Free Teleconference*
Presented by: Section of Civil Rights and Social Justice – SOGI Committee
Co-sponsored by: ABA Commission on Sexual Orientation & Gender Identity

The Application of Title IX to LGBT Students

Join us as we discuss why and how Title IX, a statute that prohibits sex discrimination, applies to LGBT students. Our legal experts will discuss the legal theory of Title IX sex discrimination, the U.S. Department of Education’s guidance for Title IX’s application to LGBT students, and the application of Title IX to transgender students in the Fourth Circuit case of G.G. v. Gloucester County Sch. Bd. Our panel includes school administrators who will talk about how their school districts have implemented nondiscrimination policies to ensure that all students have equal access to education in a safe environment.

Thursday, August 25, 2016
3:30 p.m. - 5:00 p.m. Eastern / 12:30 p.m. – 2:00 p.m. Pacific

REGISTRATION REQUIRED: please RSVP here

Speakers
- Joshua Block, Senior Staff Attorney, LGBT and HIV Project, American Civil Liberties Union (ACLU) Plaintiff counsel in G.G. v. Gloucester County School Bd.
- Kevin R. Gogin, Director of Safety and Wellness and Director of School Health Programs, Student, Family, and Community Support Department for the San Francisco Unified School District
- Adele Kimmel, Senior Attorney, Public Justice
- Asaf Orr, Staff Attorney, Transgender Youth Project, National Center for Lesbian Rights

Moderator
- Kristen Galles, Title IX litigator; Council Member, Section of Civil Rights and Social Justice

*The content of this program does not meet requirements for continuing legal education (CLE) accreditation. You will not receive CLE credit for listening.
# The Application of Title IX to LGBT Students

## PROGRAM MATERIALS

### Table of Contents


II. *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) ........................................................32

U.S. Department of Education – Office for Civil Rights (OCR) Guidance


OCR and U.S. Department of Justice Enforcement


Challenges to OCR Transgender Guidance

XII.  *Students & Parents for Privacy v. U.S. Dept. of Educ.*, Case No. 16-cv-04945, Verified Complaint for Injunctive and Declaratory Relief (N.D. Ill. May 4, 2016) ................................................................................................................................214


California Law and California State Bar Association Policy

XIX. California School Boards Association, “Policy Brief: Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender-Nonconforming Students,” February 2014 .................................................................492

San Francisco & San Diego Schools

XX. San Francisco Unified School District, Student, Family and Community Support Department, “LGBTQ Student Rights” ..........................................................498

XXI. San Francisco Unified School District, “Board of Education Administrative Regulation No: R5163a, Article 5: Students, Section: Non-Discrimination for Students and Employees” (Re-authorized 2013) .................................................................................................................................499


XXIII. San Francisco Unified School District, “School Roster Information Change Request” ..................................................................................................................511

XXIV. Dudnick, Laura, “SF schools ‘on the right track’ with transgender inclusivity,” SAN FRANCISCO EXAMINER, May 17, 2016 .........................................................512

XXV. San Diego Unified School District, “Administrative Procedure: Nondiscrimination of Transgender Students” (Revised June 16, 2014) .................................514
Adele P. Kimmel

Title IX: An Imperfect but Vital Tool To Stop Bullying of LGBT Students

Abstract. LGBT students are bullied at dramatically higher rates than other students. School bullying generally, and the targeting of LGBT students in particular, has recently garnered national attention as a serious problem that needs to be solved. Just as society is increasingly recognizing the destructive effects of school bullying and accepting the LGBT community, federal courts and agencies are increasingly holding school districts accountable under Title IX when schools fail to protect LGBT students from gender-based bullying.

This Feature discusses the emerging importance of Title IX litigation and enforcement as a tool to stop peer-on-peer harassment of LGBT students in elementary and secondary schools. Federal courts and agencies consistently recognize that bullied LGBT students may bring sex discrimination claims under Title IX based on a theory of gender stereotyping. Some even view anti-LGBT animus as per se sex discrimination. I argue that Title IX's effectiveness in addressing the problem is limited by overly narrow judicial and agency views of what constitutes actionable sex discrimination. Federal courts and agencies often focus on stereotypes about overt masculinity and femininity and fail to consider stereotypes about the appropriate roles of girls and boys and the relationships between them. They also offer conflicting views on whether bullying based on a student's actual or perceived LGBT status constitutes per se sex discrimination. If federal courts and agencies consistently considered the full spectrum of gender stereotypes and recognized that bullying based on anti-LGBT animus is also sex discrimination, Title IX would better protect LGBT students from harassment.

This Feature also discusses the need for legislation that expressly prohibits discrimination based on actual or perceived sexual orientation and gender identity. I argue that this express enumeration is needed to ensure both that schools clearly understand their duty to prevent a hostile educational environment and that LGBT students clearly understand their right to an equal education.

Even if Congress amended Title IX or passed new legislation to enumerate LGBT protections—and federal courts and agencies interpreted Title IX as broadly as I advocate—LGBT bullying would not disappear. Title IX cannot carry the weight of this problem on its own. Other reforms are needed, including school policies with enumerated protections for LGBT students, mandatory professional development for school staff, anti-bullying training and education programs for students, and district accountability for reporting incidents of LGBT bullying. This is a complex problem that requires a multipronged solution.
AUTHOR. Senior Attorney, Public Justice, P.C., a national public interest law firm that pursues high impact lawsuits to combat social and economic injustice, protect the earth’s sustainability, and challenge predatory corporate conduct and government abuses; Head of Public Justice’s Anti-Bullying Campaign, which seeks to hold school districts and officials accountable for failing to protect students from bullying, make systemic changes in the ways that schools respond to bullying incidents, and educate others about bullying and the law. I thank Georgetown Law student Lauren Kelleher and Public Justice Thornton-Robb Attorney Gabriel Hopkins for their research assistance on this Feature, former Public Justice Cartwright-Baron Attorney Sarah Belton for her input and comments on the proposal for this Feature, and Claire Simonich and other editors at the Yale Law Journal for their insightful comments on earlier drafts.
FEATURE CONTENTS

INTRODUCTION 2009

I. OVERVIEW OF SEX DISCRIMINATION PROHIBITED BY TITLE IX 2013

II. GENDER STEREOTYPING AND ANTI-LGBT ANIMUS UNDER TITLE IX 2015
   A. The Influence of Title VII 2016
   B. Harassment of LGBT Students Based on Gender Stereotypes and Anti-LGBT Animus 2018
      1. Civil Litigation 2019
      2. Federal Agency Action 2021
   C. The Impact of Title IX on LGBT Students 2024

III. LIMITS ON TITLE IX’S EFFECTIVENESS AND NEEDED REFORMS 2026
   A. Courts and OCR Should Interpret Title IX More Broadly 2027
      1. LGBT Bullying Involves Stereotypes Beyond Overt Masculinity or Femininity 2027
      2. LGBT Bullying Is Per Se Sex Discrimination 2030
   B. Congress Should Amend Title IX or Pass New Legislation Prohibiting Discrimination Against LGBT Students 2032
   C. School Policy and Training Reforms Are Needed 2035

CONCLUSION 2036

2008
INTRODUCTION

When Seth Walsh “came out” as gay in sixth grade, his life changed dramatically. His classmates became openly hostile and bullied him relentlessly. They routinely called him derogatory names, such as “faggot,” “pussy,” “pansy,” and “sissy,” and sometimes told him to “burn in hell” or “kill himself.” The harassment escalated throughout middle school and eventually became physically and sexually violent. Walsh’s peers pushed him into lockers, obstructed his path as he tried to walk by, hit food out of his hands, and threw food, water bottles, pencils, and erasers at him. They also grabbed Walsh “from behind while suggesting that he would be sexually gratified by the contact,” and one student “attempted to shove a pencil up the seat of [Walsh’s] pants.” Some of the most hostile incidents occurred in the boys’ locker room, where classmates pulled down his pants and a male peer threatened to rape him. Walsh and his mother repeatedly reported the bullying to school officials, but to no avail. Walsh’s peers were permitted to bully him with impunity. Even some teachers joined in the disparagement. Shortly after being “threatened, taunted, followed, and physically assaulted” at a local park by four students, Walsh committed suicide. He was thirteen.

Walsh’s experience is all too common for students who identify as (or are perceived to be) lesbian, gay, bisexual, or transgender (LGBT). LGBT students

2. Id. at 1112-13.
3. Id. at 1112.
4. Id. at 1112-13.
5. Id. at 1112.
7. 827 F. Supp. 2d at 1112.
8. Letter of Findings from Office for Civil Rights to Tehachapi Unified Sch. Dist., supra note 6, at 6.
10. For example, one teacher told a student that some teachers had bet on when Walsh would “come out,” another teacher told a student she wanted to ask Walsh and his boyfriend what was “wrong” with them, and yet another called Walsh “fruity” in front of the class. Id. at 1112.
11. Letter of Findings from Office for Civil Rights to Tehachapi Unified Sch. Dist., supra note 6, at 11-12; see also 827 F. Supp. 2d at 1113 (describing the same order of events).
12. 827 F. Supp. 2d at 1112.
are bullied at dramatically higher rates than other students. They are twice as likely as non-LGBT students to be verbally harassed or physically assaulted at school. A recent survey conducted by the Gay, Lesbian & Straight Education Network (GLSEN) found that “[s]chools nationwide are hostile environments for a distressing number of LGBT students, the overwhelming majority of whom routinely hear anti-LGBT language and experience victimization and discrimination at school.” Of the 7,898 LGBT students GLSEN surveyed about their experience in the past year of school, 74.1% were called names or threatened because of their sexual orientation and 55.2% because of their gender expression; 36.2% were pushed or shoved because of their sexual orientation and 22.7% because of their gender expression; and 16.5% were punched, kicked, or injured with a weapon because of their sexual orientation and 11.4% because of their gender expression. Moreover, school staff did nothing in response to 61.6% of students who reported an incident. As a result of routine bullying, many LGBT students miss school, get lower grades, and are less likely to pursue post-secondary education than their peers; they also suffer higher levels of depression and lower levels of self-esteem.

In recent years, school bullying in general, and the targeting of LGBT students in particular, has garnered national attention. In 2011, the Obama Administration held the first White House Conference on Bullying Prevention, following media reports on several LGBT students who committed suicide after being bullied at school. The U.S. Department of Education’s Office for Civil Rights (OCR) issued guidelines in 2010 clarifying schools’ obligations to address bullying that violates any of the federal anti-

---


14. Id.


16. Id. at xvi-xvii.

17. Id. at xviii.

18. Id. at xviii.


2010
discrimination statutes—including “gender-based” harassment of LGBT students—that violates Title IX of the Education Amendments of 1972. OCR has also investigated and reached resolution agreements with school districts that failed to respond appropriately to gender-based bullying of LGBT students. These actions reflect cultural shifts in societal views of both school bullying and the LGBT community. Bullying is now recognized as a serious problem that needs to be addressed, not a normal rite of passage to be endured. And the LGBT community is receiving increasing public acceptance.


22. Id. at 7–8. “Gender-based” harassment or bullying is a form of sex discrimination where a student is harassed for failing to conform to sex stereotypes. Id.; see also Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, U.S. DEP’T EDUC., at v (Jan. 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [http://perma.cc/HX9Z-UZU4] (explaining that gender-based harassment may be covered by Title IX, though this type of harassment is not covered by the Guidance).

23. Under Title IX, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .” 20 U.S.C. § 1681(a) (2012).


25. These cultural shifts are also reflected in state antibullying laws and school district policies. In 2000, only three states had anti-bullying statutes, and only one explicitly covered anti-LGBT harassment. See Ryan M. Kull et al., From Statehouse to Schoolhouse: Anti-Bullying Policy Efforts in U.S. States and School Districts, GAY, LESBIAN & STRAIGHT EDUC. NETWORK 43–44 (2015), http://www.glsen.org/sites/default/files/GLSEN%20-%20From%20Statehouse%20to%20Schoolhouse%202015_o.pdf [https://perma.cc/BAT9-3L8Y]. By the end of 2008, thirty-seven states had adopted anti-bullying statutes, five of which expressly prohibited bullying based on sexual orientation or gender expression. Id. at 43. By the end of 2014, forty-nine states had passed anti-bullying statutes, eighteen of which expressly protect LGBT students. Id.; see also Victoria Stuart-Cassel et al., Analysis of State Bullying Laws & Policies, U.S. DEP’T EDUC. app. B (2011), https://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf [https://perma.cc/JN5X-8N7M]. School district policies prohibiting harassment and bullying have also increased in the past two decades. See Kosciw et al., supra note 15, at 114 fig.4.11 (showing an increase in the prevalence of school bullying, harassment, and assault policies from 2003 to 2013).

26. See Lee, supra note 19; see also supra note 25 and accompanying text.

27. See supra note 25 and accompanying text. Polling data show a steady rise in the American public’s acceptance of same-sex marriage and LGBT individuals’ entitlement to general civil rights and open participation in public arenas. See, e.g., Changing Attitudes on Gay Marriage,
These cultural shifts are also reflected in federal court decisions following the Supreme Court’s ruling in *Davis v. Monroe County Board of Education*, which allowed damages actions under Title IX against school districts that respond inadequately to student-on-student sexual harassment.28 Within the last two decades, many federal courts have permitted LGBT students to sue school districts for sex discrimination under Title IX for failing to protect them from gender-based bullying by other students.29

This Feature addresses the emerging importance of Title IX litigation and enforcement as a tool to stop peer-on-peer bullying of LGBT students in elementary and secondary (commonly referred to as “K-12”) schools; it also explores Title IX’s limitations in this area. Although Title IX jurisprudence post-*Davis* shows promise for LGBT students whose school districts fail to protect them from bullying,30 action beyond the current scope of Title IX litigation and enforcement is needed to prevent and address the problem.

Part I provides a brief overview of the types of sex discrimination that Title IX prohibits and explains how the Supreme Court’s decision in *Davis* opened the door to Title IX claims by LGBT students. Part II discusses the evolution of Title IX jurisprudence on the harassment of K-12 LGBT students. It first addresses how this evolution occurred, examining the influence of employment discrimination precedent under Title VII of the Civil Rights Act of 1964.31 This Part also discusses key Title IX cases filed by LGBT or perceived-LGBT students and federal enforcement actions, showing the roles that gender stereotyping and anti-LGBT animus play in these cases. This Part concludes by explaining the important role that Title IX litigation and enforcement play in curbing the harassment of LGBT students.

Part III addresses the limits on Title IX’s effectiveness and the reforms needed to stop the bullying of K-12 LGBT students. It argues that Title IX’s effectiveness in providing LGBT students with equal access to educational opportunities is limited by two key deficiencies: (1) courts are interpreting the


29. *See infra* Part II; cases cited *infra* notes 44-45. *Nabozny v. Podlesny* was the first successful federal lawsuit alleging that school officials’ failure to protect a gay student from other students’ bullying constituted discrimination based on gender and sexual orientation, though it did not allege Title IX claims. 92 F.3d 446, 454-58 (7th Cir. 1996) (permitting Fourteenth Amendment equal protection claims based on gender and sexual orientation).

30. *See infra* Part II; cases cited *infra* notes 44-45.

statute’s prohibition against sex discrimination too narrowly, and (2) the statute does not expressly prohibit discrimination on the basis of sexual orientation or gender identity. Specifically, this Part argues that courts should interpret Title IX to cover all harassment of LGBT students because this harassment is always based on gender stereotypes. In addition, harassment of students based on their sexual orientation or gender identity is per se sex discrimination. Furthermore, this Part makes the case that Congress should amend Title IX (or pass new, separate federal legislation) to prohibit discrimination in education based on sexual orientation and gender identity, in order to ensure that LGBT students have equal access to educational opportunities. Part III concludes by explaining why these legal reforms to Title IX are nevertheless insufficient. To effectively reduce victimization and improve the educational climate for K-12 LGBT students, schools should also implement anti-bullying policies and training and education programs that specifically address anti-LGBT bullying.

I. OVERVIEW OF SEX DISCRIMINATION PROHIBITED BY TITLE IX

Title IX’s prohibition against sex discrimination in education is broad. Under Title IX, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .” 32 Title IX covers a host of conduct that creates a hostile educational environment based on sex, including unequal admission, employment and athletic opportunities, sexual harassment, gender-based harassment, and sexual violence. 33 Congress passed Title IX in part to remedy

33. See, e.g., Bernice Resnick Sandler, Title IX: How We Got It and What a Difference It Made, 55 CLEV. ST. L. REV. 473, 477, 480-82 (2007) (discussing the role of employment discrimination against women in the passage of Title IX and how Title IX was eventually interpreted as applying to intercollegiate sports); Karen Blumenthal, The Truth About Title IX, DAILY BEAST (June 22, 2012, 4:35 PM), http://www.thedailybeast.com/articles/2012/06/22/the-truth-about-title-ix.html [http://perma.cc/T9FQ-LGCX] (discussing the role of admissions quotas on women in the passage of Title IX); Office for Civil Rights, Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali, U.S. DEP’T EDUC. (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [http://perma.cc/46WS-A4WQ] [hereinafter Sexual Violence DCL] (discussing how sexual violence is a form of sex discrimination prohibited by Title IX); Bullying DCL, supra note 21, at 6-8 (discussing how sexual harassment and gender-based harassment are forms of sex discrimination prohibited by Title IX).
gender stereotypes that were interfering with educational opportunities for girls and women.34

More than two decades after Title IX’s passage, the Supreme Court’s decision in Davis paved the way for LGBT students to file Title IX lawsuits based on peer harassment. The plaintiff in Davis was a fifth-grade student in Georgia who filed a Title IX suit based on school officials’ alleged failure to take action in response to complaints about a male classmate who was sexually harassing her.35 The Court held that students subjected to peer sexual harassment may sue their school districts for damages when school officials “are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”36

Although Davis involved male-on-female sexual harassment, the Court did not limit its holding to these circumstances. By defining actionable peer sexual harassment broadly,37 Davis opened the door for LGBT students to file Title IX suits when schools fail to respond adequately to peer harassment based on gender stereotypes or perceived LGBT status.38

LGBT students are frequently bullied for failing to conform to their peers’ stereotypes about how boys and girls should look and act.39 They are also bullied because of their perceived LGBT status.40 These forms of harassment can create a “hostile environment”41 that deprives LGBT students of equal educational opportunities to which all students are entitled, regardless of sex. Post-Davis, Title IX jurisprudence has evolved to include harassment based on gender stereotypes, but the case law is divided on whether Title IX covers harassment based solely on perceived sexual orientation.42

34. See 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh) (noting the need for a strong measure to end stereotypes); see also Note, Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX, 88 YALE L.J. 1254, 1264-68 (1979) (discussing the elimination of sex stereotyping as a policy underlying Title IX).
36. Id. at 650.
37. Id. at 652.
38. See, e.g., Sexual Violence DCL, supra note 33, at 1-3; Bullying DCL, supra note 21, at 7-8; Office for Civil Rights, supra note 22, at i-ii, v, 2-3, 5-7.
40. Id.
41. “Hostile environment” harassment refers to harassment that rises to the level of denying or limiting “a student’s ability to participate in or benefit from [a] school’s program.” Office for Civil Rights, supra note 22, at 5.
42. See cases cited infra notes 44-45.
II. GENDER STEREOTYPING AND ANTI-LGBT ANIMUS UNDER TITLE IX

Since Davis, there has been a significant and growing line of Title IX cases involving harassment of K-12 students based on gender stereotypes and perceived LGBT status. Based on twenty-one cases identified as addressing whether LGBT (or perceived LGBT) students had cognizable Title IX claims for peer harassment, courts have delineated two rationales for finding that the harassment was discrimination “on the basis of sex”43 covered by Title IX. One rationale, accepted in all fifteen cases that addressed it, is that the students are harassed for failing to conform to gender stereotypes.44 The second rationale, on which the eight courts to address it are evenly split, is that sexual orientation harassment is sex discrimination per se.45

45. Four courts have accepted this rationale. See Estate of Brown v. Ogletree, No. 11-cv-1491, 2012 WL 591190, at *16-17 (S.D. Tex. Feb. 21, 2012); Callahan ex rel. Roe v. Gustine Unified Sch. Dist., 678 F. Supp. 2d 1008, 1037 (E.D. Cal. 2009); Schroeder ex rel. Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869, 880 (N.D. Ohio 2003); Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000). Four courts have rejected it. See Shuler ex rel. M.D. v. Sch. Bd. of Richmond, No. 3:13CV239-HEH, 2013 WL 2404842, at *3 (E.D. Va. May 30, 2013); Corral, 2013 WL 1855824, at *5-6; Turpin, 2010 WL 2560421, at *3; Montgomery, 109 F. Supp. 2d at 1090. If all courts recognized that harassment of LGBT students is per se discrimination, Title IX would address the problem more effectively, bullied LGBT students would have cognizable Title IX claims regardless of whether they were bullied for failing to conform to stereotypes about masculinity or femininity, and courts would not dismiss Title IX claims for being based on “sexual orientation” rather than “sex” discrimination. See infra Section III.A.
How did these two rationales evolve? And what do they portend for bullied LGBT students? Title VII precedent on sex discrimination in the workplace has had a significant influence on Title IX. Courts and the Equal Employment Opportunity Commission (EEOC) have increasingly recognized that LGBT employees suffering discrimination based on gender stereotypes or LGBT status have cognizable sex discrimination claims under Title VII. And bullied LGBT students who have filed Title IX claims are benefitting from this favorable Title VII precedent.

