclosure when school staff or administrators are required by law to use or to report a student's legal name or gender as it appears in the official record.
- Upon request, amend and re-issue a diploma in a former student's name once the former student secures a legal name change, being sure that the fact that the student's name was changed is not indicated in any way on the diploma.

Non-Discrimination Guidelines for Disclosing Information

Always act in the best interest of the child. Seek consultation and support (being sure to keep the student's identity anonymous) if unsure how to handle sensitive or complex situations. Carefully determine if the situation warrants any intervention at any level.

All persons, including students, have a right to privacy. This includes the right to keep private one's transgender status or gender non-conforming presentation at school. In considering the creation or development of a local transgender policy, school system administrators may want to review and consider these guidelines:

- Note that while a balance between students' rights to privacy and parents' rights to information in the educational environment is vital, no provision of state or federal law requires schools to affirmatively disclose this sensitive information to parents. Courts have recognized a constitutional right to medical confidentiality concerning one's status as a transsexual person, (See *Powell v. Schriver*, 175 F.3d 107, 111 (2nd Cir. 1999). Federal courts have concluded that schools should not disclose sensitive student information such as sexual orientation to parents without a legitimate stated interest to do so. See *Nguon v. Wolf*, 517 F. Supp. 2d 1177, (C.D. Cal. 2007) (finding a legitimate purpose for disclosure but stating school could not have "gratuitously" disclosed student's sexual orientation to parents); *Wyatt v. Kilgore Indep. Sch. Dist.*, 200 WL 601 6467 (E.D. Tex. Nov. 30, 2011), rev'd in part on other grounds, 718 F.3d 496 (5th Cir. 2013), (finding right to privacy regarding student's sexual orientation and denying summary judgment to school district).
- Treat all student information, medical, or other sensitive personal information, including information relating to transgender students, as confidential in accordance with applicable state, local and federal privacy laws.
- Permit transgender and gender non-conforming students to discuss and express their gender identity openly and to decide when, with whom, and how much private information may be shared.
- Implement training and practices that assist school staff and prevent accidental disclosure of information that may reveal a student's transgender status to others, including parents and other school staff unless the student and/or the student's parent has authorized school staff to make such disclosure or staff is legally required to do so.
 - Consider that while information in official student records must be disclosed upon the request of parents, sensitive information related to gender identity generally need not be disclosed without the student's consent.

Section III

Non-Discrimination Guidelines for Access

Perhaps the most difficult and sensitive issue school administrations will face is the use of bathrooms and locker rooms. Respect for the privacy and comfort-level of each student can guide the decision-making process. For example, a transgender student may not feel comfortable in a sex-specific bathroom or locker room. Likewise, a cisgender student may not feel comfortable using a bathroom or locker room with a transgender student. Having a gender neutral, single stall bathroom available to those students respects the privacy and comfort-level of each of them. Not every school building has such a bathroom generally available, but it may be that the nurse's office can be open for this purpose.

There are several cases that have found it discriminatory to mandate that a transgender student use a particular bathroom or locker room. See, e.g., *Doe v. Clenchy*, No. 09-201 (Me. Super. Ct. April 11, 2011); *Mathis v. Fountail-Fort Carson School District #8*, No. P20130034X (Colorado Division of Civil Rights. June 17, 2013). But, there are cases that find to the contrary. *Johnston v. University of Pittsburgh*, 2015 WL 1497753 (W.D.Pa., March 31, 2015); *GG v. Glouster County School Board*, Civil No. 4:15cv54L (E.D.Va., Sept. 17, 2015). The law has not yet settled on this issue.

Non-Discrimination Guidelines for Restrooms

The following suggestions may assist school systems in creating a non-discriminatory and equitable school environment.

- Provide access to the restroom that corresponds to the student's gender identity.
- Designate any available single stall restroom with a locking door as a unisex/gender neutral restroom and as available to all students. If a single stall student restroom is not generally available, designate a private restroom such as one in the health suites for any student who requests increased privacy and safety, for any reason. This accommodation may be offered to all students.
- Permit transgender and gender non-conforming students whose gender identity is not exclusively male or female to use facilities they believe are the most consistent with their safety and gender identity.

Non-Discrimination Guidelines for Locker Rooms

Respectful and careful review of all relevant factors and concerns is essential when considering the locker room issue.

- Provide access to the locker room that corresponds to the student's gender identity.

- Provide the option to use a safe and non-stigmatizing private alternative space for any student who is uncomfortable using shared facilities.
- Provide reasonable alternative arrangements for any student who expresses a need or desire for increased privacy. Alternative arrangements should be provided in a way that protects the transgender student's ability to keep his or her transgender status confidential.
 - Based on availability and appropriateness to address privacy concerns, such arrangements could include, but are not limited to:
 - Assignment of a student locker in near proximity to the coaches' office or a supportive peer group.
 - Use of a private area within the public area of the locker room facility (e.g. nearby restroom stall with a door or an area separated by a curtain).
 - Use of a nearby private area (e.g. nearby restroom or a health office restroom).
 - A separate changing schedule (either utilizing the locker room before or after the other students)

Non-Discrimination Guidelines for Physical Education and Athletics

Suggested guidelines for consideration are:

- Include transgender students in sex-segregated athletic activities based on their gender identity.
- Allow athletic participation without medical or legal documentation regarding gender.
- Protect the student athlete's privacy rights. Personal information regarding transgender status, medical history, or sex assigned at birth should not be disclosed to teammates, or to staff or students of other schools without the student's consent.
- Follow Maryland Public Secondary Schools Athletic Association Guidelines/COMAR for participation in Interscholastic Athletics. Regulations:
 - Each school system should develop and apply criteria for students to participate on interscholastic athletic teams consistent with their bona fide gender identity. All students who participate in interscholastic athletics must meet eligibility standards in COMAR 13A.06.03.

Non-Discrimination Guidelines for Single-Sex Classes and Extracurricular Activities

Non-discrimination and equity consideration in this area may address the following issues:

- Any single-sex classes or extracurricular activities must be consistent with Title IX and applicable regulations, including that the decision to offer a single-sex class or activity generally must be substantially related to an important educational objective.
- The USDE interprets Title IX to mean that schools generally must treat students consistent with their gender identity in all aspects of the single-sex classes and extracurricular activities.

Non-Discrimination Guidelines for Overnight Field Trips

Student comfort is paramount in the decisions around overnight field trips. Maximizing the student's social integration may be achieved by the integration of these guidelines:

- Make arrangements in consultation with the student. If the transgender student's parents or guardians are involved and supportive they may also be consulted.
- Be sensitive to the need to maintain the student's privacy and not disclose or require disclosure of the student's transgender status to the other students or their parents without the consent of the transgender student and/or the student's parent.
- Allow students the opportunity to room with others according to their gender identity.
- Make efforts to accommodate any student who desires greater privacy; however, transgender or gender non-conforming students should not be isolated.

Appendix 1

Laws and Regulations

U.S. Constitution, First Amendment

Protects the privacy right of students.

Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq.