A. The Influence of Title VII

When interpreting Title IX’s prohibition against sex discrimination in education, courts often rely on Title VII precedent on sex discrimination in employment. Two Title VII decisions have played a particularly significant role in Title IX peer harassment cases filed by LGBT students: Oncale v. Sundowner Offshore Services, Inc., which held that same-sex sexual harassment is actionable under Title VII, and Price Waterhouse v. Hopkins, which held that harassment based on an individual’s nonconformity to gender stereotypes is a form of sex discrimination under Title VII. After Davis, lower courts have relied on the Supreme Court’s decisions in Price Waterhouse and Oncale to hold that harassment based on gender stereotyping or perceived sexual orientation is a form of sex discrimination under Title IX. For example, in Montgomery v. Independent School District, where a student alleged that he was harassed by his male peers because they thought he was gay and did not act in a masculine manner, the district court relied on Price Waterhouse and Oncale in concluding that the plaintiff had stated

---

46. See infra Section II.A.

47. See infra Sections II.A, III.A.

48. See infra Section II.A.

49. See, e.g., Franklin v. Gwinnett Cty. Pub. Schs., 503 U.S. 60, 75 (1992) (holding that the same rule for awarding money damages should apply whether a teacher sexually harasses a student or a supervisor sexually harasses a subordinate); see also Emeldi v. Univ. of Or., 698 F.3d 715, 724 (9th Cir. 2012) (finding that the legislative history of Title IX “strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII”).


52. Courts appear to use “gender stereotyping” and “sex stereotyping” interchangeably. See cases cited supra note 44.

a viable Title IX claim based on gender stereotyping.\footnote{\textit{id.} at 1091-93; \textit{see also} \textit{Pratt v. Indian River Cent. Sch. Dist.,} 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011) (citing \textit{Price Waterhouse} in holding that a sex stereotyping claim is cognizable under Title IX); \textit{Riccio v. New Haven Bd. of Educ.}, 467 F. Supp. 2d 219, 226 (D. Conn. 2006) (relying on \textit{Oncale} to find that a same-sex harassment claim based on sex stereotyping is actionable under Title IX); \textit{Theno v. Tonganoxie Unified Sch. Dist. No. 464}, 394 F. Supp. 2d 1299, 1303-04 (D. Kan. 2005) (same).} In \textit{Ray v. Antioch Unified School District},\footnote{107 F. Supp. 2d 1165 (N.D. Cal. 2000).} where a student alleged that he was verbally and physically harassed by his male peers because they thought he was gay, the court relied on \textit{Oncale} in holding that the plaintiff had stated an actionable Title IX claim based on his perceived homosexuality.\footnote{\textit{Id.} at 1170-71; \textit{see also} \textit{Estate of Brown v. Ogletree, No. 11-cv-1491,} 2012 WL 591190, at *16-17 (S.D. Tex. Feb. 21, 2012) (relying on \textit{Oncale} to find that a same-sex harassment claim based on perceived homosexuality is actionable under Title IX); \textit{Callahan ex rel. Roe v. Gustine Unified Sch. Dist.}, 678 F. Supp. 2d 1008, 1026-27 (E.D. Cal. 2009) (same).}

Since \textit{Price Waterhouse} and \textit{Oncale}, lower courts and the EEOC have been grappling with whether LGBT employees have cognizable sex discrimination claims under Title VII when sexual-orientation or gender-identity discrimination is also at issue; these bodies now appear to agree that such claims are actionable as a form of gender stereotyping\footnote{\textit{See, e.g.}, \textit{Prowel v. Wise Bus. Forms, Inc.}, 579 F.3d 285, 291 (3d Cir. 2009) (finding sexual orientation discrimination actionable based on gender stereotyping); \textit{Smith v. City of Salem}, 378 F.3d 566, 574-75 (6th Cir. 2004) (finding gender identity discrimination actionable based on sex stereotyping).} and are beginning to conclude that the claims are also actionable as sex discrimination per se.\footnote{\textit{See, e.g.}, \textit{Schroer v. Billington}, 577 F. Supp. 2d 293, 306 (D.D.C. 2008) (holding that discrimination based on gender identity or expression is per se sex discrimination); \textit{Baldwin v. Foxx}, Appeal No. 0120133080, 2015 WL 4397641, at *10 (E.E.O.C. July 15, 2015) (holding that “allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex”); \textit{Macy v. Holder}, Appeal No. 0120120821, at 14 (E.E.O.C. Apr. 20, 2012), https://www.pcc.edu/programs/paralegal/documents/macy-v-holder.pdf [https://perma.cc/2TKA-MGQY] (holding that discrimination based on gender identity or expression is per se sex discrimination).} As explained in Section II.B.1, courts considering Title IX claims filed by LGBT students similarly agree that the claims are actionable under a gender stereotyping theory, but are divided on whether anti-LGBT animus is sex discrimination per se.

Like the courts, OCR has relied on Title VII precedent when interpreting LGBT students’ rights under Title IX. OCR’s definition of harassment derives from Title VII precedent on gender stereotyping\footnote{\textit{See Office for Civil Rights} supra note 22, at v-vi.} and states:
[G]ender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student’s ability to participate in or benefit from the educational program. 60

OCR explained in its 2010 guidance on bullying and harassment that discrimination based on gender stereotyping includes harassment “for failing to conform to stereotypical notions of masculinity and femininity,” 61 and covers “all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.” 62 OCR has not taken the position that harassment based on perceived sexual orientation is sex discrimination per se under Title IX, but in a Statement of Interest in a private lawsuit in federal court, the U.S. Department of Justice (DOJ) recently argued in support of a transgender student’s Title IX claim that harassment based on gender identity or expression is sex discrimination per se. 63 As explained in Section II.B.2, federal agencies have been interpreting the scope of LGBT students’ Title IX rights more broadly in the last several years.

B. Harassment of LGBT Students Based on Gender Stereotypes and Anti-LGBT Animus

Under Title IX, LGBT students, like all other students, have the right to an education free from sex discrimination. 64 Harassment based on sexual orientation or gender identity does not immunize school districts from liability under Title IX—even though these traits are not expressly mentioned in the statute. 65 Both civil litigation and federal administrative action confirm this.

60. Id. at 3 (footnote omitted).
61. Bullying DCL, supra note 21, at 7-8.
62. Id. at 8.
64. See Office for Civil Rights, supra note 22, at 3 (“Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance.” (footnote omitted)).
65. See Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, U.S. Dep’t EDUC. 5-6 (Apr. 29, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [http://perma.cc/S6YV-L2KW] (“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 and OCR accepts such complaints for investigation.”)
1. Civil Litigation

Federal courts have delineated two main rationales in finding that peer harassment of LGBT students is actionable sex discrimination under Title IX: the widely accepted gender stereotyping rationale and the currently controversial per se sex discrimination rationale. 66

Under the gender stereotyping rationale, courts interpret what appears to be sexual orientation discrimination—such as anti-gay epithets—as actually based on sexist stereotypes about masculinity and femininity. For example, in Riccio, plaintiff Stefanie Andree alleged that students called her derogatory names—including “bitch,” “dyke,” “lesbian,” “gay,” and “lesbian lover[ ]”—and threw objects at her. 67 The defendant school board sought to dismiss Andree’s Title IX claim on summary judgment, arguing that “the thrust of the slurs were of a sexual orientation nature and not gender specific” and “Title IX does not provide a remedy for discrimination based on sexual orientation.” 68 The court rejected this argument, holding that “Andree, a female student, targeted by other female students and called a variety of pejorative epithets, including ones implying that she is a female homosexual, has established a genuine issue of fact as to whether this harassment amounts to gender-based discrimination, actionable under Title IX.” 69 In reaching this decision, the court relied in part on the following OCR guidance on sexual harassment 70:

[G]ender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or

Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school’s obligations. . . . A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it uses in all complaints involving sexual violence. The fact that incidents of sexual violence may be accompanied by anti-gay comments or be partly based on a student’s actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy those instances of sexual violence.”]; see also Bullying DCL, supra note 21, at 8 (“Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including . . . LGBT . . . students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also . . . be subjected to forms of sex discrimination prohibited under Title IX.”).

66. See supra notes 44-45 and accompanying text.
68. Id. at 225.
69. Id. at 226; see also Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135, 151-52 (N.D.N.Y. 2011) (concluding that the plaintiff stated a Title IX claim for nonconformity to “sexist stereotypes” where plaintiff alleged he was called homophobic and sexist epithets and “was mocked with effeminate gestures”).
70. Riccio, 467 F. Supp. 2d at 226 (citing Office for Civil Rights, supra note 22, at v).
limit a student’s ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim’s failure to conform to stereotyped notions of masculinity and femininity. . . . We also note that sufficiently serious harassment of a sexual nature remains covered by Title IX . . . even though the hostile environment may also include taunts based on sexual orientation. 71

Under the per se sex discrimination rationale, courts treat sexual orientation discrimination claims as straightforward sex discrimination claims under Title IX. For example, in Ray v. Antioch Unified School District, plaintiff Daniel Ray alleged that he was subjected to verbal harassment, threats, and a serious assault based on his peers’ belief that he was gay. 72 The defendant school district moved to dismiss Ray’s Title IX claim, arguing that Title IX does not prohibit discrimination based on sexual orientation. 73 The court denied the school district’s motion and allowed Ray to proceed with his Title IX claim, stating that “it is reasonable to infer that the basis of the attacks was a perceived belief about Plaintiff’s sexuality, i.e. that Plaintiff was harassed on the basis of sex.” 74 The court further explained its reason for viewing Ray’s claim as per se sex discrimination:

[T]he Court finds no material difference between the instance in which a female student is subject to unwelcome sexual comments and advances due to her harasser’s perception that she is a sexual object, and the instance in which a male student is insulted and abused due to his harasser’s perception that he is a homosexual, and therefore a subject of prey. In both instances, the conduct is a heinous response to the harasser’s perception of the victim’s sexuality, and is not distinguishable to this Court. 75

Far more courts have addressed Title IX harassment claims filed by gay and lesbian students than those filed by transgender students. 76 This is because

71 Office for Civil Rights, supra note 22, at v.
73 Id.
74 Id. at 1170.
76 See supra notes 44-45 and accompanying text. A transgender person has a gender identity (that is, one’s internal sense of gender) that is different from the person’s assigned sex at birth (that is, the gender designated on the person’s birth certificate). See What
Title IX bullying cases filed by transgender students are in a nascent stage. However, based on Title VII precedent involving transgender employees and arguments raised in pending Title IX cases, there is good reason to believe that courts will find transgender students have actionable Title IX claims under both gender stereotype and sex discrimination theories.

Given the uniform acceptance of the gender stereotype theory and the growing acceptance of the per se sex discrimination theory, Title IX litigation has become a vital tool for helping to address LGBT bullying. Moreover, Title IX’s effectiveness in this area has been bolstered through recent actions by OCR and DOJ.

2. Federal Agency Action

In the Obama Administration, OCR and DOJ have been taking strong steps to combat LGBT bullying. OCR has issued guidance supporting the application of Title IX to bullied LGBT students. In addition, OCR and DOJ have been actively investigating and resolving Title IX administrative complaints by LGBT students, as well as intervening or filing supportive briefs in civil lawsuits filed by LGBT students. These agencies’ actions show that OCR and DOJ accept the gender stereotype rationale for Title IX claims filed by LGBT students, but limit the per se sex discrimination rationale to claims filed by transgender students. Unlike some courts, these agencies have not treated the harassment of gay and lesbian students as per se sex discrimination.

Since 2010, OCR has issued several guidance documents to explain how Title IX applies to gender-based and sexual harassment of LGBT students. In 2010, OCR issued a Dear Colleague Letter (DCL) explaining how the federal anti-discrimination statutes, including Title IX, apply to bullying. The DCL includes an example of how a school’s failure to recognize the bullying of a gay student as gender-based harassment would violate Title IX. In the example, a

---


78. See supra notes 57-58 and accompanying text.

79. See Statement of Interest of the United States, supra note 63, at 8-17.

80. See supra notes 44-45, 75 and accompanying text.

81. Bullying DCL, supra note 21.

82. Id. at 7-8.
gay high school student perceived as effeminate and nontraditional in both his personal grooming and choice of extracurricular activities was taunted with “anti-gay slurs and sexual comments,” and “physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions of how teenage boys are expected to act and appear.” The school in the example violated Title IX because it failed to recognize the bullying as a form of prohibited sex discrimination, and thus did not take effective action to stop the harassment.

In 2011, OCR issued a DCL that provided additional guidance on Title IX’s application to sexual violence, and later issued “Questions and Answers on Title IX and Sexual Violence” (Q&A) explaining, among other things, schools’ obligations to investigate and resolve allegations of sexual violence against LGBT students. In the Q&A, OCR affirms 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,” and makes clear that schools are obligated to remedy sexual violence regardless of whether it is “accompanied by anti-gay comments or . . . partly based on a student’s actual or perceived sexual orientation.”

In 2015, OCR issued a “Title IX Resource Guide” that explains the application of Title IX to various issues, including sex-based harassment. This guidance document similarly affirms that a school is obligated to “investigate and resolve allegations of sexual or gender-based harassment of lesbian, gay, bisexual, and transgender students using the same procedures and standards that it uses in all complaints involving sex-based harassment.”

OCR and DOJ have also taken significant steps to enforce Title IX when schools have failed to take appropriate action to stop gender-based and sexual harassment of LGBT students. For example, OCR investigated the Title IX complaint filed by Seth Walsh’s mother against California’s Tehachapi School

---

83. Id. at 7.
84. Id. at 7-8.
85. Sexual Violence DCL, supra note 33.
86. Office for Civil Rights, supra note 65, at 5-6.
87. Id. at 5.
88. Id. at 6.
90. Id. at 16.
District. Walsh committed suicide after enduring years of unrelenting bullying and sexual harassment by his school peers that escalated after he came out as gay. After investigating the complaint, OCR and DOJ concluded that Walsh had been subjected to “persistent, pervasive, and often severe sex-based harassment that resulted in a hostile educational environment of which the [district] had notice,” and that the district violated Title IX by failing “to take steps sufficient to stop the harassment, to prevent its recurrence, or to eliminate the hostile environment.” In reaching this conclusion, OCR and DOJ confirmed that Walsh had suffered sex-based harassment because the harassment was “sexual in nature” and “gender-based, motivated by [Walsh’s] failure to act as some of his peers believed a boy should act.” They also noted that the use of anti-gay epithets against Walsh often “stemmed from commonly held attitudes and perceptions about gender and masculinity from which also flowed the sexual and other gender-based conduct . . .”

OCR and DOJ also investigated Minnesota’s Anoka-Hennepin School District to address allegations of peer harassment of multiple students for nonconformance with traditional gender stereotypes. The students reported that they “were constantly harassed (some almost every day for years) because of their failure to conform to gender stereotypes. Female students reported being called ‘manly,’ ‘guy,’ or ‘he-she’; male students reported being called ‘girl,’ and ‘gay boy,’ and being told, ‘you’re a guy, act like it.’” Some students reported being “threatened and subjected to physical assaults because of their nonconformity to gender stereotypes.” While DOJ and OCR were investigating the matter, six students filed a private lawsuit against the school district based on the same allegations, and both federal agencies intervened against the district. After “extensive negotiations,” the parties entered into a consent decree that required the school district to make significant changes to

92. See supra notes 1-5 and accompanying text.
93. DOJ joined OCR in the resolution of the complaint following OCR’s investigation. Letter of Findings from Office for Civil Rights to Tehachapi Unified Sch. Dist., supra note 6, at 1.
94. Id. at 19.
95. Id. at 14.
96. Id. at 15.
97. Compliance Resolution Letter from Debbie Osgood to Dennis Carlson, supra note 24, at 1-3.
98. Id. at 2-3.
99. Id. at 3.
100. Id. at 3.
its policies, practices, and procedures and pay $270,000 in damages to the six plaintiffs.

DOJ and OCR have also sought to intervene or submit amicus briefs in other cases filed by LGBT or perceived-LGBT students against school districts that inadequately addressed gender-based harassment by the plaintiffs’ peers. Recently, the United States has taken promising action to protect the rights of bullied transgender students and make clear that these students have claims for gender stereotyping and per se sex discrimination under Title IX. For example, in Tooley v. Van Buren Public Schools, the United States filed a Statement of Interest in support of a fourteen-year-old transgender boy harassed by his peers and school officials based on his nonconformity to sex stereotypes, his gender identity, and his transgender status. It did so to clarify the legal standards “governing sex discrimination claims under Title IX and the Equal Protection Clause.” In that brief, DOJ and OCR argued that transgender students may assert a claim under Title IX based on sex stereotyping, as well as a straightforward sex discrimination claim based on their gender identity or transgender status.

C. The Impact of Title IX on LGBT Students

Civil litigation and administrative enforcement show that Title IX has developed into a vital tool for addressing the bullying experienced by LGBT students. In combination, public and private litigation against school districts that were the subject of bullying victims’ complaints have resulted in

---

101. Id. at 3; see also Consent Decree at 8-46, Doe v. Anoka-Hennepin Sch. Dist. No. 11, No. 11-cv-01999-JNE-SER (D. Minn. Mar. 5, 2012) (describing the measures that the school would adopt pursuant to the agreement).
102. Consent Decree, supra note 101, at 49 (requiring payment by the district’s insurance carrier).
104. See Statement of Interest of the United States, supra note 63, at 1-2.
107. Id. at 3; see also id. at 2 (asserting a federal interest in “ensuring . . . that the proper legal standards are applied to claims under Title IX and the Equal Protection Clause”).
108. Id. at 1-2, 7 (“[T]he relevant suspect classification in this case is sex, which courts have held includes gender, gender identity, transgender status, and nonconformity to sex stereotypes.”); see also id. at 8-17.
agreements to make sweeping reforms,\(^9\) held the districts accountable by forcing them to compensate victims for the serious physical, psychological, and emotional toll of bullying,\(^10\) and created favorable precedent that will help future victims and deter schools from future violations.\(^11\)

Although significant financial awards and settlements in civil litigation (often when coupled with bad publicity for a school district) can deter schools from turning a blind eye to harassment of LGBT students and lead to broader change,\(^12\) lawsuits generally have a greater impact when they also seek

---


11. See cases cited supra notes 44-45.

12. For example, publicity surrounding the suicide of Seth Walsh and the damages action his family filed led California to pass a law requiring school districts to adopt new antiharassment policies. See Foreman, supra note 110.
injunctive relief. 113 This is because injunctive relief, whether by judgment or settlement, allows bullied LGBT students to obtain broad reforms that can change the climate in their schools. For example, these reforms may include new anti-bullying policies; mandatory training and education for all district employees and students; tracking, reporting, and investigations of all anti-LGBT harassment; annual anti-bullying surveys; a properly trained Title IX coordinator; counseling for victims and perpetrators; and oversight by OCR. 114 Civil suits seeking these broad reforms tend to be filed by the United States or civil rights groups, 115 but private attorneys can (and should) seek injunctive relief in Title IX lawsuits. 116

Administrative enforcement of Title IX, particularly in the Obama Administration, is also leading to systemic change in the ways that schools address and respond to anti-LGBT bullying. OCR’s active enforcement of Title IX in response to complaints about LGBT harassment has resulted in resolutions that require school districts to institute the injunctive-type reforms described above. 117

Though civil litigation and administrative enforcement of Title IX are vital tools that are making a difference in the lives of LGBT students, they cannot remedy LGBT harassment on their own. 118

III. LIMITS ON TITLE IX’S EFFECTIVENESS AND NEEDED REFORMS

Title IX’s effectiveness in addressing anti-LGBT bullying is limited by two key deficiencies: (1) courts and OCR interpret Title IX’s prohibition against

113. See, e.g., Michael T. Morley, Enforcing Equality: Statutory Injunction, Equitable Balancing Under eBay, and the Civil Rights Act of 1964, 2014 U. CHI. LEGAL F. 177, 210 (“[A] court should attempt to provide plaintiffs, to the greatest extent possible, with the specific rights and interests that a statute protects. Whenever possible, a court should aim to directly or specifically undo the effects of a past statutory violation, rather than relegating the plaintiff to a substitute monetary judgment.” (footnote omitted)).

114. See, e.g., Consent Decree, supra note 101; S. POVERTY L. CTR., supra note 109; see also Summary of Injunctive Relief Terms of Settlement, Eccleston v. Pine Bush Cent. Sch. Dist., No. 12-cv-02303-KMK (S.D.N.Y. June 29, 2015) (settlement of Title VI anti-Semitic harassment claims).

115. See supra note 109 and accompanying text.

116. If a bullied LGBT student would not have standing to seek injunctive relief in a civil suit—such as if he graduated or moved out of the school district—another possible option for seeking district-wide reform is to file an OCR complaint and then file a damages action after the OCR process is complete. This was the route that Seth Walsh’s family took. See supra note 91 and accompanying text.

117. See, e.g., Compliance Resolution Letter from Debbie Osgood to Dennis Carlson, supra note 24; Tehachapi Resolution Agreement, supra note 109.

118. See supra Section II.B; infra Part III.
sex discrimination too narrowly; and (2) Title IX does not expressly prohibit
discrimination on the basis of sexual orientation or gender identity.\textsuperscript{119}
Furthermore, even if courts, OCR, and Congress corrected these deficiencies, a
solution to anti-LGBT bullying requires action beyond Title IX litigation and
administrative enforcement. LGBT students are more likely to enjoy equal
access to educational opportunities when school policies explicitly prohibit
harassment of students based on their actual or perceived sexual orientation
and gender identity.\textsuperscript{120} In addition, training and education for school staff and
students would likely further improve the identification of, prevention of, and
response to such harassment.\textsuperscript{121}

\textbf{A. Courts and OCR Should Interpret Title IX More Broadly}

Title IX would provide more consistent protection to LGBT students if
courts and OCR read its prohibition against sex discrimination more broadly.
Courts and OCR are interpreting Title IX too narrowly in two main ways.
First, they limit application of the gender stereotyping theory to stereotypes
about overt masculine or feminine behavior.\textsuperscript{122} Second, OCR and some courts
fail to treat sexual orientation discrimination as per se sex discrimination.\textsuperscript{123}
Furthermore, although courts are just beginning to address Title IX claims of
transgender students, courts should similarly permit them as per se sex
discrimination claims.\textsuperscript{124}

\textbf{1. LGBT Bullying Involves Stereotypes Beyond Overt Masculinity or
Femininity}

It is widely accepted that bullied LGBT students may assert Title IX claims
based on a theory of gender stereotyping.\textsuperscript{125} But, as explained below, the
protections afforded LGBT students under this theory are too narrow because
they are currently premised only on gender norms about how boys and girls
should look and act,\textsuperscript{126} ignoring other gender norms about sexuality and the

\textsuperscript{119}. See infra Sections III.A, III.B.
\textsuperscript{120}. See infra Section III.C.
\textsuperscript{121}. See infra Section III.C.
\textsuperscript{122}. See cases cited supra note 44.
\textsuperscript{123}. See Office for Civil Rights, supra note 22, at 3; cases cited supra note 45.
\textsuperscript{124}. See infra Section III.A.2.
\textsuperscript{125}. See Bullying DCL, supra note 21, at 7-8; Office for Civil Rights, supra note 65, at 5-6; Office
for Civil Rights, supra note 22, at v; cases cited supra note 44.
\textsuperscript{126}. See sources cited infra note 140.
appropriate relationships between girls and boys. If courts and OCR considered the full range of relevant gender norms, bullied LGBT students would enjoy more consistent protection under Title IX. It would then be clear that Title IX always applies to the harassment of LGBT students because such harassment necessarily involves a form of gender stereotyping.

In *Price Waterhouse v. Hopkins*, the Supreme Court stated that Congress intended Title VII to “strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” As some courts have explained in Title VII cases, discrimination against LGBT individuals on the basis of gender stereotypes “often involves far more than assumptions about overt masculine or feminine behavior.” As the court explained in *Centola v. Potter*:

> [S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, “real men don’t date men.” The gender stereotype at work here is that “real” men should date women, and not other men. Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what “real” men do or don’t do.

This reasoning applies equally to gay and lesbian students, many of whom are harassed simply because they are attracted to others of the same sex.

In *Videckis v. Pepperdine University*, a Title IX case filed by two lesbian student-athletes, the district court relied on *Centola* in finding that the sexual orientation discrimination the plaintiffs alleged fit “under the broader umbrella

127. 490 U.S. 228, 251 (1989) (plurality opinion).
129. 183 F. Supp. 2d 403, 410 (D. Mass. 2002); see also Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (“[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle’s stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men.”).
of gender stereotype discrimination.” The court reasoned that “[s]tereotypes about lesbianism, and sexuality in general, stem from a person’s views about the proper roles of men and women—and the relationships between them.” The court concluded that the plaintiffs had stated an actionable claim under Title IX based on their perceived failure to conform to these stereotypes.

In short, harassment of LGBT students is necessarily a form of impermissible gender stereotyping because it is based on the premise that same-sex attraction (or gender expression that does not match one’s sex assigned at birth) is an inappropriate expression of one’s gender.

Most courts (and OCR) fail to analyze the stereotypes imposed on LGBT students in this straightforward way. In fact, most courts either interpret gender stereotypes as limited to assumptions about how girls and boys are supposed to look and act, or attempt to distinguish peer harassment based on those stereotypes from harassment based on sexual orientation. The justification for such parsing is that Title IX does not prohibit discrimination on the basis of sexual orientation. As a result, courts typically analyze these claims by distinguishing between sexual orientation discrimination and sex discrimination while noting that “the line between [the two] can be difficult to draw.” I argue that there is no line to draw. As the court in Videckis stated, “the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.” If courts and OCR interpreted Title IX in this manner, then bullied LGBT students would always have a Title IX claim based on gender stereotyping.

If courts and OCR interpreted Title IX’s prohibition against sex discrimination to include the full range of gender stereotypes, Title IX would address LGBT bullying more effectively. LGBT students would not have to

131. Id. at *7.
132. Id.
133. Id.
134. See supra Section II.B.1.
135. See cases cited supra note 44.
139. As argued infra Section III.A.2, if OCR and courts viewed Title IX in this way, then bullied LGBT students would also have a straightforward sex discrimination claim. See Videckis, 2015 WL 8916764, at *6 (finding that sexual orientation discrimination claims are covered under Title IX as gender stereotype and sex discrimination claims); Baldwin v. Foxx, Appeal No. 0120133080, 2015 WL 4397641, at *5, *7 (E.E.O.C. July 16, 2015) (same, but under Title VII).
parse facts showing harassment based on nonconformity with stereotypes of masculinity and femininity, as distinguished from nonconformity with sex stereotypes about to whom they should be attracted (or with which gender they should identify). The “entire spectrum” of gender stereotypes would constitute sex discrimination under Title IX, consistent with *Price Waterhouse*’s broad description of unlawful gender stereotypes under Title VII.  

2. **LGBT Bullying Is Per Se Sex Discrimination**

Title IX would also provide more consistent protection to LGBT students if OCR and courts recognized that harassment based on sexual orientation or gender identity is necessarily discrimination “on the basis of sex” under Title IX. Courts are divided on this issue. OCR seems to split the baby, accepting that transgender students have per se sex discrimination claims under Title IX, but limiting gay and lesbian students to gender stereotyping claims. However, as this section explains, there are strong reasons for treating peer harassment of LGBT students as per se sex discrimination covered by Title IX.

The EEOC recently held in *Baldwin v. Foxx* that sexual orientation discrimination is covered under Title VII, explaining that “allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex.” The EEOC concluded that “[a]n employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual’s sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.” The EEOC further explained that:

“Sexual orientation” as a concept cannot be defined or understood without reference to sex. A man is referred to as “gay” if he is physically

140. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion); see also Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 Am. U. L. Rev. 715, 718, 724-75 (2014) (arguing that Title VII’s protections should extend as widely as the spectrum of sex stereotypes does, and that most courts find in favor of plaintiffs who appear gay “in observable ways at work” but reject claims of plaintiffs who do not fit an effeminate stereotype).

141. Thus far, courts have only addressed this issue in the context of sexual orientation claims under Title IX, not gender identity claims. See *supra* note 45 and accompanying text.

142. See *supra* Section II.B.2.

143. 2015 WL 4397641, at *14.

144. *Id.*
and/or emotionally attracted to other men. A woman is referred to as “lesbian” if she is physically and/or emotionally attracted to other women. Someone is referred to as “heterosexual” or “straight” if he or she is physically and/or emotionally attracted to someone of the opposite sex. It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations.  

This reasoning applies equally to Title IX claims filed by LGBT students; in fact, the court in *Videckis* relied on this rationale in concluding that the plaintiff student-athletes targeted by their school for being lesbians stated a “straightforward claim of sex discrimination under Title IX.”

Although courts have not yet ruled on Title IX peer harassment claims by transgender students, they should similarly treat these as sex discrimination claims, based on analogous Title VII precedent. This is precisely what the United States did in *Tooley*, arguing that an individual’s gender identity is an aspect of an individual’s sex, and, therefore, “discrimination on the basis of gender identity is, ‘literally,’ discrimination on the basis of sex . . . .” This argument was based in part on *Schroer v. Billington*, a Title VII case involving a transgender employee who had initially been offered a job after interviewing as male but had her offer revoked after disclosing that she was transitioning to female. The court offered the following analogy to explain why the employer’s conduct constituted per se sex discrimination:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.” No court would take seriously the notion that “converts” are not covered by

---

145. *Id.* at *5* (citation omitted).

146. *Videckis v. Pepperdine Univ.*, No. CV 15-00298 DDP, 2015 WL 8916764, at *8 (C.D. Cal. Dec. 15, 2015) (citing *Baldwin* and explaining that if “Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment”); *see also* cases cited *supra* note 45 (accepting the per se sex discrimination theory).

147. See *supra* Section II.A.


[Title VII]. Discrimination “because of religion” easily encompasses discrimination because of a change of religion.150

Similarly, discrimination based on changing one’s assigned sex at birth is discrimination on the basis of sex, and focusing on a “label” like transgender to justify denying that person protection under laws prohibiting sex discrimination would be “blind” to the “statutory language itself.”151 Thus, courts should recognize that harassment of transgender students is actionable sex discrimination under Title IX.152

The fact that Congress did not envision the application of Title IX to LGBT students is of no consequence. As the Court stated in Oncale v. Sundowner Offshore Services, Inc. when holding that same-sex sexual harassment is covered under Title VII, “statutory prohibitions often go beyond the principal evil [they were enacted to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”153 If courts considered the full spectrum of gender stereotypes when addressing LGBT students’ Title IX claims and/or recognized that harassment of LGBT students is per se sex discrimination, Title IX would address peer bullying of LGBT students far more effectively. Indeed, if courts consistently allowed bullied LGBT students to assert Title IX claims based on a failure to conform to gender stereotypes about the “proper” roles of girls and boys and the relationships between them, courts would likely recognize that these students also have a straightforward sex discrimination claim under Title IX. The artifice of parsing between allegations of anti-LGBT animus and sex discrimination—and dismissing cases based on the former—would end.

B. Congress Should Amend Title IX or Pass New Legislation Prohibiting Discrimination Against LGBT Students

Though bullied LGBT students would benefit from broader judicial interpretations of Title IX, Congress should take parallel steps to protect LGBT students. It can do this by amending Title IX to include a prohibition against

151. Id. at 306–07; see also Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012) (concluding that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination violates Title VII,” just as discrimination based on a person’s perceived religion or religious conversion is prohibited under Title VII); Statement of Interest of the United States, supra note 63, at 10-11.
152. OCR subscribes to this view. See Office for Civil Rights, supra note 65, at 5-6.
discrimination on the basis of actual or perceived sexual orientation or gender identity, or by passing new legislation that includes this prohibition. If Congress does not amend Title IX as suggested, it could pass one or both of two alternative bills to address the problem: the Student Non-Discrimination Act of 2015154 and the Safe Schools Improvement Act of 2015.155

The Student Non-Discrimination Act is modeled on Title IX, but would explicitly protect LGBT students:

No student shall, on the basis of actual or perceived sexual orientation or gender identity of such individual or of a person with whom the student associates or has associated, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.156

The Safe Schools Improvement Act would address bullying and harassment in K-12 public schools by, among other things, requiring local education agencies to adopt policies that expressly prohibit bullying and harassment based on a student’s actual or perceived sexual orientation or gender identity, and requiring those agencies and states to collect and report data on incidents of such bullying and harassment.157

If Congress passed either bill, LGBT students would have clearer, more secure protection against harassment. Not only would it be clear to schools that discrimination against LGBT students violates federal law and school policies, but these laws could make it easier for bullied LGBT students to obtain redress. For example, under the Student Non-Discrimination Act, bullied LGBT students would no longer have to convince a court that they were subjected to gender-based stereotyping—rather than harassment based on sexual orientation or gender identity—or that there is no real distinction between the

156. S. 439 § 4(a). In addition, unlike Title IX, the Act would expressly authorize a private cause of action for “all appropriate relief, including equitable relief, compensatory damages, and costs of the action.” Id. § 6(a).
157. S. 311 §§ 4402-4403. Thus, the Safe Schools Improvement Act would address LGBT bullying by requiring public K-12 schools to adopt policies that expressly prohibit such bullying, whereas the Student Non-Discrimination Act would prohibit such conduct as a matter of federal law and would apply to all federally funded education programs (not just K-12 public schools). Compare id., with S. 439 § 4(a).
two. A congressional enactment would also offer immediate uniformity that is difficult to accomplish through judicial reform.

A law that expressly prohibits discrimination against LGBT students is important, both so schools clearly understand their legal duties and so LGBT students clearly understand their legal protections. The Supreme Court explained the importance of clear anti-discrimination laws in *Romer v. Evans*, when it found an equal protection violation in a Colorado law that singled out sexual orientation as a class not entitled to protection under anti-discrimination laws: “[e]numeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply.” By explicitly prohibiting discrimination based on actual or perceived sexual orientation or gender identity, Congress would send a strong message to school officials, parents, and students—including LGBT students themselves—that harassment on the basis of sexual orientation or gender identity is not permitted in schools. As some commentators have argued, enumeration may help reduce harassment of LGBT students and make them feel safer in reporting harassment when it occurred. Expressly prohibiting

---

158. For cases that addressed this argument, see supra Section II.B.

159. Given the current disagreement among the courts on the scope of Title IX’s protections for LGBT students, see supra Section II.B, a federal law of the type proposed would eliminate the uncertainty and extend protection to all LGBT students across the country at the same time. Even if the Supreme Court were to resolve the scope of the gender stereotype rationale or the issue of whether bullied LGBT students have per se sex discrimination claims under Title IX, the implementation of its rulings may not be uniform or immediate in the lower courts.

160. The likelihood that Congress would pass legislation of this nature is currently low, which makes the judicial reforms advocated in this Feature all the more important. See, e.g., Taylor Wofford, *Bill To Ban Discrimination Against LGBT People Faces Hurdles*, NEWSWEEK (July 23, 2015), http://www.newsweek.com/bill-ban-discrimination-against-lgbt-people-faces-hurdles-356861 [http://perma.cc/9W7Y-3U27] (quoting Laura Durso, Director of the LGBT Research and Communications Project at the Center for American Progress, who states that “[w]e’re under no illusion about passage [of the Equality Act] in this Congress”).