Title IX prohibits discrimination and harassment based on sex in educational institutions, programs, and activities that receive federal financial assistance. This includes formal and informal school policies as well as harassing or discriminatory action by individual school personnel, and also includes failing to respond effectively to student-on-student harassment and bullying.

- U.S. Department of Education (USDE) guidelines issued in 2014 (April 29, 2014) clarify USDE's position that Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.
- When school districts fail to provide protections, the Department of Education's Office for Civil Rights (OCR) and the Justice Department's Civil Rights Division have initiated complaint investigations and districts have been held liable for failure to protect. (Arcadia Unified School District, OCR 09-1201020, DOJ 169-12-C-70, United States Department of Education Office of Civil Rights, July 2013; Maine Supreme Court John and Jane Doe, on behalf of Susan Doe v. Regional School Unit 26, *A.3d*, 2014 WL 325906; US Department of Justice DOJ Case No. DJ 169-12C-70, OCR Case No. 09-12-1020; United States Department of Education Office for Civil Rights, Downey Unified School District (CA) (2011). Case No. 09-12-1095
- A USDE Dear Colleague letter (October 20, 2010) states that Title IX protects all students, including lesbian, gay, bisexual and transgender students from sex discrimination.
- A USDE Dear Colleague letter (April 4, 2011) states that sexual harassment and sexual violence are prohibited forms of sex discrimination under Title IX.
- The USDE December 20, 2014 guidelines for K-12 schools that implement single-sex classes and activities under specified circumstances state that schools must treat students consistent with their gender identity in all aspects of single sex classes and extra-curricular activities.
- Case law interpreting Title IX as it applies to transgender students is not settled, despite USDE's position.

The Equal Access Act (1984), 20 U.S.C. §7905

- Requires public secondary schools to provide equal access to school premises for extracurricular clubs.
- Ensures that non-curricular student groups are afforded the same access to public secondary school facilities as other similarly situated student groups.
- A USDE Dear Colleague letter (June 14, 2011) reaffirms the principles that prohibit unlawful discrimination against any student-initiated groups and speaks specifically to the rights of lesbian, gay, bisexual and transgender (LGBT) students to form gay-straight alliances (GSAs) and similar student organizations.

Family Educational Rights and Privacy Act

(FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) and the Code of Maryland Regulations (COMAR) 13A.08.02.14

Parents or eligible students (students who are over age 18 or in a post-secondary program) have the right to request that a school correct records which they believe to be inaccurate, misleading, or an invasion of privacy. If the school decides not to amend the record, the parent or eligible student then has the right to a formal hearing. After the hearing, if the school still decides not to amend the record, the parent or eligible student has the right to place a statement with the record setting forth his or her view about the contested information.

Maryland Education Code, Annotated Title 7 Public Schools, Subtitle 4, Health and Safety of Students §7-424

Requires reporting incidents of harassment or intimidation against students. Defines bullying, harassment, or intimidation as intentional conduct, including verbal, physical or written, or an intentional electronic communication that creates a hostile educational environment by substantially interfering with a student's educational benefits, opportunities, or performance, or with a student's physical or psychological well-being and is: (1) motivated by an actual or perceived personal characteristic including race, national origin, marital status, sex, sexual orientation, gender identity, religion, ancestry, physical attributes, socioeconomic status, familial status, or physical or mental ability or disability; or (2) threatening or seriously intimidating. The incident must: (1) occur on school property, at a school activity or event, or on a school bus; or (2) substantially disrupt the orderly operation of a school.

Code of Maryland Regulations, COMAR 13.A.01.04.03 Public School Standards, School Safety

All students in Maryland's public schools, without exception and regardless of race, ethnicity, religion, gender, sexual orientation, language, socioeconomic status, age or disability, have the right to education environments that are safe, appropriate for academic achievement, and free from any form of harassment.

Md. Code Ann., Health-Gen §4-211. Vital Records-New Certificates of Birth-Sex Change or Diagnosis of an Intersex Condition.

As of October 1, 2015 individuals can update the sex listed on their birth certificate by submitting a letter to Maryland Vital Records from a licensed health care practitioner stating that the individual has had appropriate clinical treatment for gender transition or has been diagnosed with an intersex condition.

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RESOURCES

This is not intended to be a complete list but serves as a short list of resources:

National Resources

Advocates for Informed Choice (AIC) <http://aiclegal.org> Advocates for Informed Choice (AIC) uses innovative strategies to advocate for the legal and human rights of children born with intersex traits. Their work is grounded in a sense of respect and compassion for the children, parents, doctors, and intersex adults involved. A number of publications for parents, professionals, and peers are available online.

American Institutes for Research (AIR) LGBTQ Training and Technical Assistance
<http://tapartnership.org/COP/CLC/lgbtqi2s.php>

AIR's Health and Social Development program works with a range of youth-serving systems and agencies to improve policies, services, and care for lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth. Through research and evaluation, we work to improve available services and health and mental health outcomes. Applying findings from current research, our strategies promote safety, success, and well-being for LGBTQ youth and their families. We also provide training and technical assistance to federal, state, and local agencies in health, behavioral health, public health, education, child welfare, homelessness and housing, and juvenile justice with the goal of strengthening and integrating systems serving LGBTQ youth.

Family Acceptance Project <http://familyproject.sfsu.edu/>

The Family Acceptance Project™ is a research, intervention, education and policy initiative that works to prevent health and mental health risks for lesbian, gay, bisexual and transgender (LGBT) children and youth, including suicide, homelessness and HIV – in the context of their families, cultures and faith communities. They use a research-based, culturally grounded approach to help ethnically, socially and religiously diverse families to support their LGBT children. A number of publications for parents and professionals are available here free of charge.

Gay, Lesbian and Straight Educators Network (GLSEN) www.glsen.org

The largest organization of parents, educators, students and other concerned citizens working to end homophobia in K-12 schools and ensure all students are valued and respected, regardless of sexual orientation. Their site details their conference calendar, provides a regional chapter locator, and offers a “tool-kit” or resources to use in schools.

Gender Spectrum www.genderspectrum.org/

Gender Spectrum provides education, training and support to help create a gender sensitive and inclusive environment for children of all ages. Topics include parenting and family, teens, education, mental health, legal, social services, faith and medical. In addition, they sponsor a national conference on transgender issues each year.

National Center for Transgender Equality <http://transequality.org/>

The National Center for Transgender Equality works to improve the lives of transgender people through education and advocacy. NCTE works with policymakers and community members at the federal, state, and local levels to develop fair and sound public policies, and to educate the public about transgender people and educate transgender people about their rights.

PFLAG www.pflag.org

PFLAG is families and allies working with the gay, lesbian, bisexual, transgender and questioning community. PFLAG envisions a world where diversity is celebrated and all people are respected, valued, and affirmed inclusive of their sexual orientation, gender identity and gender expression. Almost 400 local grassroots communities provide support, advocacy and education. You can find or create a chapter near you at www.pflag.org.

Transgender Law Center <http://transgenderlawcenter.org>

National organization, that works to change law, policy and attitudes for all people regardless of their gender identity or expression.