162. If Title IX were amended in this way, it is unclear whether courts would interpret sex discrimination as expansively as advocated in this Feature, but LGBT students who are not “out” or are afraid to “come out” might feel more comfortable asserting a Title IX sex discrimination claim based on gender stereotyping, rather than a sexual orientation or gender identity claim.

Title IX: An Imperfect But Vital Tool to Stop Bullying of LGBT Students

discrimination against LGBT students would also reflect and reinforce the increasing public acceptance of equal rights for LGBT persons.164

C. School Policy and Training Reforms Are Needed

To reduce anti-LGBT bullying, we need action beyond Title IX litigation and enforcement. School policies that expressly prohibit harassment based on actual or perceived sexual orientation, gender identity, and gender expression are a vital part of the solution. In addition, training and education programs are needed to ensure that these policies are effectively implemented and enforced.

Empirical data collected by GLSEN on school anti-bullying policies throughout the country consistently show that policies that enumerate protections for LGBT students have a positive effect on school climate, significantly reducing victimization of LGBT students and increasing the effectiveness of a school’s response when harassment occurs in districts with such policies.165 But many schools do not have such policies.166 Mandatory professional development for educators and district accountability for incident reporting that explicitly includes these protected characteristics should also help.167 Policies are meaningless if they are not implemented and enforced. Part of improving the school climate for LGBT students involves making sure that everyone within the school environment understands what constitutes anti-LGBT bullying and the consequences for such conduct, and that they are trained to deal with bullying incidents when they occur.168 Implementing

164. See supra note 27 and accompanying text (showing a steady rise in the American public’s acceptance of same-sex marriage and LGBT individuals’ entitlement to general civil rights and open participation in public arenas).

165. See supra note 163 and accompanying text.

166. See Kull et al., supra note 25, at 27-29; Stuart-Cassel et al., supra note 25, at 65-66.


168. See Greytak & Kosciw, supra note 167, at 17-19; Kull et al., supra note 25, at 8; see also Culhane, supra note 163, at 346 (“Part of changing the culture is making sure all within the
LGBT-inclusive policies and training and education programs that specifically address anti-LGBT bullying will likely play a key role in reducing harassment and improving the educational environment for LGBT students.169

CONCLUSION

LGBT students are beginning to benefit from cultural shifts in the national consciousness about school bullying and the targeting of LGBT individuals for unequal treatment. Now that these issues are generally regarded as serious problems, we are seeing more action to solve them. However, LGBT students continue to experience bullying at dramatically higher rates than other students, and Title IX has emerged as an important part of the remedy. Many courts allow bullied LGBT students to assert Title IX claims, and the Obama Administration is taking an active role in protecting LGBT students’ Title IX rights to an education free from sex discrimination. Title IX litigation and enforcement is thus more frequently resulting in broad reforms designed to improve the educational climate. As a result, schools are increasingly held accountable for their roles in creating or allowing a hostile educational environment for LGBT students. Although Title IX is a critical piece of the solution, it is not a silver bullet. Even if courts and OCR were to interpret Title IX’s prohibition against sex discrimination as broadly as advocated here, LGBT bullying would not disappear. There is no single cure-all for LGBT bullying. This is a problem that requires action in our homes, schools, communities, states, and federal government. As the national initiative on solving campus sexual assault says, “It’s On Us” to solve it.170

169. See Greytak & Kosciw, supra note 168, at 17-19 (finding that a New York City training program implemented to combat bullying of LGBT students was effective in helping school staff address the problem and creating a safer environment for LGBT students); Kull et al., supra note 25, at 3, 7-8; see also David P. Farrington & Maria M. Ttofi, Reducing School Bullying: Evidence-Based Implications for Policy, 38 CRIME & JUST. 281, 283 (2009) (concluding based on a meta-analysis of 30 school-based anti-bullying programs that these programs reduced bullying by twenty to twenty-three percent).

prive that Smith desired immediate, and personal, notice of such decisions.

Communication by facsimile has simplified and streamlined the way in which business is conducted in this country. This technological advance provides a valuable service and benefit, and our holding should not be taken as an indication that parties should not use facsimiles to conduct their affairs. Certain attributes of facsimiles warrant precautionary measures to ensure that the intended recipient actually receives the transmission, however. Unlike mail or courier deliveries, which generally arrive predictably at certain times during the work day, facsimiles can arrive, unsolicited and unnoticed, at any time, day or night. Companies frequently have internal mail deliveries timed to their receipt of mail or courier deliveries. Facsimiles may arrive minutes or hours after the last internal mail delivery of the day. Unless the facsimile machine is under constant surveillance, a communication easily may be overlooked for the better part of a business day. Thus, while technology permits almost instantaneous transmission of information, the transmission may go unnoticed for hours.

[8] In the end, however, the key to this case is not the fact that a facsimile transmission was used. The key to this case is, simply, fair notice. If the parties, expressly or by conduct, agree to a method of communication, and use the agreed-upon method, we will not require actual knowledge of the communication on the part of the recipient. If the parties did not agree to the method of communication utilized, and if there is no pattern of conduct reflecting acquiescence to the method of communication utilized, we will not impute notice of the communication to the recipient. This is the situation presented here. Andrews departed from the course of conduct he had established with Smith in several ways. His use of an unannounced facsimile, without additional communication by the methods regularly utilized by him in the past, does not allow us reasonably to infer that the offer to return to work was effectively communicated to Clow. Under the circumstances, therefore, the union's unconditional offer to return to work was not time-ly communicated prior to Clow's hiring of permanent replacements.

We thus GRANT Clow's petition for review, and DENY the Board's cross-application for enforcement.


No. 95–3634.

United States Court of Appeals, Seventh Circuit.

Argued March 28, 1996.

Decided July 31, 1996.

Student brought § 1983 action against school officials alleging equal protection and due process violations stemming from officials' alleged failure to protect student from harassment and harm by other students due to student's sexual orientation. The United States District Court for the Western District of Wisconsin, John C. Shabaz, Chief Judge, granted summary judgment for officials, and student appealed. The Court of Appeals, Eschbach, Circuit Judge, held that: (1) review would encompass entire record; (2) student could maintain equal protection claims alleging discrimination based on both gender and sexual orientation; (3) officials were not entitled to qualified immunity with respect to equal protection claims; and (4) evidence did not support student's due process claims.

Affirmed in part, reversed in part, and remanded.
1. Federal Courts

Student charging school officials with constitutional violations could rely on entire record on appeal, not merely officials' proposed findings of fact, despite student's alleged failure to comply with local rule requiring parties responding to summary judgment motions to present evidence, with citations to record, that established genuine issues of material fact for trial, as district court did not limit its review to defendants' grounds for summary judgment and proposed findings of fact. Fed.Rules Civ.Proc.Rule 56(c, e), 28 U.S.C.A.

2. Federal Civil Procedure

If district court relies on either local rule or federal summary judgment rule to limit record, for purposes of summary judgment, to moving party's undisputed facts, then court cannot look beyond moving party's motion and selectively incorporate legal theories or facts that support motion; but, if court elects to rely on legal arguments and evidence not incorporated in, or submitted with, summary judgment motion, court is obligated to consider entire record to ensure that record reveals no issue of material fact. Fed. Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

3. Federal Courts

Court of Appeals reviews summary judgment awards de novo, considering record in light most favorable to nonmovant.

4. Civil Rights


5. Constitutional Law

Discriminatory purpose, which must be shown to establish equal protection violation, implies more than intent as volition or intent as awareness of consequences, instead implying that decision maker singled out particular group for disparate treatment and selected course of action at least in part for purpose of causing its adverse effects on identifiable group; showing that defendants were negligent will not suffice. U.S.C.A. Const.Amend. 14.

6. Civil Rights


7. Federal Civil Procedure

Material issue of fact as to whether school officials treated male student who was subject to harassment and harm by other students, due to his sexual orientation, differently than female students who suffered similar harassment precluded summary judgment on student's § 1983 claim against school officials alleging equal protection violation, in view of evidence that student was treated differently than other students, that different treatment was based on student's gender, and that officials acted with at least deliberate indifference. U.S.C.A. Const. Amend. 14; 42 U.S.C.A. § 1983.

8. Constitutional Law


9. Civil Rights

School district was not entitled to qualified immunity in student's § 1983 action alleging equal protection violation stemming from school officials' alleged failure to protect student from harassment and harm by other students due to student's sexual orientation. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

10. Constitutional Law

11. Civil Rights ⇐214(5)

Defendant school officials were not entitled to qualified immunity in § 1983 action by male student alleging that officials violated equal protection due to their differing treatment of male and female victims of harassment by other students, as law clearly provided for equal protection in context of gender discrimination at relevant time, and officials did not proffer important governmental objective in support of their conduct. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

12. Civil Rights ⇐214(2)

Under doctrine of qualified immunity, liability is not predicated upon existence of prior case that is directly on point; rather, question is whether reasonable state actor would have known that his actions, viewed in light of law at the time, were unlawful.

13. Federal Civil Procedure ⇐2535, 2554

Plaintiff's alleged failure to argue particular claim in response to defendants' summary judgment motion did not result in waiver of that claim; even where nonmoving party fails to file timely response to motion for summary judgment, district court must still review uncontroverted facts and make finding that summary judgment is appropriate as matter of law, and plaintiff's alleged failure did not relieve district court of its obligation to consider claim.

14. Federal Civil Procedure ⇐2491.5

Evidence was sufficient to withstand school officials' summary judgment motion in student's § 1983 claim alleging equal protection violation arising from officials' alleged different treatment of student, who was harassed by other students, due to his sexual orientation, as evidence demonstrated that student was treated differently and that discriminatory treatment was motivated by officials' disapproval of student's sexual orientation, particularly in view of statements by officials that student should expect to be harassed because he was gay. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

15. Civil Rights ⇐214(5)

Defendant school officials were not entitled to qualified immunity in § 1983 action by male student who was harassed by other students and alleged that officials violated equal protection due to their differing treatment of student due to student's sexual orientation, as it was established, at relevant time, that Constitution prohibited intentional invidious discrimination between otherwise similarly situated persons based on one's membership in definable minority, absent at least rational basis for discrimination, homosexuals were definable minority, and officials failed to show rational basis for their conduct. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

16. Constitutional Law ⇐213.1(2)

Under rational basis review of equal protection claim, there is no constitutional violation if there is any reasonably conceivable state of facts that would provide rational basis for government's conduct. U.S.C.A. Const.Amend. 14.

17. Constitutional Law ⇐253(1)


18. Federal Courts ⇐617

Party's forfeiture of legal argument prevents Court of Appeals from considering it because argument is not then before court.

19. Civil Rights ⇐128

Student could not maintain § 1983 claim that school officials violated student's right to due process by creating risk of harm or exacerbating existing risk of harm in connection with officials' alleged failure to protect student from harassment by other students based on his sexual orientation; although student presented evidence to show that officials failed to act, and that their failure to act was intentional, officials had no affirmative duty to act absent evidence that officials' failure itself placed student in danger, or increased preexisting threat of harm. U.S.C.A. Const. Amend. 14.

20. Civil Rights ⇐128

Homosexual student could not maintain § 1983 claim that school officials violated his right to due process by acting with deliberate
indifference in maintaining policy or practice of failing to punish students who harassed and harmed student, based on his sexual orientation, thereby encouraging harmful environment; even if state actor could be liable for intentionally adopting policy that encouraged one private actor to harm another, officials had no duty to act to protect student and thus could not be held liable for such failure. U.S.C.A. Const. Amend. 14; 42 U.S.C.A. § 1983.

Patricia M. Logue (argued), Lambda Legal Defense and Education Fund, Chicago, IL, David Buckel, Lambda Legal Defense and Education Fund, New York City, for Jamie S. Nabozny.

Timothy J. Yanacheck (argued), Stilp & Cotton, Madison, WI, for Mary Podlesny, William Davis, Thomas Blauert and Ashland Public School District.

Cynthia H. Hyndman, Robinson, Curley & Clayton, Chicago, IL, for National Ass’n of School Psychologists, National Ass’n of Social Workers, Horizons Community Service and Parents, Family, and Friends of Lesbians and Gays.

Before BAUER, ESCHBACH, and FLAUM, Circuit Judges.

ESCHBACH, Circuit Judge.

Jamie Nabozny was a student in the Ashland Public School District (hereinafter “the District”) in Ashland, Wisconsin throughout his middle school and high school years. During that time, Nabozny was continually harassed and physically abused by fellow students because he is homosexual. Both in middle school and high school Nabozny reported the harassment to school administrators. Nabozny asked the school officials to protect him and to punish his assailants. Despite the fact that the school administrators had a policy of investigating and punishing student-on-student battery and sexual harassment, they allegedly turned a deaf ear to Nabozny’s requests. Indeed, there is evidence to suggest that some of the administrators themselves mocked Nabozny’s predicament. Nabozny eventually filed suit against several school officials and the District pursuant to 42 U.S.C. § 1983 alleging, among other things, that the defendants: 1) violated his Fourteenth Amendment right to equal protection by discriminating against him based on his gender; 2) violated his Fourteenth Amendment right to equal protection by discriminating against him based on his sexual orientation; 3) violated his Fourteenth Amendment right to due process by encouraging an environment in which he would be harmed.

I.

[1] Before discussing the facts of this case, we must delineate the scope of the record properly before the court. The defendants argue that many of the facts relied on by Nabozny in his appellate brief were not presented to the district court. The defendants’ argument is based on the district court’s pretrial order dated March 24, 1995, in which the court ordered the parties to submit motions for summary judgment by August 15, in accordance with the local rule on summary judgment. The local rule requires parties filing motions for summary judgment to submit proposed findings of fact, with citations to the record. The defendants did so. The local rule requires parties responding to summary judgment motions to present evidence, with citations to the record, that establishes genuine issues of material fact for trial. Nabozny responded to the defendants’ summary judgment motion by submitting a litany of conclusory statements, largely unsupported by citations to the record; those claims.
The defendants maintain that absent a more definitive response by Nabozny, the district court relied on the defendants' proposed findings of fact to grant summary judgment in the defendants' favor.

We strictly enforce local rules, such as the summary judgment rule in this case, holding that when the nonmovant fails to reply in the proper form he concedes the movant's version of the facts. See Fed.R.Civ.P. 56(e); Waldridge v. American Hoechst Corp., 24 F.3d 918, 922 (7th Cir.1994). Nabozny's failure to comply with the local rule entitled the district court to limit its inquiry to whether, viewed in the light of the facts presented by the defendants, judgment is appropriate as a matter of governing law. Fed.R.Civ.P. 56(e); Glass v. Dachel, 2 F.3d 733, 739 (7th Cir. 1993). It is unclear whether the district court meant to limit the record to the undisputed facts set forth in the defendants' summary judgment motion. The district court's summary judgment order made no mention of the local rule, or Nabozny's failure to comply with it.

For our purposes herein, we need not decide whether the court relied on the local rule. Regardless of what the district court intended, it is clear from the court's order that it did not limit its review to the defendants' grounds for summary judgment and proposed findings of fact. For example, the defendants sought summary judgment on Nabozny's equal protection claims on the basis that Nabozny had failed to allege that any of the defendants participated in or encouraged the harassment that Nabozny suffered. The district court, however, granted summary judgment on Nabozny's gender equal protection claim on the ground that no evidence in the record suggested that the defendants treated Nabozny differently because of his gender; a different legal basis than that offered by the defendants. The district court

2. Nabozny’s “Proposed Findings of Fact” generally consisted of “agrees in entirety” or “disagrees in entirety,” responding to the defendants’ proposed findings of fact.

3. Nabozny is clearly entitled to rely on the entire record regarding his equal protection claims. The district court granted summary judgment on Nabozny’s gender equal protection claim on a basis not proffered by the defendants. The court did not discuss its basis for granting summary judgment on Nabozny’s sexual orientation equal protection claim. We will assume that the court’s reasoning was the same regarding Nabozny’s gender and sexual orientation claims. We need not decide whether Nabozny is entitled to rely on the entire record regarding his due process claims. As our opinion will make clear, even if we assume arguendo that Nabozny can rely on the entire record, he cannot prevail on his due process theories.

[2, 3] Our court has previously ruled that “[i]f the district court is inclined to venture outside the moving party’s grounds for summary judgment and statement of undisputed facts, the court must be careful to ensure that the record reveals no issue of material fact.” Brown v. United States, 976 F.2d 1104, 1110 (7th Cir.1992). If a district court relies on either a local rule or Federal Rule 56(c) to limit the record for the purposes of summary judgment to the moving party’s undisputed facts, then the court cannot look beyond the moving party’s motion and selectively incorporate legal theories or facts that support the motion. If the court elects to rely on legal arguments and evidence not incorporated in, or submitted with, the summary judgment motion, the court is obligated to consider the entire record “to ensure that the record reveals no issue of material fact.” Id. Because the district court elected to venture beyond the parameters of the defendants’ summary judgment papers to dispose of some of Nabozny's claims, the entire record was before the district court regarding those claims, including “the pleadings, admissions, answers to interrogatories, and admissions on file, [and] affidavits . . . .” Fed. R.Civ.P. 56(c). Therefore, Nabozny is entitled to rely on the entire record on appeal.3
With the scope of the record delineated, we turn to a discussion of the facts. We review summary judgment awards de novo, considering the record in the light most favorable to the non-movant. *Roger v. Yellow Freight Systems, Inc.*, 21 F.3d 146, 148-49 (7th Cir. 1994). Therefore, the facts are presented in the light most favorable to Nabozny.

II.

From his birth in 1975, Nabozny lived in Ashland, Wisconsin. Throughout his childhood, adolescence, and teenaged years he attended schools owned and operated by the Ashland Public School District. In elementary school, Nabozny proved to be a good student and enjoyed a positive educational experience.

When Nabozny graduated to the Ashland Middle School in 1988, his life changed. Around the time that Nabozny entered the seventh grade, Nabozny realized that he is gay. Many of Nabozny’s fellow classmates soon realized it too. Nabozny decided not to “closet” his sexuality, and considerable harassment from his fellow students ensued. Nabozny’s classmates regularly referred to him as “faggot,” and subjected him to various forms of physical abuse, including striking and spitting on him. Nabozny spoke to the school’s guidance counselor, Ms. Peterson, about the abuse, informing Peterson that he is gay. Peterson took action, ordering the offending students to stop the harassment and placing two of them in detention. However, the students’ abusive behavior toward Nabozny stopped only briefly. Meanwhile, Peterson was replaced as guidance counselor by Mr. Nowakowski. Nabozny similarly informed Nowakowski that he is gay, and asked for protection from the student harassment. Nowakowski, in turn, referred the matter to school Principal Mary Podlesny; Podlesny was responsible for school discipline.