TransYouth Family Allies (TYFA) www.imatyfs.org

TYFA empowers children and families by partnering with educators, service providers and communities, to develop supportive environments in which gender may be expressed and respected. The site has resources for parents, educators and youth.

TV Segment

<http://abcnews.go.com/Nightline/video/transgender-teens-transformative-journey-30059193>. Look at the life of one young trans-male and his journey to transformation.

Local Resources

Maryland Resource Guide, <http://freestatelegal.org/wp-content/uploads/2014/12/Resource-Guide1.pdf>

Resource Guide for LBGTQ+ Youth Maryland

This comprehensive resource guide lists Maryland resources for support groups, health and wellness, legal and advocacy, places of worship, community centers, identity groups, education, transitional housing and hotlines.

Equality Maryland www.equalitymaryland.org

Equality Maryland works to secure and protect the rights of LGBT Marylanders by promoting legislative initiatives on the state, county and municipal levels. They work with members of the General Assembly to shape and pass positive legislation in Annapolis and to beat back discriminatory legislation. Equality Maryland's sister arm, the Equality Maryland Foundation, works to eliminate prejudice and discrimination

against LGBT Marylanders through outreach, education, research, community organizing, training and coalition building.

FreeState Legal www.freestatelegal.org

FreeState Legal serves the low-income lesbian, gay, bisexual, transgender, and questioning (LGBTQ) community in Maryland through direct, free legal services, policy advocacy, and training and outreach activities. FreeState Legal provides trainings to school administrators, staff, teachers, and students on how to create inclusive environments for LGBTQ students.

Maryland PFLAG Chapters www.pflagmd.org/ look under Area PLAGs

Local chapters across Maryland include Frederick County, Baltimore County, Howard County and Chestertown, with new chapters starting up in other counties.

Exhibit 5



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

January 7, 2015

Emily T. Prince, Esq.
emily@emily-esque.com

Dear Ms. Prince:

I write in response to your letter, sent via email to the U.S. Department of Education (the Department) on December 14, 2014, regarding transgender students' access to facilities such as restrooms. In your letter, you mentioned statements in recent guidance documents issued by the Department concerning the application of Title IX of the Education Amendments of 1972 (Title IX) to gender identity discrimination. In addition, you identified a particular school district's policy about access to restrooms and asked about the existence and distribution of any guidance by the Department about policies or practices regarding transgender students' access to restrooms. Your letter has been referred to the Department's Office for Civil Rights (OCR), and I am happy to respond.

As you know, OCR's mission includes enforcing Title IX, which prohibits recipients of Federal financial assistance from discriminating on the basis of sex, including gender identity and failure to conform to stereotypical notions of masculinity or femininity.¹ OCR enforces and interprets Title IX consistent with case law,² and with the adjudications and guidance documents of other Federal agencies.³

¹ See OCR's April 2014 Questions and Answers on Title IX and Sexual Violence at B-2, <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

² See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding that Title VII of the Civil Rights Act of 1964's (Title VII) prohibition on sex discrimination bars discrimination based on gender stereotyping, that is "insisting that [individuals] matched the stereotype associated with their group"); *Barnes v. City of Cincinnati*, 401 F.3d 729, 736-39 (6th Cir. 2005) (holding that demotion of transgender police officer because he did not "conform to sex stereotypes concerning how a man should look and behave" stated a claim of sex discrimination under Title VII); *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) ("[D]iscrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman."); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (applying *Price Waterhouse* to conclude, under the Equal Credit Opportunity Act, that plaintiff states a claim for sex discrimination if bank's refusal to provide a loan application was because plaintiff's "traditionally feminine attire.... did not accord with his male gender"); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (holding that discrimination against transgender females – i.e., "as anatomical males whose outward behavior and inward identity [do] not meet social definitions of masculinity" – is actionable discrimination "because of sex" under the Gender Motivated Violence Act").

³ See, e.g., U.S. Dept. of Justice, Memorandum from the Attorney General regarding the Treatment of

The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.⁴ OCR also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

OCR refrains from offering opinions about specific facts, circumstances, or compliance with federal civil rights laws without first conducting an investigation, and does not release information about its pending investigations. Nevertheless, it may be useful to be aware that in response to OCR's recent investigations of two complaints of gender identity discrimination, recipients have agreed to revise policies to make clear that transgender students should be treated consistent with their gender identity for purposes of restroom access. For examples of how OCR enforces Title IX in this area, please review the following resolutions of OCR investigations involving transgender students: Arcadia Unified School District;⁵ and Downey Unified School District.⁶

OCR is committed to helping all students thrive at school and ensuring that schools take action to prevent and respond promptly and effectively to all forms of discrimination, including gender-identity discrimination. OCR staff is also available to

Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014) (stating that the protection of Title VII extends to claims of discrimination based on an individual's gender identity, including transgender status), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf; see also *Macy v. Holder*, Appeal No. 012012082 (U.S. Equal Emp't Opportunity Comm'n Apr. 20, 2012) (holding that gender identity and transgender status did not need to be specifically addressed in Title VII in order to be prohibited bases of discrimination, as they are simply part of the protected category of "sex"), <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>; U.S. Dept. of Health & Human Services, Office for Civil Rights, *Letter to Maya Rupert, Esq.*, Transaction No. 12-0008000 (July 12, 2012) (stating that Section 1557 of the Affordable Care Act, which incorporates Title IX's prohibition on sex discrimination, "extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity"), <http://www.scribd.com/doc/101981113/Response-on-LGBT-People-in-Sec-1557-in-the-Affordable-Care-Act-from-the-U-S-Dept-of-Health-and-Human-Services>; U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, *Gender Identity and Sex Discrimination*, Directive 2014-02 (Aug. 14, 2014) (directing that for purposes of Executive Order 11246, which prohibits employment discrimination on the basis of sex by federal contractors and subcontractors, "discrimination based on gender identity or transgender status ... is discrimination based on sex"), http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

⁴ See, e.g., OCR's December 2014 Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities, at Q. 31, <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

⁵ OCR Case No. 09-12-1020 (July 24, 2013), <http://www.justice.gov/crt/about/edu/documents/arcadialetter.pdf> (resolution letter); and <http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf> (resolution agreement).

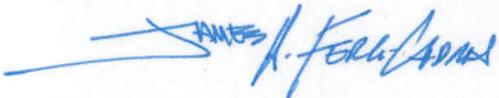
⁶ OCR Case No. 09-12-1095 (October 14, 2014), <http://www2.ed.gov/documents/press-releases/downey-school-district-letter.pdf> (resolution letter); and <http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf> (resolution agreement).

offer schools technical assistance on how to comply with Title IX and ensure all students, including transgender students, have equal access to safe learning environments.

If you have questions, want additional information or technical assistance, or believe that a school is engaging in discrimination based on gender identity or another basis protected by the laws enforced by OCR, you may visit OCR's website at www.ed.gov/ocr or contact OCR at (800) 421-3481 (TDD: 800-877-8339) or at ocr@ed.gov. You may also fill out a complaint form online at www.ed.gov/ocr/complaintintro.html.