Just before the 1988 Winter holiday, Nabozny met with Nowakowski and Podlesny to discuss the harassment. During the meeting, Nabozny explained the nature of the harassment and again revealed his homosexuality. Podlesny promised to protect Nabozny, but took no action. Following the holiday season, student harassment of Nabozny worsened, especially at the hands of students Jason Welty and Roy Grande. Nabozny complained to Nowakowski, and school administrators spoke to the students. The harassment, however, only intensified. A short time later, in a science classroom, Welty grabbed Nabozny and pushed him to the floor. Welty and Grande held Nabozny down and performed a mock rape on Nabozny, exclaiming that Nabozny should enjoy it. The boys carried out the mock rape as twenty other students looked on and laughed. Nabozny escaped and fled to Podlesny’s office. Podlesny’s alleged response is somewhat astonishing; she said that “boys will be boys” and told Nabozny that if he was “going to be so openly gay,” he should “expect” such behavior from his fellow students. In the wake of Podlesny’s comments, Nabozny ran home. The next day Nabozny was forced to speak with a counselor, not because he was subjected to a mock rape in a classroom, but because he left the school without obtaining the proper permission. No action was taken against the students involved. Nabozny was forced to return to his regular schedule. Understandably, Nabozny was “petrified” to attend school; he was subjected to abuse throughout the duration of the school year.

The situation hardly improved when Nabozny entered the eighth grade. Shortly after the school year began, several boys attacked Nabozny in a school bathroom, hitting him and pushing his books from his hands. This time Nabozny’s parents met with Podlesny and the alleged perpetrators. The offending boys denied that the incident occurred, and no action was taken. Podlesny told both Nabozny and his parents that Nabozny should expect such incidents because he is “openly” gay. Several similar meetings between Nabozny’s parents and Podlesny followed subsequent incidents involving Nabozny. Each time perpetrators were identified to Podlesny. Each time Podlesny pledged to take action. And, each time nothing was done. Toward the end of the school year, the harassment against Nabozny intensified to the point that a district attorney purportedly advised Nabozny to take time off from school. Nabozny took one and a half weeks...
off from school. When he returned, the harassment resumed, driving Nabozny to attempt suicide. After a stint in a hospital, Nabozny finished his eighth grade year in a Catholic school.

The Catholic school attended by Nabozny did not offer classes beyond the eighth grade. Therefore, to attend the ninth grade, Nabozny enrolled in Ashland High School. Almost immediately Nabozny's fellow students sang an all too familiar tune. Early in the year, while Nabozny was using a urinal in the restroom, Nabozny was assaulted. Student Stephen Huntley struck Nabozny in the back of the knee, forcing him to fall into the urinal. Roy Grande then urinated on Nabozny. Nabozny immediately reported the incident to the principal's office. Nabozny recounted the incident to the office secretary, who in turn relayed the story to Principal William Davis. Davis ordered Nabozny to go home and change clothes. Nabozny's parents scheduled a meeting with Davis and Assistant Principal Thomas Blauert. At the meeting, the parties discussed numerous instances of harassment against Nabozny, including the restroom incident.

Rather than taking action against the perpetrators, Davis and Blauert referred Nabozny to Mr. Reeder, a school guidance counselor. Reeder was supposed to change Nabozny's schedule so as to minimise Nabozny's exposure to the offending students. Eventually the school placed Nabozny in a special education class; Stephen Huntley and Roy Grande were special education students. Nabozny's parents continued to insist that the school take action, repeatedly meeting with Davis and Blauert among others. Nabozny's parents' efforts were futile: no action was taken. In the middle of his ninth grade year, Nabozny again attempted suicide. Following another hospital stay and a period living with relatives, Nabozny ran away to Minneapolis. His parents convinced him to return to Ashland by promising that Nabozny would not have to attend Ashland High. Because Nabozny's parents were unable to afford private schooling, however, the Department of Social Services ordered Nabozny to return to Ashland High.

In tenth grade, Nabozny fared no better. Nabozny's parents moved, forcing Nabozny to rely on the school bus to take him to school. Students on the bus regularly used epithets, such as "fag" and "queer," to refer to Nabozny. Some students even pelted Nabozny with dangerous objects such as steel nuts and bolts. When Nabozny's parents complained to the school, school officials changed Nabozny's assigned seat and moved him to the front of the bus. The harassment continued. Ms. Hanson, a school guidance counselor, lobbied the school's administration to take more aggressive action to no avail. The worst was yet to come, however. One morning when Nabozny arrived early to school, he went to the library to study. The library was not yet open, so Nabozny sat down in the hallway. Minutes later he was met by a group of eight boys led by Stephen Huntley. Huntley began kicking Nabozny in the stomach, and continued to do so for five to ten minutes while the other students looked on laughing. Nabozny reported the incident to Hanson, who referred him to the school's "police liaison" Dan Crawford. Nabozny told Crawford that he wanted to press charges, but Crawford dissuaded him. Crawford promised to speak to the offending boys instead. Meanwhile, at Crawford's behest, Nabozny reported the incident to Blauert. Blauert, the school official supposedly in charge of disciplining, laughed and told Nabozny that Nabozny deserved such treatment because he is gay. Weeks later Nabozny collapsed from internal bleeding that resulted from Huntley's beating. Nabozny's parents and counselor Hanson repeatedly urged Davis and Blauert to take action to protect Nabozny. Each time aggressive action was promised. And, each time nothing was done.

Finally, in his eleventh grade year, Nabozny withdrew from Ashland High School. Hanson told Nabozny and his parents that school administrators were unwilling to help him and that he should seek educational opportunities elsewhere. Nabozny left Ashland and moved to Minneapolis where he was diagnosed with Post Traumatic Stress Disorder. In addition to seeking medical help, Nabozny sought legal advice.
On February 6, 1995, Nabozny filed the instant suit pursuant to 42 U.S.C. § 1983 against Mary Podlesny, William Davis, Thomas Blauert, Steven Kelly, and the District alleging, among other things, that the defendants violated his Fourteenth Amendment rights to equal protection and due process. By an agreement between the parties, Steven Kelly was dropped from the suit.\footnote{Kelly was Superintendent of the Ashland Public School District at the time that the events at issue occurred.} The remaining defendants moved for summary judgment.

The district court ruled in favor of the defendants. The court dispensed with Nabozny’s gender equal protection claim, holding that Nabozny failed to produce evidence to establish that the defendants discriminated against him based on his gender. The court did not specify its basis for deciding Nabozny’s sexual orientation equal protection claim. It appears from the order, however, that the court intended the reasoning that it applied to Nabozny’s gender claim to apply to the sexual orientation claim as well. Regarding Nabozny’s due process claims, the court concluded that Nabozny failed to produce evidence to establish that the defendants either created or exacerbated the risk of harm to Nabozny posed by other students. The court also concluded that Nabozny could not prevail on his claim that the defendants’ policies encouraged a climate in which Nabozny suffered harm because none of Nabozny’s assailants were state actors. In the alternative, the court granted qualified immunity to all of the defendants against all of Nabozny’s claims. Nabozny now brings this timely appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291.

III.

We will begin our analysis by considering Nabozny’s equal protection claims, reserving Nabozny’s due process claims for subsequent treatment in the opinion. Wisconsin has elected to protect the students in its schools from discrimination. Wisconsin statute section 118.13(1), regulating general school operations, provides that:

No person may be denied . . . participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person’s sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.

Since at least 1988, in compliance with the state statute, the Ashland Public School District has had a policy of prohibiting discrimination against students on the basis of gender or sexual orientation. The District’s policy and practice includes protecting students from student-on-student sexual harassment and battery. Nabozny maintains that the defendants denied him the equal protection of the law by denying him the protection extended to other students, based on his gender and sexual orientation.

\footnote{4. Kelly was Superintendent of the Ashland Public School District at the time that the suit was filed.} The Equal Protection Clause grants to all Americans “the right to be free from invidious discrimination in statutory classifications and other governmental activity.” 

\textit{Harris v. McRae}, 448 U.S. 297, 322, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784 (1980). When a state actor turns a blind eye to the Clause’s command, aggrieved parties such as Nabozny can seek relief pursuant to 42 U.S.C. § 1983. \textit{Cf. Muckway v. Craft}, 789 F.2d 517, 521 (7th Cir.1986) (noting that a § 1983 claim is a tort action, requiring proof of duty, breach, causation, and damages). In order to establish liability under § 1983, Nabozny must show that the defendants acted with a nefarious discriminatory purpose, \textit{Personnel Adm’r of Massachusetts v. Feeney}, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979), and discriminated against him based on his membership in a definable class. \textit{Albright v. Oliver}, 975 F.2d 343, 348 (7th Cir.1992), aff’d, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); \textit{Falls v. Town of Dyer}, 875 F.2d 146, 148 (7th Cir.1989). As we explained in \textit{Shango v. Jurich}, 681 F.2d 1091 (7th Cir.1982):

The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state’s action. A plaintiff

He was not, however, Superintendent at the time that the events at issue occurred.
must demonstrate intentional or purposeful discrimination to show an equal protection violation. Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences. It implies that a decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group.  

Id. at 1104 (citations and internal quotations omitted). A showing that the defendants were negligent will not suffice. Nabozny must show that the defendants acted either intentionally or with deliberate indifference. Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir.1988), cert. denied, 489 U.S. 1065, 109 S.Ct. 1338, 103 L.Ed.2d 809 (1989); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir.1983), cert. denied, 465 U.S. 1049, 104 S.Ct. 1325, 79 L.Ed.2d 720 (1984); Shango, 681 F.2d at 1104; Cf. Muckway, 789 F.2d at 522 (holding that a violation of a state law does not establish an equal protection violation absent proof that the defendant intentionally discriminated against otherwise similarly situated persons). To escape liability, the defendants either must prove that they did not discriminate against Nabozny, or at a bare minimum, the defendants' discriminatory conduct must satisfy one of two well-established standards of review: heightened scrutiny in the case of gender discrimination, or rational basis in the case of sexual orientation.

The district court found that Nabozny had proffered no evidence to support his equal protection claims. In the alternative, the court granted to the defendants qualified immunity. Considering the facts in the light most favorable to Nabozny, we respectfully disagree with the district court's conclusions.

A. Gender and Equal Protection.

The district court disposed of Nabozny's equal protection claims in two brief paragraphs. Regarding the merits of Nabozny's gender claim, the court concluded that "[i]here is absolutely nothing in the record to indicate that plaintiff was treated differently because of his gender." The district court's conclusion affords two interpretations: 1) there is no evidence that the defendants treated Nabozny differently from other students; or, 2) there is no evidence that the discriminatory treatment was based on Nabozny's gender. We will examine each in turn.

[7] The record viewed in the light most favorable to Nabozny, combined with the defendants' own admissions, suggests that Nabozny was treated differently from other students. The defendants stipulate that they had a commendable record of enforcing their anti-harassment policies. Yet Nabozny has presented evidence that his classmates harassed and battered him for years and that school administrators failed to enforce their anti-harassment policies, despite his repeated pleas for them to do so. If the defendants otherwise enforced their anti-harassment policies, as they contend, then Nabozny's evidence strongly suggests that they made an exception to their normal practice in Nabozny's case.

Therefore, the question becomes whether Nabozny can show that he received different treatment because of his gender. Nabozny's evidence regarding the defendants' punishment of male-on-female battery and harassment is not overwhelming. Nabozny contends that a male student that struck his girlfriend was immediately expelled, that males were reprimanded for striking girls, and that when pregnant girls were called "slut" or "whore," the school took action. Nabozny's evidence does not include specific facts, such as the names and dates of the individuals involved. Nabozny does allege, however, that when he was subjected to a mock rape Podlesny responded by saying "boys will be boys," apparently dismissing the incident because both the perpetrators and the victim were males. We find it impossible to believe that a female lodging a from that practice in this case and address the issues in the order followed by the district court below.
similar complaint would have received the same response.

More important, the defendants do not deny that they aggressively punished male-on-female battery and harassment. The defendants argue that they investigated and punished all complaints of battery and harassment, regardless of the victim’s gender. According to the defendants, contrary to the evidence presented by Nabozny, they aggressively pursued each of Nabozny’s complaints and punished the alleged perpetrators whenever possible. Like Nabozny, the defendants presented evidence to support their claim. Whether to believe the defendants or Nabozny is, of course, a question of credibility for the fact-finder. In the context of considering the defendants’ summary judgment motion, we must assume that Nabozny’s version is the credible one. If Nabozny’s evidence is considered credible, the record taken in conjunction with the defendants’ admissions demonstrates that the defendants treated male and female victims differently.

[8] The defendants also argue that there is no evidence that they either intentionally discriminated against Nabozny, or were deliberately indifferent to his complaints. The defendants concede that they had a policy and practice of punishing perpetrators of battery and harassment. It is well settled law that departures from established practices may evince discriminatory intent. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 267, 97 S.Ct. 555, 564-65, 50 L.Ed.2d 450 (1977). Moreover, Nabozny introduced evidence to suggest that the defendants literally laughed at Nabozny’s pleas for help. The defendants’ argument, considered against Nabozny’s evidence, is simply indefensible.

[9] Our inquiry into Nabozny’s gender equal protection claim does not end here, because the district court granted to the defendants qualified immunity. The District itself clearly is not entitled to qualified immunity. See Owen v. City of Independence, Mo., 445 U.S. 622, 650-51, 100 S.Ct. 1398, 1415-16, 63 L.Ed.2d 673 (1980) (denying to municipalities qualified immunity based on good faith constitutional violations). Therefore, we need only consider whether the individual defendants are immune from suit.

In Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Supreme Court held that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Id. at 818, 102 S.Ct. at 2738. If the law was not “clearly established,” no liability should result because “an official could not reasonably be expected to anticipate subsequent legal developments, nor could be said to ‘know’ that the law forbade conduct not previously identified as unlawful.” Id. Thus, the critical questions in this case are whether the law “clearly establishes” the basis for Nabozny’s claim, and whether the law was so established in 1988 when Nabozny entered middle school. Sherman v. Four County Counseling Ctr., 987 F.2d 397, 401 (7th Cir.1993).

The Fourteenth Amendment provides that a State shall not “deny to any person within its jurisdiction the equal protection of the laws.” In 1971, the Supreme Court interpreted the Equal Protection Clause to prevent arbitrary gender-based discrimination. See Reed v. Reed, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971) (“To give a mandatory preference to members of either sex over members of the other...is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause...”). A few years later, in Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975), the Court held that discrimination based on “gender-based generalization[s]” in society runs afoul of the Equal Protection Clause. Id. at 645, 95 S.Ct. at 1232.

[10] In Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), building on its earlier precedents, the Court went further in requiring equal treatment regardless of gender. In Hogan, the Court struck down a state statute that prevented males from enrolling in a state nursing school as violating the
Equal Protection Clause. Id. at 727, 102 S.Ct. at 3837-38. Rejecting Mississippi's argument that gender-biased enrollment criteria were necessary to compensate for prior discrimination, the Court held that "if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." Id. at 725, 102 S.Ct. at 3336. Hogan made clear, in 1982, that state-sponsored educational institutions may not discriminate in their protection of men and women based on a stereotype of feminine weakness or inferiority. It is now well settled that to survive constitutional scrutiny, gender based discrimination must be substantially related to an important governmental objective. See Bohren v. City of East Chicago, Ind., 799 F.2d 1180, 1185 (7th Cir. 1986),

[11] Nonetheless, the defendants ask us to affirm the grant of qualified immunity because "there was no clear duty under the equal protection clause for the individual defendants to enforce every student complaint of harassment by other students the same way." The defendants are correct in that the Equal Protection Clause does not require the government to give everyone identical treatment. Nothing we say today suggests anything to the contrary. The Equal Protection Clause does, however, require the state to treat each person with equal regard, as having equal worth, regardless of his or her status. The defendants' argument fails because they frame their inquiry too narrowly. The question is not whether they are required to treat every harassment complaint the same way; as we have noted, they are not. The question is whether they are required to give male and female students equivalent levels of protection; they are, absent an important governmental objective, and the law clearly said so prior to Nabozny's years in middle school.

[12] The defendants bemoan the fact that there is no prior case directly on point with facts identical to this case. Under the doctrine of qualified immunity, liability is not predicated upon the existence of a prior case that is directly on point. See McDonald v. Haskins, 966 F.2d 292, 293 (7th Cir. 1992). The question is whether a reasonable state actor would have known that his actions, viewed in the light of the law at the time, were unlawful. Id. at 294. We believe that reasonable persons standing in the defendants' shoes at the time would have reached just such a conclusion.

B. Sexual Orientation and Equal Protection.

[13] On the face of the summary judgment order, the fate of Nabozny's sexual orientation equal protection claim is unclear. In the order the district court never specifically discussed Nabozny's sexual orientation claim. There is little doubt, however, that State is holding a person in custody, "a State's failure to protect an individual against private violence" does not violate the Due Process Clause. Id. at 197, 109 S.Ct. at 1004. DeShaney was a due process case. Nabozny based his suit, in part, on due process theories which we will discuss later. But the Court's reasoning in DeShaney is inapplicable to Nabozny's equal protection arguments. As the Court noted in DeShaney, "[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." Id. at 197 n. 3, 109 S.Ct. at 1004 n. 3.

It is worth noting that we do not understand the defendants to argue that their actions were motivated by an important governmental objective. We are unable to garner any important governmental objective that is furthered by the alleged gender discrimination in this case, and the defendants do not offer us one.

6. On June 26, 1996, the Supreme Court decided United States v. Virginia, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). In Virginia, rather than employing more conventional heightened scrutiny parlance, the Court held that to defend gender based discrimination a state actor must demonstrate an "exceedingly persuasive justification." Id. at 2274. We express no opinion on whether the Court's ruling heightens the level of scrutiny applied to gender discrimination in this circuit.

7. The defendants also argue that they were not required to protect Nabozny, citing DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). In DeShaney, the Supreme Court ruled that the Due Process Clause confers "no affirmative right to governmental aid." Id. at 200. Relying on that principle the Court concluded that, except for cases where the
the district court intended for its order to dispose of Nabozny's suit in its entirety. In the interest of judicial economy, rather than remanding the claim back to the district court, we will assume that the court's disposition of Nabozny's sexual orientation claim was synonymous with, and on the same grounds as, the court's disposition of Nabozny's gender claim.9

[14] First we must consider whether Nabozny proffered a sufficient evidentiary basis to support his claim. As we noted above, Nabozny's evidence, combined with the defendants' admissions, demonstrates that Nabozny was treated differently. What is more, Nabozny introduced sufficient evidence to show that the discriminatory treatment was motivated by the defendants' disapproval of Nabozny's sexual orientation, including statements by the defendants that Nabozny should expect to be harassed because he is gay.

[15] Next we must consider whether the defendants are entitled to qualified immunity. In other words, we must determine whether reasonable persons in the defendants' positions would have known that discrimination against Nabozny based on his sexual orientation, viewed in the light of the law at the time, was unlawful.

Our discussion of equal protection analysis thus far has revealed a well-established principle: the Constitution prohibits intentional invidious discrimination between otherwise similarly situated persons based on one's membership in a definable minority, absent at least a rational basis for the discrimination. There can be little doubt that homosexuals are an identifiable minority10 subjected to discrimination in our society. Given the legislation across the country both positioning and prohibiting homosexual rights, that proposition was as self-evident in 1988 as it is today. In addition, the Wisconsin statute expressly prohibits discrimination on the basis of sexual orientation. Obviously that language was included because the Wisconsin legislature both recognized that homosexuals are discriminated against, and sought to prohibit such discrimination in Wisconsin schools. The defendants stipulate that they knew about the Wisconsin law, and enforced it to protect homosexuals. Therefore, it appears that the defendants concede that they knew that homosexuals are a definable minority and treated them as such.11

9. The defendants allege that Nabozny waived his sexual orientation claim by failing to argue it in his response to the defendants' summary judgment motion. The defendants' argument lacks merit. We have previously held that even where the non-moving party fails to file a timely response to a motion for summary judgment, the district court must still review the uncontroverted facts and make a finding that summary judgment is appropriate as a matter of law. Glass, 2 F.3d at 739; Wienco, Inc. v. Katan Assoc., Inc., 965 F.2d 565, 568 (7th Cir.1992). Assuming arguendo that Nabozny failed to defend his sexual orientation claim in the face of the defendants' summary judgment motion, the district court was not relieved of its obligation to consider the claim.

10. The Sixth Circuit has ruled that:

[The reality remains that no law can successfully be drafted that is calculated to penalize, or to benefit, or to protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts. Those persons having a homosexual "orientation" simply do not, as such, comprise an identifiable class.... Because homosexuals generally are not identifiable "on sight"... they cannot constitute a suspect class or a quasi-suspect class....

Equality Foundation of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261, 267 (6th Cir.1995).

The Sixth Circuit's analysis appears to conflate the requirement that discrimination be based on membership in a definable class to trigger equal protection analysis, see Albright, 975 F.2d at 348, Falls, 875 F.2d at 148, with the requirement that the class have "obvious, immutable, or distinguishing characteristics" to trigger heightened or strict scrutiny. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir.1990). To the extent that the Sixth Circuit's position conflicts with our prior holdings, we are bound by the precedent of this circuit. We express no opinion on whether sexual orientation is an "obvious, immutable, or distinguishing" characteristic. However, it does seem dubious to suggest that someone would choose to be homosexual, absent some genetic predisposition, given the considerable discrimination leveled against homosexuals.

11. We do not mean to suggest that the constitutionality of the defendants' conduct turns on the existence of the Wisconsin statute. The fact that the conduct in question is illegal under the statute neither adds to, nor subtracts from, the conduct's constitutional permissibility. See Muck-
In this case we need not consider whether homosexuals are a suspect or quasi-suspect class, which would subject the defendants' conduct to either strict or heightened scrutiny. Our court has already ruled that, in the context of the military, discrimination on the basis of sexual orientation is subject to rational basis review. See *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir.1989), cert. denied, 494 U.S. 1004, 101 S.Ct. 1296, 108 L.Ed.2d 473 (1990). The rational basis standard is sufficient for our purposes herein.

[16] Under rational basis review there is no constitutional violation if "there is any reasonably conceivable state of facts" that would provide a rational basis for the government's conduct. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313–14, 113 S.Ct. 2066, 121 L.Ed.2d 211 (1993). We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one. Like Nabozny's gender claim, the defendants argue that they did not discriminate against Nabozny.

Absent any rational basis for their alleged discrimination, the defendants are left to argue that the principle that the Constitution prohibits discrimination between similarly situated persons based on membership in a delineable class was somehow unclear back in 1988. We find that suggestion unacceptable. As early as 1886 the Supreme Court held that if the law "is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74, 6 S.Ct. 1064, 1073, 29 L.Ed. 220 (1886). Further, almost every case that we have cited thus far was decided prior to the events giving rise to this litigation.

Our discussion of qualified immunity cannot end without mentioning one case in the area of "homosexual rights" commonly cited during the period in question: *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2551, 92 L.Ed.2d 140 (1986). In *Bowers*, the Supreme Court ruled that state sodomy statutes that prohibit sodomy performed in private between two consenting adults do not run afoul of an individual's Fourteenth Amendment right to substantive due process. *Id.* at 191, 106 S.Ct. at 2556, 92 L.Ed.2d at 147. We will address Nabozny's due process arguments below. However, reliance on *Bowers* by the defendants in this case is misplaced. *Bowers* addressed the criminalization of sodomy. The defendants make no mention of sodomy as a motive for their discrimination. To the contrary, the defendants offer us no rational basis for their alleged conduct. The defendants certainly cannot rely on *Bowers*'s rational basis analysis to establish qualified immunity when they do not assert a rational basis for their alleged conduct, and expressly maintain that they did not discriminate on the basis of sexual orientation.12

Therefore, although it presents a closer question than does Nabozny's gender claim, we hold that reasonable persons in the defendants' positions in 1988 would have concluded that discrimination against Nabozny based on his sexual orientation was unconstitutional.

IV.

[17, 18] Now we turn to Nabozny's due process arguments. We believe that in order to clarify the nature of Nabozny's due process theories, it is necessary to specify what Nabozny does not argue. However untenable it may be to suggest that under the Fourteenth Amendment a state can force a
NABOZNY v. PODLESNY
Cite as 92 F.3d 446 (7th Cir. 1996)

student to attend a school when school officials know that the student will be placed at risk of bodily harm, our court has concluded that local school administrations have no affirmative substantive due process duty to protect students. J.O. v. Alton Community Unit School Dist. 11, 909 F.2d 287, 272-73 (7th Cir.1990). In J.O. v. Alton Community Unit School District 11, we relied on the Supreme Court's opinion in DeShaney v. Winnebago County Department of Social Services to conclude that school administrators do not have a "special relationship" with students. Id. at 272. Absent a "special relationship," a state actor has no duty to protect a potential victim. Id. at 272-73; see DeShaney, 489 U.S. at 200, 109 S.Ct. at 1065-06 ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."). Nabozny has expressly stated that he does not challenge our holding in Alton Community, thereby forfeiting his right to do so. (Appellate Brief at 41 n. 13). A party's forfeiture of a legal argument prevents us from considering it because the argument is not before the court. United States v. Hubbard, 61 F.3d 1261, 1273 (7th Cir.1995), cert. denied. — U.S. —, 116 S.Ct. 1268, 134 L.Ed.2d 216 (1996); John Doe v. United States, 51 F.3d 693, 699 (7th Cir.1995); United States v. Jones, 94 F.3d 485, 499 (7th Cir.1994); Wilson v. Giesen, 966 F.2d 788, 741 (7th Cir.1992); United States v. Berkowitz, 927 F.2d 1376, 1391 (7th Cir.), cert. denied, 502 U.S. 845, 112 S.Ct. 141, 116 L.Ed.2d 108 (1991). Having clarified Nabozny's forfeiture, we turn to the arguments that were raised by Nabozny.13

Nabozny argues that the defendants should be liable because they enhanced his risk of harm, and because their policies encouraged a climate in which he suffered harm. We will consider each theory in turn. First, Nabozny argues that by failing to punish his assailants the defendants exacerbated the risk that he would be harmed, or even encouraged the students to harm him. Nabozny relies on our opinion in Reed v. Gardner, 986 F.2d 1122 (7th Cir.), cert. denied, 510 U.S. 947, 114 S.Ct. 389, 126 L.Ed.2d 337 (1993). In Reed, we considered a case in which police officers arrested the driver of an automobile, but left an intoxicated passenger on the side of the road with the keys to the car. Id. at 1124. After the police left, the intoxicated passenger drove the car onto the road and caused a serious accident. Id. The victims of the accident sued the police officers pursuant to § 1983 for leaving the intoxicated passenger on the side of the road, arguing that the officers' conduct deprived the victims of their Fourteenth Amendment right to due process. Id. at 1124-25. We reversed a lower court's dismissal of the complaint, ruling that state actors have a duty to care for citizens if the state actors' conduct "creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been." Id. at 1126. But we noted that the plaintiffs would lose on

13. The facts of this case are distinguishable from the facts in Alton Community. In Alton Community, a student who was molested by a teacher sued the school district and various administrators for her injuries, alleging that the defendants breached their duty to protect her. Alton Community, 909 F.2d at 268. Nothing suggests that the defendants in Alton Community were aware of the potential molestation, and failed to prevent it. There is evidence to suggest that Nabozny informed school officials that he was at risk, and that the officials took no action—for years. Moreover, in some cases schools arguably serve as temporary custodians of children, limiting parent's ability to care for children, or children's ability to care for themselves. Many parents and students depend on schools to provide students with food, shelter, discipline, guidance, and medical care, in addition to an education, while the students are on campus. In this case, it seems that Ashland High even fulfilled a police function by providing a "police liaison" officer. Depending upon the state law, a student may be compelled to attend school. In a small town the state law requirement may be tantamount to a requirement that the student attend specific schools. The extent of a school's control over a student also might vary with the student's age: schools control kindergarten students more than high school students. It may be, therefore, that in some cases a school is in a custodial relationship with its students. Because Nabozny has failed to argue that Alton Community can be distinguished, these are issues necessarily left for another day. We mention them here only to make clear that they are not foreclosed to future litigants by our opinion.
summary judgment if the defendants could show that the arrested driver was also intoxicated: "[t]he reason is simple: without state intervention, the same danger would exist." *Id.* at 1125.

[19] We agree with Nabozny in principle that the defendants could be liable under a due process theory if Nabozny could show that the defendants created a risk of harm, or exacerbated an existing one. After a thorough review of the record, however, we must agree with the district court that Nabozny's claim suffers from a paucity of evidence. Nabozny has presented evidence to show that the defendants failed to act, and that their failure to act was intentional. But, as we noted, *Alton Community* held that the defendants had no affirmative duty to act. The defendants' failure to act left Nabozny in a position of danger, but nothing suggests that their failure to act placed him in the danger, or increased the pre-existing threat of harm. Nabozny has presented "wrenching" facts, but there is insufficient evidence from which a reasonable factfinder could conclude that the defendants' conduct increased the risk of harm to Nabozny beyond that which he would have faced had the defendants taken no action. *See Reed*, 986 F.2d at 1125.

[20] Under Nabozny's second theory, he argues that the defendants violated his right to due process by acting with deliberate indifference in maintaining a policy or practice of failing to punish his assailants, thereby encouraging a harmful environment. *Alton Community*, 909 F.2d at 273; *Stoneking v. Bradford Area School Dist.*, 852 F.2d 720, 725 (3rd Cir.1989), *cert. denied*, 489 U.S. 1044, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990). The district court rejected Nabozny's argument because the harm he suffered was not perpetrated by school employees. On appeal, Nabozny challenges the district court's reasoning, arguing that liability can result regardless whether students or teachers inflicted the harm.

The district court relied on *D.R. by L.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1964 (3rd Cir.1992) (en banc), *cert. denied*, 506 U.S. 1079, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993). In *Middle Bucks*, the Third Circuit considered constitutional claims brought against a school by two female students for injuries the students suffered at the hands of male students. *Id.* at 1365-66. The plaintiffs alleged, among other things, that the school's policy of not punishing the perpetrators violated their rights to due process. *Id.* at 1376. The court of appeals concluded that because the acts perpetrated against the student plaintiffs were not perpetrated by a school employee, there was no state action, and thus no § 1983 claim against the defendants. *Id.* at 1376.

We prefer not to rest our holding on *Middle Bucks*. Although *Middle Bucks* suggests that in the context of a "state created danger" liability can result from an "interminning of state conduct with private violence," *id.* at 1375, language elsewhere in the opinion appears to foreclose the possibility of liability in cases where state actors intentionally formulate policies or practices that encourage one private actor to injure another. *Id.* at 1376. We see no need to go that far in this case. Even assuming arguendo that a state actor can be liable for intentionally adopting a policy that encourages one private actor to harm another, Nabozny's claim fails.

Nabozny argues, and presents facts suggesting, that the defendants had a policy or practice of ignoring his pleas for help, and that as a result, he was repeatedly assaulted. Nabozny's theory has one fatal flaw: it rests on a failure to act. Under *Alton Community* the defendants had no duty to act. Therefore, to hold them liable for adopting a practice of failing to act would run directly counter to *Alton Community*.

**Conclusion.**

We conclude that, based on the record as a whole, a reasonable fact-finder could find that the District and defendants Podlesny, Davis, and Blauert violated Nabozny's Fourteenth Amendment right to equal protection by discriminating against him based on his gender or sexual orientation. Further, the law establishing the defendants' liability was sufficiently clear to inform the defendants at the time that their conduct was unconstitutional. Nabozny's equal protection claims
against the District, Podlesny, Davis, and Blauert are reinstated in toto. We further conclude that Nabozny has failed to produce sufficient evidence to permit a reasonable fact-finder to find that the defendants violated Nabozny's Fourteenth Amendment right to due process either by enhancing his risk of harm or by encouraging a climate to flourish in which he suffered harm. Our disposition of Nabozny's due process claims renders the district court's award of qualified immunity as to those claims moot. The decision of the district court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

UNITED STATES of America, Plaintiff–Appellee,  
v.  
Edward L. MIMS and Cleveland J. McDade, Defendants–Appellants.  
Nos. 95-2582, 95-2620.  
United States Court of Appeals, Seventh Circuit.  
Decided Aug. 5, 1996.

Defendants were convicted in the United States District Court for the Southern District of Illinois, William L. Beatty, J., of conspiracy to distribute cocaine base, possession of cocaine base with intent to distribute, and using or carrying firearm during drug-trafficking offense. The Court of Appeals, Cudahy, Circuit Judge, held that: (1) instruction differentiating between conspiracy and mere buyer-seller relationship was plain error; (2) bartering weapon in exchange for crack cocaine supported convictions of using or carrying firearm during drug-trafficking offense; (3) separate instructions on each charge against each defendant were not required when separate instructions were given for each element of offense charged; and (4) failure to give multiple conspiracy instruction was not plain error. Affirmed in part, reversed in part and remanded.

1. Conspiracy $\equiv$47(12)

While purchase of narcotics for resale is evidence of conspiratorial agreement, especially where purchases are repeated, buyer-seller relationship alone is insufficient to prove conspiracy, even when buyer intends to resell purchased narcotics. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

2. Criminal Law $\equiv$1030(1), 1038.2

Requirement of specific objection to preserve error applies equally to court's giving or refusing to give instruction; court's refusal to give tendered instruction does not automatically preserve objection to instruction actually given. Fed.Rules Cr.Proc.Rule 30, 18 U.S.C.A.

3. Criminal Law $\equiv$1030(1)


See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law $\equiv$1030(1)


5. Criminal Law $\equiv$1038.1(4)

Erroneous buyer-seller instruction given with respect to charge of conspiracy to distribute cocaine, which enabled jury to convict defendants merely upon showing that one defendant bought cocaine from other defendant for resale with knowledge that other defendant was in cocaine business, without prospective costs.

14. The parties shall be responsible for their respective costs.
Dear Colleague:

In recent years, many state departments of education and local school districts have taken steps to reduce bullying in schools. The U.S. Department of Education (Department) fully supports these efforts. Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential. The movement to adopt anti-bullying policies reflects schools’ appreciation of their important responsibility to maintain a safe learning environment for all students. I am writing to remind you, however, that some student misconduct that falls under a school’s anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department’s Office for Civil Rights (OCR). As discussed in more detail below, by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment.

The statutes that OCR enforces include Title VI of the Civil Rights Act of 19641 (Title VI), which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 19722 (Title IX), which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 19733 (Section 504); and Title II of the Americans with Disabilities Act of 19904 (Title II). Section 504 and Title II prohibit discrimination on the basis of disability.5 School districts may violate these civil rights statutes and the Department’s implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.6 School personnel who understand their legal obligations to address harassment under these laws are in the best position to prevent it from occurring and to respond appropriately when it does. Although this letter focuses on the elementary and secondary school context, the legal principles also apply to postsecondary institutions covered by the laws and regulations enforced by OCR.

Some school anti-bullying policies already may list classes or traits on which bases bullying or harassment is specifically prohibited. Indeed, many schools have adopted anti-bullying policies that go beyond prohibiting bullying on the basis of traits expressly protected by the federal civil

---

1 42 U.S.C. § 2000d et seq.
2 20 U.S.C. § 1681 et seq.
4 42 U.S.C. § 12131 et seq.
6 The Department’s regulations implementing these statutes are in 34 C.F.R. parts 100, 104, and 106. Under these federal civil rights laws and regulations, students are protected from harassment by school employees, other students, and third parties. This guidance focuses on peer harassment, and articulates the legal standards that apply in administrative enforcement and in court cases where plaintiffs are seeking injunctive relief.

Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation.
rights laws enforced by OCR—race, color, national origin, sex, and disability—to include such bases as sexual orientation and religion. While this letter concerns your legal obligations under the laws enforced by OCR, other federal, state, and local laws impose additional obligations on schools. And, of course, even when bullying or harassment is not a civil rights violation, schools should still seek to prevent it in order to protect students from the physical and emotional harms that it may cause.

Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.

A school is responsible for addressing harassment incidents about which it knows or reasonably should have known. In some situations, harassment may be in plain sight, widespread, or well-known to students and staff, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on a school bus, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the school on notice. In other situations, the school may become aware of misconduct, triggering an investigation that could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment. In all cases, schools should have well-publicized policies prohibiting harassment and procedures for reporting and resolving complaints that will alert the school to incidents of harassment.

When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school’s investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial.

If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile

---

7 For instance, the U.S. Department of Justice (DOJ) has jurisdiction over Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c (Title IV), which prohibits discrimination on the basis of race, color, sex, religion, or national origin by public elementary and secondary schools and public institutions of higher learning. State laws also provide additional civil rights protections, so districts should review these statutes to determine what protections they afford (e.g., some state laws specifically prohibit discrimination on the basis of sexual orientation).

8 Some conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression. For more information on the First Amendment’s application to harassment, see the discussions in OCR’s Dear Colleague Letter: First Amendment (July 28, 2003), available at http://www.ed.gov/about/offices/list/ocr/firstamend.html; and OCR’s Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 19, 2001) (Sexual Harassment Guidance), available at http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.

9 A school has notice of harassment if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment. For a discussion of what a “responsible employee” is, see OCR’s Sexual Harassment Guidance.

10 Districts must adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex and disability discrimination complaints, and must notify students, parents, employees, applicants, and other interested parties that the district does not discriminate on the basis of sex or disability. See 28 C.F.R. § 35.106; 28 C.F.R. § 35.107(b); 34 C.F.R. § 104.7(b); 34 C.F.R. § 104.8; 34 C.F.R. § 106.8(b); 34 C.F.R. § 106.9.
environment and its effects, and prevent the harassment from recurring. These duties are a school’s responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed. For example, any separation of the target from an alleged harasser should be designed to minimize the burden on the target’s educational program (e.g., not requiring the target to change his or her class schedule).

In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond. A school also may be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment. An effective response also may need to include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment (or wide dissemination of existing policies and procedures), as well as wide distribution of the contact information for the district’s Title IX and Section 504/Title II coordinators. 11

Finally, a school should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses. At a minimum, the school’s responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems.