I hope that this information is helpful and thank you for contacting the Department.

Sincerely,



James A. Ferg-Cadima
Acting Deputy Assistant Secretary for Policy
Office for Civil Rights

Exhibit 6



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, 或者使用英語有困難, 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 nahhirapan 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 inpormasyon 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](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/fpc.

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/fpc/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).

Exhibit 7

Examples of Policies and Emerging Practices for Supporting Transgender Students



U.S. Department of Education

Office of Elementary and Secondary Education

Office of Safe and Healthy Students

May 2016

U.S. Department of Education
Office of Elementary and Secondary Education
Office of Safe and Healthy Students

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May 2016

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This guide is also available on the Office of Safe and Healthy Students website at www.ed.gov/oese/oshs/emergingpractices.pdf. Any updates to this guide will be available at this website.

If you need technical assistance, please contact the Office of Safe and Healthy Students at: OESE.Info.SupportingTransgenderStudents@ed.gov

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Examples of Policies and Emerging Practices for Supporting Transgender Students

The U.S. Department of Education (“ED”) is committed to providing schools with the information they need to provide a safe, supportive, and nondiscriminatory learning environment for all students. It has come to ED’s attention that many transgender students (*i.e.*, students whose gender identity is different from the sex they were assigned at birth) report feeling unsafe and experiencing verbal and physical harassment or assault in school, and that these students may perform worse academically when they are harassed. School administrators, educators, students, and parents are asking questions about how to support transgender students and have requested clarity from ED. In response, ED developed two documents:

- ED’s Office for Civil Rights and the U.S. Department of Justice’s Civil Rights Division jointly issued a Dear Colleague Letter (“DCL”) about transgender students’ rights and schools’ legal obligations under Title IX of the Education Amendments of 1972.¹ Any school that has questions related to transgender students or wants to be prepared to address such issues if they arise should review the DCL.
- ED’s Office of Elementary and Secondary Education compiled the attached examples of policies² and emerging practices³ that some schools are already using to support transgender students. We share some common questions on topics such as school records, privacy, and terminology, and then explain how some state and school district policies have answered these questions. We present this information to illustrate how states and school districts are supporting transgender students. We also provide information about and links to those policies at the end of the document, along with other resources that may be helpful as educators develop policies and practices for their own schools.

¹ 20 U.S.C. §§ 1681-1688; Dear Colleague Letter: Transgender Students (May 13, 2016), www.ed.gov/ocr/letters/colleague-201605-title-ix-transgender.pdf.

² In this document, the term *policy* or *policies* refers generally to policies, guidance, guidelines, procedures, regulations, and resource guides issued by schools, school districts, and state educational agencies.

³ ED considers *emerging practices* to be operational activities or initiatives that contribute to successful outcomes or enhance agency performance capabilities. Emerging practices are those that have been successfully implemented and demonstrate the potential for replication by other agencies. Emerging practices typically have not been rigorously evaluated, but still offer ideas that work in specific situations.

Each person is unique, so the needs of individual transgender students vary. But a school policy setting forth general principles for supporting transgender students can help set clear expectations for students and staff and avoid unnecessary confusion, invasions of privacy, and other harms. The education community continues to develop and revise policies and practices to address the rights of transgender students and reflect our evolving understanding and the individualized nature of transgender students' needs.

This document contains information from some schools, school districts, and state and federal agencies. Inclusion of this information does not constitute an endorsement by ED of any policy or practice, educational product, service, curriculum or pedagogy. In addition, this document references websites that provide information created and maintained by other entities. These references are for the reader's convenience. ED does not control or guarantee the accuracy, relevance, timeliness, or completeness of this outside information. This document does not constitute legal advice, create legal obligations, or impose new requirements.

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Student Transitions

1. How do schools find out that a student will transition?

Typically, the student or the student's parent or guardian will tell the school and ask that the school start treating the student in a manner consistent with the student's gender identity. Some students transition over a school break, such as summer break. Other students may undergo a gender transition during the school year, and may ask (or their parents may ask on their behalf) teachers and other school employees to respect their identity as they begin expressing their gender identity, which may include changes to their dress and appearance. Some school district or state policies address how a student or parent might provide the relevant notice to the school.

- Alaska's Matanuska-Susitna Borough School District issued guidelines ("Mat-Su Borough Guidelines") advising that transgender students or their parents or guardians should contact the building administrator or the student's guidance counselor to schedule a meeting to develop a plan to address the student's particular circumstances and needs.
- The guidelines issued by Washington's Superintendent of Public Instruction ("Washington State Guidelines") offer an example of a student who first attended school as a boy and, about midway through a school year, she and her family decided that she would transition and begin presenting as a girl. She prefers to dress in stereotypically feminine attire such as dresses and skirts. Although she is growing her hair out and consistently presents as female at school, her hair is still in a rather short, typically boyish haircut. The student, her parents, and school administrators asked her friends and teachers to use female pronouns to address her.

2. How do schools confirm a student's gender identity?

Schools generally rely on students' (or in the case of younger students, their parents' or guardians') expression of their gender identity. Although schools sometimes request some form of confirmation, they generally accept the student's asserted gender identity. Some schools offer additional guidance on this issue.

- Los Angeles Unified School District issued a policy ("LAUSD Policy") noting that "[t]here is no medical or mental health diagnosis or treatment threshold that

students must meet in order to have their gender identity recognized and respected” and that evidence may include an expressed desire to be consistently recognized by their gender identity.

- The New York State Education Department issued guidance (“NYSED Guidance”) recommending that “schools accept a student’s assertion of his/her/their own gender identity” and provides examples of ways to confirm the assertion, such as a statement from the student or a letter from an adult familiar with the student’s situation. The same guidance also offers the following example: “In one middle school, a student explained to her guidance counselor that she was a transgender girl who had heretofore only been able to express her female gender identity while at home. The stress associated with having to hide her female gender identity by presenting as male at school was having a negative impact on her mental health, as well as on her academic performance. The student and her parents asked if it would be okay if she expressed her female gender identity at school. The guidance counselor responded favorably to the request. The fact that the student presented no documentation to support her gender identity was not a concern since the school had no reason to believe the request was based on anything other than a sincerely held belief that she had a female gender identity.”
- Alaska’s Anchorage School District developed administrative guidelines (“Anchorage Administrative Guidelines”) noting that being transgender “involves more than a casual declaration of gender identity or expression but does not require proof of a formal evaluation and diagnosis. Since individual circumstances, needs, programs, facilities and resources may differ; administrators and school staff are expected to consider the needs of the individual on a case-by-case basis.”

3. How do schools communicate with the parents of younger students compared to older transgender students?

Parents are often the first to initiate a conversation with the school when their child is transgender, particularly when younger children are involved. Parents may play less of a role in an older student’s transition. Some school policies recommend, with regard to an older student, that school staff consult with the student before reaching out to the student’s parents.

- The District of Columbia Public Schools issued guidance (“DCPS Guidance”) noting that “students may choose to have their parents participate in the transition process, but parental participation is not required.” The guidance further

recommends different developmentally appropriate protocols depending on grade level. The DCPS Guidance suggests that the school work with a young student's family to identify appropriate steps to support the student, but recommends working closely with older students prior to notification of family. The guidance also provides a model planning document with key issues to discuss with the student or the student's family.

- Similarly, the Massachusetts Department of Elementary and Secondary Education issued guidance ("Massachusetts Guidance") that notes: "Some transgender and gender nonconforming students are not openly so at home for reasons such as safety concerns or lack of acceptance. School personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent or guardian. For the same reasons, school personnel should discuss with the student how the school should refer to the student, *e.g.*, appropriate pronoun use, in written communication to the student's parent or guardian."
- Chicago Public Schools' guidelines ("Chicago Guidelines") provide: "When speaking with other staff members, parents, guardians, or third parties, school staff should not disclose a student's preferred name, pronoun, or other confidential information pertaining to the student's transgender or gender nonconforming status without the student's permission, unless authorized to do so by the Law Department."
- Oregon's Department of Education issued guidance stating, "In a case where a student is not yet able to self-advocate, the request to respect and affirm a student's identity will likely come from the student's parent. However, in other cases, transgender students may not want their parents to know about their transgender identity. These situations should be addressed on a case-by-case basis and school districts should balance the goal of supporting the student with the requirement that parents be kept informed about their children. The paramount consideration in such situations should be the health and safety of the student, while also making sure that the student's gender identity is affirmed in a manner that maintains privacy and confidentiality."

Privacy, Confidentiality, and Student Records

4. How do schools protect a transgender student's privacy regarding the student's transgender status?

There are a number of ways schools protect transgender students' interests in keeping their transgender status private, including taking steps to prepare staff to consistently use the appropriate name and pronouns. Using transgender students' birth names or pronouns that do not match their gender identity risks disclosing a student's transgender status. Some state and school district policies also address how federal and state privacy laws apply to transgender students and how to keep information about a student's transgender status confidential.

- California's El Rancho Unified School District issued a regulation ("El Rancho Regulation") that provides that students have the right to openly discuss and express their gender identity, but also reminds school personnel to be "mindful of the confidentiality and privacy rights of [transgender] students when contacting parents/legal guardians so as not to reveal, imply, or refer to a student's actual or perceived sexual orientation, gender identity, or gender expression."
- The Chicago Guidelines provide that the school should convene an administrative support team to work with transgender students and/or their parents or guardians to address each student's individual needs and supports. To protect the student's privacy, this team is limited to "the school principal, the student, individuals the student identifies as trusted adults, and individuals the principal determines may have a legitimate interest in the safety and healthy development of the student."
- The Mat-Su Borough Guidelines state: "In some cases, a student may want school staff and students to know, and in other cases the student may not want this information to be widely known. School staff should take care to follow the student's plan and not to inadvertently disclose information that is intended to be kept private or that is protected from disclosure (such as confidential medical information)."
- The Massachusetts Guidance advises schools "to collect or maintain information about students' gender only when necessary" and offers an example: "One school reviewed the documentation requests it sent out to families and noticed that field trip permission forms included a line to fill in indicating the student's gender. Upon consideration, the school determined that the requested information was irrelevant to the field trip activities and deleted the line with the gender marker request."

5. How do schools ensure that a transgender student is called by the appropriate name and pronouns?

One of the first issues that school officials may address when a student notifies them of a gender transition is determining which name and pronouns the student prefers. Some schools have adopted policies to prepare all school staff and students to use a student's newly adopted name, if any, and pronouns that are consistent with a student's gender identity.

- A regulation issued by Nevada's Washoe County School District ("Washoe County Regulation") provides that: "Students have the right to be addressed by the names and pronouns that correspond to their gender identity. Using the student's preferred name and pronoun promotes the safety and wellbeing of the student. When possible, the requested name shall be included in the District's electronic database in addition to the student's legal name, in order to inform faculty and staff of the name and pronoun to use when addressing the student."
- A procedure issued by Kansas City Public Schools in Missouri ("Kansas City Procedure") notes that: "The intentional or persistent refusal to respect the gender identity of an employee or student after notification of the preferred pronoun/name used by the employee or student is a violation of this procedure."
- The NYSED Guidance provides: "As with most other issues involved with creating a safe and supportive environment for transgender students, the best course is to engage the student, and possibly the parent, with respect to name and pronoun use, and agree on a plan to reflect the individual needs of each student to initiate that name and pronoun use within the school. The plan also could include when and how this is communicated to students and their parents."
- The DCPS Guidance includes a school planning guide for principals to review with transgender students as they plan how to ensure the school environment is safe and supportive. The school planning guide allows the student to identify the student's gender identity and preferred name, key contacts at home and at school, as well as develop plans for access to restrooms, locker rooms, and other school activities.

6. How do schools handle requests to change the name or sex designation on a student's records?

Some transgender students may legally change their names. However, transgender students often are unable to obtain identification documents that reflect their gender identity (*e.g.*, due to financial limitations or legal restrictions imposed by state or local law). Some school district policies specify that they will use the name a student identifies as consistent with the student's gender identity regardless of whether the student has completed a legal name change.

- The NYSED Guidance provides that school records, including attendance records, transcripts, and Individualized Education Programs, be updated with the student's chosen name and offers an example: "One school administrator dealt with information in the student's file by starting a new file with the student's chosen name, entered previous academic records under the student's chosen name, and created a separate, confidential folder that contained the student's past information and birth name."
- The DCPS Guidance notes: "A court-ordered name or gender change is not required, and the student does not need to change their official records. If a student wishes to go by another name, the school's registrar can enter that name into the 'Preferred First' name field of [the school's] database."
- The Kansas City Procedure recognizes that there are certain situations where school staff or administrators may need to report a transgender student's legal name or gender. The procedure notes that in these situations, "school staff and administrators shall adopt practices to avoid the inadvertent disclosure of such confidential information."
- The Chicago Guidelines state: "Students are not required to obtain a court order and/or gender change or to change their official records as a prerequisite to being addressed by the name and pronoun that corresponds to their gender identity."
- The Massachusetts Guidance also addresses requests to amend records after graduation: "Transgender students who transition after having completed high school may ask their previous schools to amend school records or a diploma or transcript that include the student's birth name and gender. When requested, and when satisfied with the gender identity information provided, schools should amend the student's record."

Sex-Segregated Activities and Facilities

7. How do schools ensure transgender students have access to facilities consistent with their gender identity?

Schools often segregate restrooms and locker rooms by sex, but some schools have policies that students must be permitted to access facilities consistent with their gender identity and not be required to use facilities inconsistent with their gender identity or alternative facilities.