When responding to incidents of misconduct, schools should keep in mind the following:

- The label used to describe an incident (e.g., bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications. So, for example, if the abusive behavior is on the basis of race, color, national origin, sex, or disability, and creates a hostile environment, a school is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR.

- When the behavior implicates the civil rights laws, school administrators should look beyond simply disciplining the perpetrators. While disciplining the perpetrators is likely a necessary step, it often is insufficient. A school’s responsibility is to eliminate the

---

11 Districts must designate persons responsible for coordinating compliance with Title IX, Section 504, and Title II, including the investigation of any complaints of sexual, gender-based, or disability harassment. See 28 C.F.R. § 35.107(a); 34 C.F.R. § 104.7(a); 34 C.F.R. § 106.8(a).
hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. Put differently, the unique effects of discriminatory harassment may demand a different response than would other types of bullying.

Below, I provide hypothetical examples of how a school’s failure to recognize student misconduct as discriminatory harassment violates students’ civil rights. In each of the examples, the school was on notice of the harassment because either the school or a responsible employee knew or should have known of misconduct that constituted harassment. The examples describe how the school should have responded in each circumstance.

**Title VI: Race, Color, or National Origin Harassment**

- Some students anonymously inserted offensive notes into African-American students’ lockers and notebooks, used racial slurs, and threatened African-American students who tried to sit near them in the cafeteria. Some African-American students told school officials that they did not feel safe at school. The school investigated and responded to individual instances of misconduct by assigning detention to the few student perpetrators it could identify. However, racial tensions in the school continued to escalate to the point that several fights broke out between the school’s racial groups.

In this example, school officials failed to acknowledge the pattern of harassment as indicative of a racially hostile environment in violation of Title VI. Misconduct need not be directed at a particular student to constitute discriminatory harassment and foster a racially hostile environment. Here, the harassing conduct included overtly racist behavior (e.g., racial slurs) and also targeted students on the basis of their race (e.g., notes directed at African-American students). The nature of the harassment, the number of incidents, and the students’ safety concerns demonstrate that there was a racially hostile environment that interfered with the students’ ability to participate in the school’s education programs and activities.

Had the school recognized that a racially hostile environment had been created, it would have realized that it needed to do more than just discipline the few individuals whom it could identify as having been involved. By failing to acknowledge the racially hostile environment, the school failed to meet its obligation to implement a more systemic response to address the unique effect that the misconduct had on the school climate. A more effective response would have included, in addition to punishing the perpetrators, such steps as reaffirming the school’s policy against discrimination (including racial harassment), publicizing the means to report allegations of racial harassment, training faculty on constructive responses to racial conflict, hosting class discussions about racial harassment and sensitivity to students of other races, and conducting outreach to involve parents and students in an effort to identify problems and improve the school climate. Finally, had school officials responded appropriately

---

12 Each of these hypothetical examples contains elements taken from actual cases.
and aggressively to the racial harassment when they first became aware of it, the school might have prevented the escalation of violence that occurred.  

- Over the course of a school year, school employees at a junior high school received reports of several incidents of anti-Semitic conduct at the school. Anti-Semitic graffiti, including swastikas, was scrawled on the stalls of the school bathroom. When custodians discovered the graffiti and reported it to school administrators, the administrators ordered the graffiti removed but took no further action. At the same school, a teacher caught two ninth-graders trying to force two seventh-graders to give them money. The ninth-graders told the seventh-graders, “You Jews have all of the money, give us some.” When school administrators investigated the incident, they determined that the seventh-graders were not actually Jewish. The school suspended the perpetrators for a week because of the serious nature of their misconduct. After that incident, younger Jewish students started avoiding the school library and computer lab because they were located in the corridor housing the lockers of the ninth-graders. At the same school, a group of eighth-grade students repeatedly called a Jewish student “Drew the dirty Jew.” The responsible eighth-graders were reprimanded for teasing the Jewish student.

The school administrators failed to recognize that anti-Semitic harassment can trigger responsibilities under Title VI. While Title VI does not cover discrimination based solely on religion, groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (e.g., Muslims or Sikhs). Thus, harassment against students who are members of any religious group triggers a school’s Title VI responsibilities when the harassment is based on the group’s actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members’ religious practices. A school also has responsibilities under Title VI when its students are harassed based on their actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.

In this example, school administrators should have recognized that the harassment was based on the students’ actual or perceived shared ancestry or ethnic identity as Jews (rather than on the students’ religious practices). The school was not relieved of its responsibilities under Title VI because the targets of one of the incidents were not actually Jewish. The harassment was still based on the perceived ancestry or ethnic characteristics of the targeted students. Furthermore, the harassment negatively affected the ability and willingness of Jewish students to participate fully in the school’s

---


14 As noted in footnote seven, DOJ has the authority to remedy discrimination based solely on religion under Title IV.

15 More information about the applicable legal standards and OCR’s approach to investigating complaints of discrimination against members of religious groups is included in OCR’s Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), available at http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html.
education programs and activities (e.g., by causing some Jewish students to avoid the library and computer lab). Therefore, although the discipline that the school imposed on the perpetrators was an important part of the school’s response, discipline alone was likely insufficient to remedy a hostile environment. Similarly, removing the graffiti, while a necessary and important step, did not fully satisfy the school’s responsibilities. As discussed above, misconduct that is not directed at a particular student, like the graffiti in the bathroom, can still constitute discriminatory harassment and foster a hostile environment. Finally, the fact that school officials considered one of the incidents “teasing” is irrelevant for determining whether it contributed to a hostile environment.

Because the school failed to recognize that the incidents created a hostile environment, it addressed each only in isolation, and therefore failed to take prompt and effective steps reasonably calculated to end the harassment and prevent its recurrence. In addition to disciplining the perpetrators, remedial steps could have included counseling the perpetrators about the hurtful effect of their conduct, publicly labeling the incidents as anti-Semitic, reaffirming the school’s policy against discrimination, and publicizing the means by which students may report harassment. Providing teachers with training to recognize and address anti-Semitic incidents also would have increased the effectiveness of the school’s response. The school could also have created an age-appropriate program to educate its students about the history and dangers of anti-Semitism, and could have conducted outreach to involve parents and community groups in preventing future anti-Semitic harassment.

Title IX: Sexual Harassment

- Shortly after enrolling at a new high school, a female student had a brief romance with another student. After the couple broke up, other male and female students began routinely calling the new student sexually charged names, spreading rumors about her sexual behavior, and sending her threatening text messages and e-mails. One of the student’s teachers and an athletic coach witnessed the name calling and heard the rumors, but identified it as “hazing” that new students often experience. They also noticed the new student’s anxiety and declining class participation. The school attempted to resolve the situation by requiring the student to work the problem out directly with her harassers.

Sexual harassment is unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. Thus, sexual harassment prohibited by Title IX can include conduct such as touching of a sexual nature; making sexual comments, jokes, or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating e-mails or Web sites of a sexual nature.
In this example, the school employees failed to recognize that the “hazing” constituted sexual harassment. The school did not comply with its Title IX obligations when it failed to investigate or remedy the sexual harassment. The conduct was clearly unwelcome, sexual (e.g., sexual rumors and name calling), and sufficiently serious that it limited the student’s ability to participate in and benefit from the school’s education program (e.g., anxiety and declining class participation).

The school should have trained its employees on the type of misconduct that constitutes sexual harassment. The school also should have made clear to its employees that they could not require the student to confront her harassers. Schools may use informal mechanisms for addressing harassment, but only if the parties agree to do so on a voluntary basis. Had the school addressed the harassment consistent with Title IX, the school would have, for example, conducted a thorough investigation and taken interim measures to separate the student from the accused harassers. An effective response also might have included training students and employees on the school’s policies related to harassment, instituting new procedures by which employees should report allegations of harassment, and more widely distributing the contact information for the district’s Title IX coordinator. The school also might have offered the targeted student tutoring, other academic assistance, or counseling as necessary to remedy the effects of the harassment.16

**Title IX: Gender-Based Harassment**

- **Over the course of a school year, a gay high school student was called names (including anti-gay slurs and sexual comments) both to his face and on social networking sites, physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions of how teenage boys are expected to act and appear (e.g., effeminate mannerisms, nontraditional choice of extracurricular activities, apparel, and personal grooming choices).** As a result, the student dropped out of the drama club to avoid further harassment. Based on the student’s self-identification as gay and the homophobic nature of some of the harassment, the school did not recognize that the misconduct included discrimination covered by Title IX. The school responded to complaints from the student by reprimanding the perpetrators consistent with its anti-bullying policy. The reprimands of the identified perpetrators stopped the harassment by those individuals. It did not, however, stop others from undertaking similar harassment of the student.

As noted in the example, the school failed to recognize the pattern of misconduct as a form of sex discrimination under Title IX. Title IX prohibits harassment of both male and female students regardless of the sex of the harasser—i.e., even if the harasser and target are members of the same sex. It also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their

16 More information about the applicable legal standards and OCR’s approach to investigating allegations of sexual harassment is included in OCR’s Sexual Harassment Guidance, available at http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.
sex, or for failing to conform to stereotypical notions of masculinity and femininity. Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.

Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also, as this example illustrates, be subjected to forms of sex discrimination prohibited under Title IX. The fact that the harassment includes anti-LGBT comments or is partly based on the target’s actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment. In this example, the harassing conduct was based in part on the student’s failure to act as some of his peers believed a boy should act. The harassment created a hostile environment that limited the student’s ability to participate in the school’s education program (e.g., access to the drama club). Finally, even though the student did not identify the harassment as sex discrimination, the school should have recognized that the student had been subjected to gender-based harassment covered by Title IX.

In this example, the school had an obligation to take immediate and effective action to eliminate the hostile environment. By responding to individual incidents of misconduct on an ad hoc basis only, the school failed to confront and prevent a hostile environment from continuing. Had the school recognized the conduct as a form of sex discrimination, it could have employed the full range of sanctions (including progressive discipline) and remedies designed to eliminate the hostile environment. For example, this approach would have included a more comprehensive response to the situation that involved notice to the student’s teachers so that they could ensure the student was not subjected to any further harassment, more aggressive monitoring by staff of the places where harassment occurred, increased training on the scope of the school’s harassment and discrimination policies, notice to the target and harassers of available counseling services and resources, and educating the entire school community on civil rights and expectations of tolerance, specifically as they apply to gender stereotypes. The school also should have taken steps to clearly communicate the message that the school does not tolerate harassment and will be responsive to any information about such conduct.17

Section 504 and Title II: Disability Harassment

- Several classmates repeatedly called a student with a learning disability “stupid,” “idiot,” and “retard” while in school and on the school bus. On one occasion, these students tackled him, hit him with a school binder, and threw his personal items into the garbage. The student complained to his teachers and guidance counselor that he was continually being taunted and teased. School officials offered him counseling services and a

---

17 Guidance on gender-based harassment is also included in OCR’s Sexual Harassment Guidance, available at http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.
psychiatric evaluation, but did not discipline the offending students. As a result, the harassment continued. The student, who had been performing well academically, became angry, frustrated, and depressed, and often refused to go to school to avoid the harassment.

In this example, the school failed to recognize the misconduct as disability harassment under Section 504 and Title II. The harassing conduct included behavior based on the student’s disability, and limited the student’s ability to benefit fully from the school’s education program (e.g., absenteeism). In failing to investigate and remedy the misconduct, the school did not comply with its obligations under Section 504 and Title II.

Counseling may be a helpful component of a remedy for harassment. In this example, however, since the school failed to recognize the behavior as disability harassment, the school did not adopt a comprehensive approach to eliminating the hostile environment. Such steps should have at least included disciplinary action against the harassers, consultation with the district’s Section 504/Title II coordinator to ensure a comprehensive and effective response, special training for staff on recognizing and effectively responding to harassment of students with disabilities, and monitoring to ensure that the harassment did not resume.18

I encourage you to reevaluate the policies and practices your school uses to address bullying19 and harassment to ensure that they comply with the mandates of the federal civil rights laws. For your convenience, the following is a list of online resources that further discuss the obligations of districts to respond to harassment prohibited under the federal antidiscrimination laws enforced by OCR:

- **Sexual Harassment: It’s Not Academic (Revised 2008):**
  [http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html](http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html)

- **Dear Colleague Letter: Sexual Harassment Issues (2006):**
  [http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html](http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html)

- **Dear Colleague Letter: Religious Discrimination (2004):**
  [http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html](http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html)

- **Dear Colleague Letter: First Amendment (2003):**
  [http://www.ed.gov/about/offices/list/ocr/firstamend.html](http://www.ed.gov/about/offices/list/ocr/firstamend.html)

---

18 More information about the applicable legal standards and OCR’s approach to investigating allegations of disability harassment is included in OCR’s Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000), available at [http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html](http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html).

19 For resources on preventing and addressing bullying, please visit [http://www.bullyinginfo.org](http://www.bullyinginfo.org), a Web site established by a federal interagency working group on Youth Programs. For information on the Department’s bullying prevention resources, please visit the Office of Safe and Drug-Free Schools’ Web site at [http://www.ed.gov/offices/OESE/SDS](http://www.ed.gov/offices/OESE/SDS). For information on regional Equity Assistance Centers that assist schools in developing and implementing policies and practices to address issues regarding race, sex, or national origin discrimination, please visit [http://www.ed.gov/programs/equitycenters](http://www.ed.gov/programs/equitycenters).
Dear Colleague

Letter: Harassment and Bullying

• Sexual Harassment Guidance (Revised 2001):
  http://www.ed.gov/about/offices/list/ocr/docs/shguide.html

• Dear Colleague Letter: Prohibited Disability Harassment (2000):
  http://www.ed.gov/about/offices/list/ocr/docs/disabharassltr.html

• Racial Incidents and Harassment Against Students (1994):
  http://www.ed.gov/about/offices/list/ocr/docs/race394.html

Please also note that OCR has added new data items to be collected through its Civil Rights Data Collection (CRDC), which surveys school districts in a variety of areas related to civil rights in education. The CRDC now requires districts to collect and report information on allegations of harassment, policies regarding harassment, and discipline imposed for harassment. In 2009-10, the CRDC covered nearly 7,000 school districts, including all districts with more than 3,000 students. For more information about the CRDC data items, please visit http://www2.ed.gov/about/offices/list/ocr/whatsnew.html.

OCR is committed to working with schools, students, students’ families, community and advocacy organizations, and other interested parties to ensure that students are not subjected to harassment. Please do not hesitate to contact OCR if we can provide assistance in your efforts to address harassment or if you have other civil rights concerns.

For the OCR regional office serving your state, please visit: http://wdcrobcopl01.ed.gov/CFAPPS/OCR/contactus.cfm, or call OCR’s Customer Service Team at 1-800-421-3481.

I look forward to continuing our work together to ensure equal access to education, and to promote safe and respectful school climates for America’s students.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights
Dear Colleague Letter Harassment and Bullying (October 26, 2010)
Background, Summary, and Fast Facts

What are the possible effects of student-on-student harassment and bullying?

- Lowered academic achievement and aspirations
- Increased anxiety
- Loss of self-esteem and confidence
- Depression and post-traumatic stress
- General deterioration in physical health
- Self-harm and suicidal thinking
- Feelings of alienation in the school environment, such as fear of other children
- Absenteeism from school

What does the Dear Colleague letter (DCL) do?

- Clarifies the relationship between bullying and discriminatory harassment under the civil rights laws enforced by the Department of Education’s (ED) Office for Civil Rights (OCR).
- Explains how student misconduct that falls under an anti-bullying policy also may trigger responsibilities under one or more of the anti-discrimination statutes enforced by OCR.
- Reminds schools that failure to recognize discriminatory harassment when addressing student misconduct may lead to inadequate or inappropriate responses that fail to remedy violations of students’ civil rights. Colleges and universities have the same obligations under the anti-discrimination statutes as elementary and secondary schools.
- Discusses racial and national origin harassment, sexual harassment, gender-based harassment, and disability harassment and illustrates how a school should respond in each case.
Why is ED Issuing the DCL?

ED is issuing the DCL to clarify the relationship between bullying and discriminatory harassment, and to remind schools that by limiting their responses to a specific application of an anti-bullying or other disciplinary policy, they may fail to properly consider whether the student misconduct also results in discrimination in violation of students’ federal civil rights.

What are the anti-discrimination statutes that the Office for Civil Rights enforces?

- Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin.
- Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex.
- Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990, which prohibit discrimination on the basis of disability.¹

What are a school’s obligations under these anti-discrimination statutes?

- Once a school knows or reasonably should know of possible student-on-student harassment, it must take immediate and appropriate action to investigate or otherwise determine what occurred.
- If harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, and prevent its recurrence. These duties are a school’s responsibility even if the misconduct also is covered by an anti-bullying policy and regardless of whether the student makes a complaint, asks the school to take action, or identifies the harassment as a form of discrimination.

How can I get help from OCR?

OCR offers technical assistance to help schools achieve voluntary compliance with the civil rights laws it enforces and works with schools to develop creative approaches to preventing and addressing discrimination. A school should contact the OCR enforcement office serving its jurisdiction for technical assistance. For contact information, please visit ED’s website at http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm.

A complaint of discrimination can be filed by anyone who believes that a school that receives Federal financial assistance has discriminated against someone on the basis of race, color, national origin, sex, disability, or age. The person or organization filing the complaint need not be a victim of the alleged discrimination, but may complain on behalf of another person or group. Information about how to file a complaint with OCR is at http://www2.ed.gov/about/offices/list/ocr/complaintintro.html or by contacting OCR’s Customer Service Team at 1-800-421-3481.

¹ OCR also enforces the Age Discrimination Act of 1975 and the Boy Scouts of America Equal Access Act. The DCL does not address these statutes.
Notice of Language Assistance
Dear Colleague Letter on Voluntary Youth Service Organizations

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


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 정책 장애인용 전화번호 1-800-877-8339 또는 이메일주소 Ed.Language.Assistance@ed.gov으로 연락하시기 바랍니다.


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.
Dear Colleague:

The U.S. Department of Education’s Office for Civil Rights (OCR) has recently received questions from school districts and State educational agencies about outside organizations that provide single-sex programming to a school district’s students. I write to explain the circumstances under which a school district lawfully may work with such organizations and to address legal issues that may arise under Title IX of the Education Amendments of 1972 (Title IX) and the Department’s Title IX regulations.¹

School districts often work with outside organizations, such as community-based groups, local businesses, parent-teacher associations, and nonprofit organizations, to help improve the quality and diversity of the educational opportunities they offer, to target underserved or underrepresented student groups, and to expose students to opportunities not otherwise available on campus. Parent, family, and community involvement in education correlates with higher academic performance and school improvement.² The Department supports school districts’ efforts to provide a diverse range of

¹ 20 U.S.C. §§ 1681–1688; 34 C.F.R. Part 106. This letter focuses on school districts, but the principles apply to any recipient of Federal financial assistance that offers an educational program or activity, including school districts, postsecondary institutions, and outside organizations. The Department has determined that this document is a “significant guidance document” under the Office of Management and Budget’s 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. OCR issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR’s legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202.