- The Washington State Guidelines provide: “School districts should allow students to use the restroom that is consistent with their gender identity consistently asserted at school.” In addition, no student “should be required to use an alternative restroom because they are transgender or gender nonconforming.”
- The Washoe County Regulation provides: “Students shall have access to use facilities that correspond to their gender identity as expressed by the student and asserted at school, irrespective of the gender listed on the student’s records, including but not limited to locker rooms.”
- The Anchorage Administrative Guidelines emphasize the following provision: “However, staff should not require a transgender or gender nonconforming student/employee to use a separate, nonintegrated space unless requested by the individual student/employee.”

8. How do schools protect the privacy rights of all students in restrooms or locker rooms?

Many students seek additional privacy in school restrooms and locker rooms. Some schools have provided students increased privacy by making adjustments to sex-segregated facilities or providing all students with access to alternative facilities.

- The Washington State Guidelines provide that any student who wants increased privacy should be provided access to an alternative restroom or changing area. The guidelines explain: “This allows students who may feel uncomfortable sharing the facility with the transgender student(s) the option to make use of a separate restroom and have their concerns addressed without stigmatizing any individual student.”

- The NYSED Guidance gives an example of accommodating all students' interest in privacy: "In one high school, a transgender female student was given access to the female changing facility, but the student was uncomfortable using the female changing facility with other female students because there were no private changing areas within the facility. The principal examined the changing facility and determined that curtains could easily be put up along one side of a row of benches near the group lockers, providing private changing areas for any students who wished to use them. After the school put up the curtains, the student was comfortable using the changing facility."
- Atherton High School, in Jefferson County, Kentucky, issued a policy that offers examples of accommodations to address any student's request for increased privacy: "use of a private area within the public area of the locker room facility (e.g. nearby restroom stall with a door or an area separated by a curtain); use of a nearby private area (e.g. nearby restroom); or a separate changing schedule."
- The DCPS Guidance recommends talking to students to come up with an acceptable solution: "Ultimately, if a student expresses discomfort to any member of the school staff, that staff member should review these options with the student and ask the student permission to engage the school LGBTQ liaison or another designated ally in the building."

9. How do schools ensure transgender students have the opportunity to participate in physical education and athletics consistent with their gender identity?

Some school policies explain the procedures for establishing transgender students' eligibility to participate in athletics consistent with their gender identity. Many of those policies refer to procedures established by state athletics leagues or associations.

- The NYSED Guidance explains that "physical education is a required part of the curriculum and an important part of many students' lives. Most physical education classes in New York's schools are coed, so the gender identity of students should not be an issue with respect to these classes. Where there are sex-segregated classes, students should be allowed to participate in a manner consistent with their gender identity."
- The LAUSD Policy provides that "participation in competitive athletics, intramural sports, athletic teams, competitions, and contact sports shall be facilitated in a

manner consistent with the student's gender identity asserted at school and in accordance with the California Interscholastic Federation bylaws." The California Interscholastic Federation establishes a panel of professionals, including at least one person with training or expertise in gender identity health care or advocacy, to make eligibility decisions.

- The Rhode Island Interscholastic League's policy states that all students should have the opportunity to participate in athletics consistent with their gender identity, regardless of the gender listed on school records. The policy provides that the league will base its eligibility determination on the student's current transcript and school registration information, documentation of the student's consistent gender identification (*e.g.*, affirmed written statements from student, parent/guardian, or health care provider), and any other pertinent information.

10. How do schools treat transgender students when they participate in field trips and athletic trips that require overnight accommodations?

Schools often separate students by sex when providing overnight accommodations. Some school policies provide that students must be treated consistent with their gender identity in making such assignments.

- Colorado's Boulder Valley School District issued guidelines ("Boulder Valley Guidelines") providing that when a school plans overnight accommodations for a transgender student, it should consider "the goals of maximizing the student's social integration and equal opportunity to participate in overnight activity and athletic trips, ensuring the [transgender] student's safety and comfort, and minimizing stigmatization of the student."
- The Chicago Guidelines remind school staff: "In no case should a transgender student be denied the right to participate in an overnight field trip because of the student's transgender status."

Additional Practices to Support Transgender Students

11. What can schools do to make transgender students comfortable in the classroom?

Classroom practices that do not distinguish or differentiate students based on their gender are the most inclusive for all students, including transgender students.

- The DCPS Guidance suggests that “[w]herever arbitrary gender dividers can be avoided, they should be eliminated.”
- The Massachusetts Guidance states that “[a]s a general matter, schools should evaluate all gender-based policies, rules, and practices and maintain only those that have a clear and sound pedagogical purpose.”
- Minneapolis Public Schools issued a policy providing that students generally should not be grouped on the basis of sex for the purpose of instruction or study, but rather on bases such as student proficiency in the area of study, student interests, or educational needs for acceleration or enrichment.
- The Maryland State Department of Education issued guidelines that include an example of eliminating gender-based sorting of students: “Old Practice: boys line up over here.” New Practice: birthdays between January and June; everybody who is wearing something green, etc.”

12. How do school dress codes apply to transgender students?

Dress codes that apply the same requirements regardless of gender are the most inclusive for all students and avoid unnecessarily reinforcing sex stereotypes. To the extent a school has a dress code that applies different standards to male and female students, some schools have policies that allow transgender students to dress consistent with their gender identity.

- Wisconsin’s Shorewood School District issued guidelines (“Shorewood Guidelines”) that allow students to dress in accordance with their gender identity and remind school personnel that they must not enforce a dress code more strictly against transgender and gender nonconforming students than other students.
- The Washington State Guidelines encourage school districts to adopt gender-neutral dress codes that do not restrict a student’s clothing choices on the basis of gender: “Dress codes should be based on educationally relevant considerations, apply

consistently to all students, include consistent discipline for violations, and make reasonable accommodations when the situation requires an exception.”

13. How do schools address bullying and harassment of transgender students?

Unfortunately, bullying and harassment continue to be a problem facing many students, and transgender students are no exception. Some schools make clear in their nondiscrimination statements that prohibited sex discrimination includes discrimination based on gender identity and expression. Their policies also address this issue.

- The NYSED Guidance stresses the importance of protecting students from bullying and harassment because “[the] high rates experienced by transgender students correspond to adverse health and educational consequences,” including higher rates of absenteeism, lower academic achievement, and stunted educational aspirations.
- The Shorewood Guidelines specify that harassment based on a student’s actual or perceived transgender status or gender nonconformity is prohibited and notes that these complaints are to be handled in the same manner as other discrimination, harassment, and bullying complaints.
- The DCPS Guidance provides examples of prohibited harassment that transgender students sometimes experience, including misusing an individual’s preferred name or pronouns on purpose, asking personal questions about a person’s body or gender transition, and disclosing private information.

14. How do school psychologists, school counselors, school nurses, and school social workers support transgender students?

School counselors can help transgender students who may experience mental health disorders such as depression, anxiety, and posttraumatic stress. Mental health staff may also consult with school administrators to create inclusive policies, programs, and practices that prevent bullying and harassment and ensure classrooms and schools are safe, healthy, and supportive places where all students, including transgender students, are respected and can express themselves. Schools will be in a better position to support transgender students if they communicate to all students that resources are available, and that they are competent to provide support and services to any student who has questions related to gender identity.

- The NYSED Guidance suggests that counselors can serve as a point of contact for transgender students who seek to take initial steps to assert their gender identity in school.
- The Chicago Guidelines convene a student administrative support team to determine the appropriate supports for transgender students. The team consists of the school principal, the student, adults that the student trusts, and individuals the principal determines may have a legitimate interest in the safety and healthy development of the student.

15. How do schools foster respect for transgender students among members of the broader school community?

Developing a clear policy explaining how to support transgender students can help communicate the importance the school places on creating a safe, healthy, and nondiscriminatory school climate for all students. Schools can do this by providing educational programs aimed at staff, students, families, and other community members.

- The Massachusetts Guidance informs superintendents and principals that they “need to review existing policies, handbooks, and other written materials to ensure they are updated to reflect the inclusion of gender identity in the student antidiscrimination law, and may wish to inform all members of the school community, including school personnel, students, and families of the recent change to state law and its implications for school policy and practice. This could take the form of a letter that states the school’s commitment to being a supportive, inclusive environment for all students.”
- The NYSED Guidance states that “school districts are encouraged to provide this guidance document and other resources, such as trainings and information sessions, to the school community including, but not limited to, parents, students, staff and residents.”

16. What topics do schools address when training staff on issues related to transgender students?

Schools can reinforce commitments to providing safe, healthy, and nondiscriminatory school climates by training all school personnel about appropriate and respectful treatment of all students, including transgender students.

- The Massachusetts Guidance suggests including the following topics in faculty and staff training “key terms related to gender identity and expression; the development of gender identity; the experiences of transgender and other gender nonconforming students; risks and resilience data regarding transgender and gender nonconforming students; ways to support transgender students and to improve school climate for gender nonconforming students; [and] gender-neutral language and practices.”
- The El Rancho Regulation states that the superintendent or designee “shall provide to employees, volunteers, and parents/guardians training and information regarding the district’s nondiscrimination policy; what constitutes prohibited discrimination, harassment, intimidation, or bullying; how and to whom a report of an incident should be made; and how to guard against segregating or stereotyping students when providing instruction, guidance, supervision, or other services to them. Such training and information shall include guidelines for addressing issues related to transgender and gender-nonconforming students.”

17. How do schools respond to complaints about the way transgender students are treated?

School policies often provide that complaints from transgender students be handled under the same policy used to resolve other complaints of discrimination or harassment.

- The Boulder Valley Guidelines provide that “complaints alleging discrimination or harassment based on a person’s actual or perceived transgender status or gender nonconformity are to be handled in the same manner as other discrimination or harassment complaints.”
- The Anchorage Administrative Guidelines provide that “students may also use the Student Grievance Process to address any civil rights issue, including transgender issues at school.”

Terminology

18. What terms are defined in current school policies on transgender students?

Understanding the needs of transgender students includes understanding relevant terminology. Most school policies define commonly used terms to assist schools in understanding key concepts relevant to transgender students. The list below is not exhaustive, and only includes examples of some of the most common terms that school policies define.

- *Gender identity* refers to a person’s deeply felt internal sense of being male or female, regardless of their sex assigned at birth. (Washington State Guidelines)
- *Sex assigned at birth* refers to the sex designation, usually “male” or “female,” assigned to a person when they are born. (NYSED Guidance)
- *Gender expression* refers to the manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice or mannerisms. (Washoe County Regulation)
- *Transgender* or *trans* describes a person whose gender identity does not correspond to their assigned sex at birth. (Massachusetts Guidance)
- *Gender transition* refers to the process in which a person goes from living and identifying as one gender to living and identifying as another. (Washoe County Regulation)
- *Cisgender* describes a person whose gender identity corresponds to their assigned sex at birth. (NYSED Guidance)
- *Gender nonconforming* describes people whose gender expression differs from stereotypic expectations. The terms *gender variant* or *gender atypical* are also used. Gender nonconforming individuals may identify as male, female, some combination of both, or neither. (NYSED Guidance)
- *Intersex* describes individuals born with chromosomes, hormones, genitalia and/or other sex characteristics that are not exclusively male or female as defined by the medical establishment in our society. (DCPS Guidance)
- *LGBTQ* is an acronym that stands for “lesbian, gay, bisexual, transgender, and queer/questioning.” (LAUSD Policy)

- *Sexual orientation* refers to a person’s emotional and sexual attraction to another person based on the gender of the other person. Common terms used to describe sexual orientation include, but are not limited to, heterosexual, lesbian, gay, and bisexual. Sexual orientation and gender identity are different. (LAUSD Policy)

19. How do schools account for individual preferences and the diverse ways that students describe and express their gender?

Some students may use different terms to identify themselves or describe their situations. For example, a transgender male student may identify simply as male, consistent with his gender identity. The same principles apply even if students use different terms. Some school policies directly address this question and provide additional guidance.

- The Washington State Guidelines recognize how “terminology can differ based on religion, language, race, ethnicity, age, culture and many other factors.”
- Washington’s Federal Way School District issued a resource guide that states: “Keep in mind that the meaning of gender conformity can vary from culture to culture, so these may not translate exactly to Western ideas of what it means to be transgender. Some of these identities include Hijra (South Asia), Fa’afafine (Samoa), Kathoey (Thailand), Travesti (South America), and Two-Spirit (Native American/First Nations).”
- The Washoe County Regulation, responding to cultural diversity within the state, offers examples of “ways in which transgender and gender nonconforming youth describe their lives and gendered experiences: trans, transsexual, transgender, male-to-female (MTF), female-to-male (FTM), bi-gender, two-spirit, trans man, and trans woman.”
- The DCPS Guidance provides this advice to staff: “If you are unsure about a student’s preferred name or pronouns, it is appropriate to privately and tactfully ask the student what they prefer to be called. Additionally, when speaking about a student it is rarely necessary to label them as being transgender, as they should be treated the same as the rest of their peers.”

Cited Policies on Transgender Students

- Anchorage School District (AK): *Administrative Guidelines: Working with Transgender and Gender Nonconforming Students and Employees* (2015) (on file with ED)
- Atherton High School, Jefferson County School District (KY), *Policy on School Space* (2014), www.jefferson.k12.ky.us/schools/high/atherton/SBDMDocuments/Policy%20500%20Draft-%20Los%20Angeles%20Unified%20School%20District%20Revised%20Model.pdf
- Boulder Valley School District (CO), *Guidelines Regarding the Support of Students and Staff Who Are Transgender and/or Gender Nonconforming* (2016), <http://www.bvsvd.org/policies/Policies/AC-E3.pdf>
- California Interscholastic Federation, *Guidelines for Gender Identity Participation* (2015), http://static.psb.in.com/m/5/0ndq7wwfgh2em9/Guidelines_for_Gender_Identity_Participation.pdf
- Chicago Public Schools (IL), *Guidelines Regarding the Support of Transgender and Gender Nonconforming Students* (2016), cps.edu/SiteCollectionDocuments/TL_TransGenderNonconformingStudents_Guidelines.pdf
- District of Columbia Public Schools, *Transgender and Gender-Nonconforming Policy Guidance* (2015), dcps.dc.gov/publication/dcps-transgender-and-gender-non-conforming-policy-guidance
- El Rancho Unified School District, *Transgender and Gender-Nonconforming Students* (AR 5145.3) (2014), www.erusd.org/pdf/board_policies/5145_3.pdf
- Federal Way Public Schools (WA), *Working with Transgender and Gender-Nonconforming Students and Staff* (2014-2015), www.fwps.net/districtresources/wp-content/uploads/sites/32/2013/12/FWPS_Transgender3.pdf?7a385a
- Kansas City 33 School District (MO), *Prohibition Against Discrimination, Harassment and Retaliation (Transgender and Gender Nonconforming Employee and Students)* (2013), [eboard.eboardsolutions.com/ePolicy/policy.aspx?PC=AC-AP\(1\)&Sch=228&S=228&RevNo=1.01&C=A&Z=R](http://eboard.eboardsolutions.com/ePolicy/policy.aspx?PC=AC-AP(1)&Sch=228&S=228&RevNo=1.01&C=A&Z=R)
- Los Angeles Unified School District (CA), *Transgender Students – Ensuring Equity and Nondiscrimination* (2014), notebook.lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/FLDR_ORGANIZATIONS/FLDR_GENERAL_COUNSEL/BUL-6224.1%20TRANSGENDER%20POLICY,%2008-15-14%20-%20ADDED%20ED%20CODE%20221%205.PDF

- Maryland State Department of Education, *Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination* (2015), marylandpublicschools.org/MSDE/divisions/studentschoolsvcs/student_services_alt/docs/ProvidingSafeSpacesTransgendergenderNonConformingYouth012016.pdf
- Massachusetts Department of Elementary and Secondary Education, *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment Nondiscrimination on the Basis of Gender Identity* (2014), www.doe.mass.edu/ssce/GenderIdentity.pdf
- Matanuska-Susitna Borough School District (AK), *Transgender Student Guidelines* (2015), www.matsuk12.us/site/handlers/filedownload.ashx?moduleinstanceid=10846&dataid=41646&FileName=Title IX--Transgender Students Guidelines.pdf
- Minneapolis Public Schools (MN), *Permissible Grouping Principles* (2014), policy.mpls.k12.mn.us/uploads/regulation_6135_a.pdf
- New York State Education Department, *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students* (2015), www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf
- Oregon Department of Education, *Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students* (2016), www.ode.state.or.us/groups/supportstaff/hklb/schoolnurses/transgenderstudentguidance.pdf
- Rhode Island Interscholastic League, *Rules & Regulations* (Article I, Section 22 – Gender Identity), www.riil.org/files/8214/3861/6354/ARTICLE_1_ORGANIZATION_2015.pdf
- Shorewood School District (WI), *Nondiscrimination Guidelines Related to Students Who Are Transgender and Students Nonconforming to Gender Role Stereotypes* (2014), www.shorewood.k12.wi.us/uploaded/Board_Documents/Policies/411_Guidelines_and_Exhibit.pdf?1393865642372
- Washington Office of State Superintendent of Public Instruction, *Prohibiting Discrimination in Washington Public Schools* (2012), www.k12.wa.us/Equity/pubdocs/ProhibitingDiscriminationInPublicSchools.pdf
- Washoe County School District (NV), *Gender Identity and Gender Non-Conformity – Students* (2015), washoecountyschools.net/csi/pdf_files/5161%20Reg%20-%20Gender%20Identity%20v1.pdf

Select Federal Resources on Transgender Students

- U.S. Department of Education
 - Office for Civil Rights and U.S. Department of Justice's Civil Rights Division, *Dear Colleague Letter: Transgender Students* (May 13, 2016), www.ed.gov/ocr/letters/colleague-201605-title-ix-transgender.pdf
 - Office for Civil Rights, *Resources for Transgender and Gender-Nonconforming Students*, www.ed.gov/ocr/lgbt.html
 - Office for Civil Rights, *Publications on Title IX*, www.ed.gov/about/offices/list/ocr/publications.html#TitleIX
 - Office for Civil Rights, *How to File a Discrimination Complaint*, www.ed.gov/about/offices/list/ocr/docs/howto.html
 - National Center on Safe Supportive Learning Environments, safesupportivelearning.ed.gov

- U.S. Department of Health and Human Services
 - Administration for Children and Families, *Resources for Serving Lesbian, Gay, Bisexual and Transgender Youth*, <http://ncfy.acf.hhs.gov/features/serving-lesbian-gay-bisexual-transgender-and-questioning-youth-open-arms/resources-serving>
 - Centers for Disease Control and Prevention, *LGBT Youth Resources*, www.cdc.gov/lgbthealth/youth-resources.htm
 - Homelessness Resource Center, *Homeless Populations: LGBTQI2-S Youth*, <http://homeless.samhsa.gov/Channel/LGBTQ-153.aspx>
 - Stopbullying.gov, *Bullying and LGBT Youth*, <http://www.stopbullying.gov/at-risk/groups/lgbt>

- U.S. Department of Housing and Urban Development
 - *Community-Wide Prevention of LGBTQ Youth Homelessness* (June 2015), <https://www.hudexchange.info/resources/documents/LGBTQ-Youth-Homelessness-Prevention-Initiative-Overview.pdf>

- U.S. Department of Labor
 - Office of Job Corps, *Directive: Job Corps Program Instruction Notice No. 14-31* (May 1, 2015), [https://supportservices.jobcorps.gov/Program Instruction Notices/pi 14 31.pdf](https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi_14_31.pdf)

Exhibit 8



U.S. Department of Justice
Civil Rights Division



U.S. Department of Education
Office for Civil Rights

Dear Colleague Letter
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, 或者使用英語有困難, 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 이메일 주소 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

February 22, 2017

Dear Colleague:

The purpose of this guidance is to inform you that the Department of Justice and the Department of Education are withdrawing the statements of policy and guidance reflected in:

- Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015; and
- Dear Colleague Letter on Transgender Students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May 13, 2016.

These guidance documents take the position that the prohibitions on discrimination “on the basis of sex” in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity. These guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.

This interpretation has given rise to significant litigation regarding school restrooms and locker rooms. The U.S. Court of Appeals for the Fourth Circuit concluded that the term “sex” in the regulations is ambiguous and deferred to what the court characterized as the “novel” interpretation advanced in the guidance. By contrast, a federal district court in Texas held that the term “sex” unambiguously refers to biological sex and that, in any event, the guidance was “legislative and substantive” and thus formal rulemaking should have occurred prior to the adoption of any such policy. In August of 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned.

In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.

In these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them.

Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.

This guidance does not add requirements to applicable law. If you have questions or are interested in commenting on this letter, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339); or the Department of Justice at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Sincerely,

/s/
Sandra Battle
Acting Assistant Secretary for Civil Rights
U.S. Department of Education

/s/
T.E. Wheeler, II
Acting Assistant Attorney General for Civil Rights
U.S. Department of Justice