² See, e.g., Misty M. Kirby & Michael F. DiPaola, Academic Optimism and Community Engagement in Urban Schools, 49 J. EDUC. ADMIN. 542, 557 (2011) (“[I]n schools where there are high levels of community engagement, there tends to be high levels of student achievement.”); Anne T. Henderson & Karen K. Mapp, National Center for Family and Community Connections with Schools, A New Wave of Evidence: The Impact of School, Family, and Community Connections on Student Achievement 7 (2002), https://files.eric.ed.gov/fulltext/ED536946.pdf (surveying research and
opportunities, including through outside organizations, to improve student achievement and address students’ educational needs. A school district may not, however, absolve itself of its Title IX obligations by delegating responsibility to an outside organization.3

Title IX generally prohibits recipients of Federal funding both from excluding students from educational opportunities based on their sex and from providing significant assistance to outside organizations that do so. Nonetheless, there are instances in which Title IX permits the separation of students by sex. Specifically, Title IX does not apply to the membership practices of certain outside organizations, including voluntary youth service organizations. Under Title IX, voluntary youth service organizations are tax-exempt organizations, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.4 And, because this statutory exemption is separate from the regulatory exemption for single-sex classes and extracurricular activities, a voluntary youth service organization’s membership may be limited to students of one sex without triggering the detailed regulatory requirements for offering single-sex classes and activities.5 This is true even if the voluntary youth service organization receives significant assistance from a school district. In such cases, however, the district must comply with the Title IX requirements described in this letter to ensure girls and boys have comparable educational opportunities overall.

This letter offers guidance on how to determine whether an organization qualifies as a voluntary youth service organization under Title IX and how OCR evaluates a school district’s compliance with Title IX when it chooses to work with such an organization.

concluding “When schools, families, and community groups work together to support learning, children tend to do better in school, stay in school longer, and like school more.”).


4 20 U.S.C. § 1681(a)(6)(B) (Title IX does not apply to membership practices of “the Young Men’s Christian Association, Young Women’s Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are [exempt from taxation under section 501(a) of the Internal Revenue Code], the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age”); 34 C.F.R. § 106.14(c). This exemption is separate from the Boy Scouts of America Equal Access Act (Boy Scouts Act), 20 U.S.C. § 7905, 34 C.F.R. Part 108, which prohibits recipient public school districts that have a designated open forum or limited public forum from denying equal access or a fair opportunity to meet to, or from discriminating against, any group officially affiliated with the Boy Scouts of America (or affiliated with other youth groups listed in Title 36 of the United States Code) that wishes to meet in that designated open forum or limited public forum.

Title IX Prohibits a School District from Providing Significant Assistance to an Outside Organization that Engages in Unlawful Sex Discrimination

As part of its broad prohibition on sex discrimination, Title IX prohibits school districts from aiding or perpetuating discrimination by providing significant assistance to any outside organization that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees. When a school district provides significant assistance to a voluntary youth service organization, the school district is responsible if the organization engages in unlawful sex discrimination against students or employees in any aspect of the organization’s program other than its membership practices.

Whether a school district is providing significant assistance to an outside organization will turn on the facts and circumstances of each specific situation. OCR will consider a variety of factors, each of which could constitute significant assistance, including, but not limited to, financial support, provision of tangible resources (e.g., staff, equipment, and facilities), intangible benefits (e.g., recognition and approval), the terms under which the school district provides similar privileges and resources to other organizations, and whether the relationship is occasional and temporary or permanent and long-term.

For example, if a school district encourages students to contact its administrative office to register for participation in an outside organization’s program and allows the organization to use the school district’s facilities (when those facilities are not otherwise open to the public), OCR would likely find that it provides significant assistance to the organization. If, on the other hand, the school district provides very little administrative support (e.g., making a few copies of handouts or directing participants to the correct room) for the program and the outside organization pays the same amount as other nonprofit organizations for the use of the school district’s facilities, OCR would likely find that the school district does not provide significant assistance to the organization. Similarly, if the only assistance a school district provides to an outside organization is to share information about the needs of a student with a disability or an English learner student, consistent with its general policy

6 34 C.F.R. § 106.31(b)(6). See also Final Rule: Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24,128, 24,132 (June 4, 1975). Other civil rights laws also bar schools from providing significant assistance to outside organizations that discriminate on prohibited bases. See, e.g., 34 C.F.R. § 104.4(b)(1)(v), Appendix A § (A)(6) (Section 504 of the Rehabilitation Act of 1973). This letter only addresses a school district’s obligations under Title IX.

7 The detailed regulatory requirements for offering single-sex classes and activities described in footnote 5 do not apply to opportunities offered by voluntary youth service organizations.

8 A school district’s provision of access to premises or facilities to an outside organization to comply with another Federal law, such as the Boy Scouts Act, does not constitute significant assistance in and of itself.
on sharing such information and its obligations under other Federal laws,\(^9\) OCR would not consider that communication significant assistance.

**A School District May Provide Significant Assistance to a Voluntary Youth Service Organization that Limits Membership to Students of One Sex**

Title IX does not apply to the membership practices of voluntary youth service organizations even when they receive significant assistance from a school district.\(^10\) Likewise, because of this exemption, a school district that provides significant assistance to a voluntary youth service organization will not be found to violate Title IX simply because of the single-sex membership of the organization.

In order to qualify for this exemption, membership in the organization must be voluntary (e.g., participation may not be required as part of a class, and students may not be automatically enrolled), traditionally limited to members of one sex, and principally limited to persons under nineteen years old. A voluntary youth service organization also must facilitate public service opportunities for its members. A school district that provides significant assistance to an organization that satisfies these requirements would not violate Title IX’s general prohibition against excluding students from programs on the basis of sex.

In determining whether an organization’s membership (i.e., the students who participate in the organization’s program) has traditionally been limited to one sex, OCR will consider, on a case-by-case basis, the extent to which the organization has restricted membership by sex. To make this determination, OCR will consider factors such as whether the organization has held itself out, in its historical and foundational documents, as having single-sex membership, and whether the organization’s custom is and has been to, in fact, limit membership to a single sex.

To qualify for the exemption for voluntary youth service organizations, an organization also must facilitate public service opportunities for its members. An organization does not qualify for the exemption based solely on the services it provides to its members. Many outside organizations focus on youth development, but in order to qualify for this exemption, the organization’s program must also include a service component. For example, an organization that provides a program for girls in


\(^10\) If the voluntary youth service organization receives Federal financial assistance directly from a Federal agency, its membership practices will remain exempt, but the voluntary youth service organization must comply with other Title IX regulatory requirements.
engineering would meet this requirement if the members work together on a project to develop recommendations to improve the energy efficiency of public buildings.

This exemption from Title IX is limited, however, to the organization’s membership practices. A school district may not provide significant assistance to a voluntary youth service organization that engages in sex discrimination against students or employees in any other aspect of the organization’s program. For example, the school district remains responsible for addressing any sexual or gender-based harassment against students participating in a program offered by a voluntary youth service organization that receives significant assistance from the school district. The school district is responsible under Title IX to the same extent as if the school district were directly offering the program if students or employees who participate in the program are subjected to sex discrimination. If OCR finds that a school district is providing significant assistance to a voluntary youth service organization that engages in sex discrimination prohibited by Title IX, OCR will require the school district to either obtain compliance from the outside organization (including prompt and effective steps reasonably calculated to end the discrimination, prevent its recurrence, and, as appropriate, remedy its effects) or terminate the significant assistance.

A School District Has Title IX Obligations to the Excluded Sex

As a condition of receiving Federal funds, a school district agrees that it will not exclude, separate, deny benefits to, or otherwise treat students differently on the basis of sex unless expressly authorized to do so under Title IX or the Department’s Title IX regulations. Although there are limited exceptions in the statute and regulations that authorize a school district to separate or treat male and female students differently, including through the provision of significant assistance to a voluntary youth service organization, it still has a Title IX obligation to ensure girls and boys have comparable educational opportunities overall.12

As in other contexts in which Title IX permits a school district to offer programs separately for male and female students, comparable opportunities must be offered to male and female students. To make this assessment when outside organizations are involved with the school in providing opportunities to students, OCR will look at the overall set of opportunities available by combining the opportunities offered by the school district directly and the opportunities offered by any organization to which the school district provides significant assistance. Under this comparability standard, a school district is not required to provide identical opportunities, provided the overall effects of any differences are negligible. The lack of comparability may be established by a single

---

11 34 C.F.R. §§ 106.4, 106.31(a).
13 In comparing the school district’s offerings, OCR does not consider programming provided by outside organizations that do not receive significant assistance from the school district.
disparity that is so substantial as to deny equal opportunity to students of one sex or by multiple disparities that add up to a denial of equal opportunity to students of one sex.

For example, if a school district allows a voluntary youth service organization free use of its facilities and administrative support so that the organization can provide a four-week summer science camp for the school district’s male students, but offers no comparable summer opportunities for its female students, OCR would likely find a violation. To correct or avoid such a violation, the school district would have several options for complying with Title IX, including, for example, by allowing another organization to provide comparable single-sex opportunities for girls or coeducational opportunities to both boys and girls, by offering its own summer camp that is open to both boys and girls, or by terminating the significant assistance to the outside organization. The alternative camp need not be exactly the same type of camp so long as it offers comparable opportunities. The key to Title IX compliance in this context is ensuring male and female students have comparable opportunities overall.

**Conclusion**

Outside organizations, such as voluntary youth service organizations, can help improve the quality and diversity of the educational opportunities a school district offers, including reaching underserved or underrepresented student groups. A school district that is considering working with such an organization should, however, ensure that appropriate school district and organization officials understand their legal rights and responsibilities with respect to the issues discussed in this letter. If you need technical assistance concerning the Title IX exemption for voluntary youth service organizations or other civil rights issues, please contact the OCR regional office serving your state or territory by visiting wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm, or call OCR’s Customer Service Team at 1-800-421-3481; TDD 1-800-877-8339.

Thank you for your commitment to improving public education and providing high-quality educational opportunities to our nation’s students.

Sincerely,

/s/

Catherine E. Lhamon
Assistant Secretary 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。

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。

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。


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.
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. 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. 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.

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. 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.

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. 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), 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.

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. 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.\textsuperscript{10}

2. \textit{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.\textsuperscript{11}

3. \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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. 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. 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.

**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).

### 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. 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).

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. 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
Dear Colleague Letter: Transgender Students

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).


3 ED, Examples of Policies and Emerging Practices for Supporting Transgender Students (May 13, 2016), www.ed.gov/osee/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).


6 See Lusardi v. Dep’t of the Army, Appeal No. 012013395 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).
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”).


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).

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

See 34 C.F.R. § 106.31.

See 34 C.F.R. § 106.33.

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.”).

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

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 controlling authority over portions of their athletic program to the association. Where an athletic association is

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%282%29.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.

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 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\(^{\text{21}}\).


\(^{22}\) 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).


\(^{27}\) 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1).


\(^{29}\) 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.


\(^{32}\) 34 C.F.R. § 99.20.


\(^{34}\) See 34 C.F.R. § 106.31(b)(4).

\(^{35}\) 34 C.F.R. § 106.8(b).
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
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.

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.
# Table of Contents

## Student Transitions

1. How do schools find out that a student will transition? ................................................................. 1
2. How do schools confirm a student’s gender identity? .......................................................................... 1
3. How do schools communicate with the parents of younger students compared to older transgender students? .................................................................................................................................................... 2

## Privacy, Confidentiality, and Student Records

4. How do schools protect a transgender student’s privacy regarding the student’s transgender status? ................................................................................................................................................................................. 4
5. How do schools ensure that a transgender student is called by the appropriate name and pronouns? ............................................................................................................................................................................. 5
6. How do schools handle requests to change the name or sex designation on a student’s records? .................................................................................................................................................................................... 6

## Sex-Segregated Activities and Facilities

7. How do schools ensure transgender students have access to facilities consistent with their gender identity? ............................................................................................................................................................................ 7
8. How do schools protect the privacy rights of all students in restrooms or locker rooms? ................................................................................................................................................................................................. 7
9. How do schools ensure transgender students have the opportunity to participate in physical education and athletics consistent with their gender identity? ................................................................................................................................ 8
10. How do schools treat transgender students when they participate in field trips and athletic trips that require overnight accommodations? ........................................................................................................................................... 9

## Additional Practices to Support Transgender Students

11. What can schools do to make transgender students comfortable in the classroom? ....................... 10
12. How do school dress codes apply to transgender students? ............................................................. 10
13. How do schools address bullying and harassment of transgender students? .................................. 11
14. How do school psychologists, school counselors, school nurses, and school social workers support transgender students? ....................................................................................................................................... 11
15. How do schools foster respect for transgender students among members of the broader school community? ........................................................................................................................................................................ 12
16. What topics do schools address when training staff on issues related to transgender students? .............................................................................................................................................................................. 12
17. How do schools respond to complaints about the way transgender students are treated? .................................................................................................................................................................................. 13
Terminology ........................................................................................................................ 14

18. What terms are defined in current school policies on transgender students? .......... 14
19. How do schools account for individual preferences and the diverse ways that students describe and express their gender?................................................................. 15

Cited Policies on Transgender Students........................................................................... 16

Select Federal Resources on Transgender Students ............................................................ 18
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’aafafine (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


- Boulder Valley School District (CO), Guidelines Regarding the Support of Students and Staff Who Are Transgender and/or Gender Nonconforming (2016), [document link](http://www.bvsd.org/policies/Policies/AC-E3.pdf)


- Chicago Public Schools (IL), *Guidelines Regarding the Support of Transgender and Gender Nonconforming Students* (2016), [document link](cps.edu/SiteCollectionDocuments/TL_TransGenderNonconformingStudents_Guidelines.pdf)


- Kansas City 33 School District (MO), *Prohibition Against Discrimination, Harassment and Retaliation (Transgender and Gender Nonconforming Employee and Students)* (2013), [document link](eboard.eboardsolutions.com/ePolicy/policy.aspx?PC=AC-AP(1)&Sch=228&S=228&RevNo=1.01&C=A&Z=R)


• 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


• Washoe County School District (NV), *Gender Identity and Gender Non-Conformity – Students* (2015), washoecountyschools.net/cgi/pdf_files/5161%20Reg%2020%20Gender%20Identity%20v1.pdf
Select Federal Resources on Transgender Students

- U.S. Department of Education
  - Office for Civil Rights, *Publications on Title IX*, [www.ed.gov/about/offices/list/ocr/publications.html#TitleIX](http://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](http://www.ed.gov/about/offices/list/ocr/docs/howto.html)
  - National Center on Safe Supportive Learning Environments, [safesupportivelearning.ed.gov](http://safesupportivelearning.ed.gov)

- U.S. Department of Health and Human Services
  - Centers for Disease Control and Prevention, *LGBT Youth Resources*, [www.cdc.gov/lgbthealth/youth-resources.htm](http://www.cdc.gov/lgbthealth/youth-resources.htm)

- U.S. Department of Housing and Urban Development
• U.S. Department of Labor
  
June 29, 2011

Richard L. Swanson, Ph.D.
Superintendent
Tehachapi Unified School District
400 South Snyder Avenue
Tehachapi, California 93561

(In reply, please refer to OCR Case No. 09-11-1031, DOJ Case No. DJ 169-11E-38)

Dear Dr. Swanson:

On October 28, 2010, the U.S. Department of Education, Office for Civil Rights (OCR), received a complaint against the Tehachapi Unified School District (District). The Complainant filed the complaint following the September 2010 suicide of her 13-year-old son (Student). The Complainant alleged that, prior to his death, the Student was subject to chronic sex-based harassment by his peers at Jacobsen Middle School (School) and that, despite having notice of the harassment, the District failed to respond to it appropriately. The Student was in the eighth grade at the time of his death.

The issues OCR investigated were whether the Student was subject to sexual and gender-based harassment, including harassment based on his nonconformity with gender stereotypes, and whether the District failed to provide a prompt and equitable response to the harassment as required by law. Following OCR’s investigation, the U.S. Department of Justice, Civil Rights Division (DOJ) joined OCR in the resolution of the complaint.

Based on the evidence gathered, OCR and DOJ (collectively, the “United States”) concluded that the District violated Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations and Title IV of the Civil Rights Act of 1964 (Title IV). Specifically, the United States found that the Student suffered sexual and gender-based harassment by his peers, including harassment based on his nonconformity with gender stereotypes; that the harassment was sufficiently severe, pervasive, and persistent to interfere with his educational opportunities; and that despite having notice of the harassment, the District did not adequately investigate or otherwise respond to it. The legal standards applicable in this case, the facts gathered during OCR’s investigation, and the basis for the United States’ legal conclusions are explained below.

1 DOJ further finds that the District’s failure to adequately investigate or otherwise respond to the harassment constitutes deliberate indifference.
Legal Standards

OCR investigated this case under its Title IX authority. DOJ and OCR share responsibility for enforcing Title IX. Title IX and its implementing regulations, 34 C.F.R. § 106.31, prohibit discrimination on the basis of sex in education programs and activities operated by recipients of Federal financial assistance. DOJ enforces Title IV, which prohibits discrimination in public schools against students based on sex, race, color, religion, and national origin. The District is a public school district that receives federal funds, and therefore is subject to the requirements of both Title IX and Title IV. In the context of OCR-initiated administrative enforcement actions and DOJ-initiated court actions for injunctive relief, OCR and DOJ interpret Title IX and Title IV as applying the same standard to allegations of sex-based harassment. Thus, in the context of this investigation, the United States applied the same legal standards under Title IX and Title IV to conduct its legal analysis and reach its findings.

Under Title IX and Title IV, school districts are responsible for providing students with a nondiscriminatory educational environment. Harassment of a student on the basis of sex can result in the denial or limitation of the student’s ability to participate in or receive education benefits, services, or opportunities. Title IX and Title IV prohibit both sexual harassment and gender-based harassment. Sexual harassment is unwelcome conduct of a sexual nature and can include verbal, nonverbal, or physical conduct. Gender-based harassment may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex stereotypes. Thus, sex-based discrimination includes harassment of a student either for exhibiting what is perceived as a stereotypical characteristic of the student’s sex, or for not conforming to stereotypical notions of masculinity and femininity. Title IX and Title IV prohibit sexual and gender-based harassment of all students, regardless of the actual or perceived sex, sexual orientation, or gender identity of the harasser or victim.

In determining whether a hostile environment based on sex has been created, the United States evaluates whether the conduct was sufficiently serious to deny or limit the student’s ability to participate in or benefit from the district’s education program. The United States examines all the relevant circumstances, including: the type of harassment (e.g., whether it was verbal or physical); the frequency and severity of the conduct; the age, sex, and relationship of the individuals involved; the setting and context in which the harassment occurred; whether other incidents have occurred at the school; and other relevant factors.

Under Title IX and its regulations, as well as under Title IV, once a school district has actual or constructive notice of possible sexual or gender-based harassment among students, it is responsible for determining what occurred and for responding appropriately. When a district fails to take adequate steps to address harassment, it is held liable under Title IX and Title IV for its own conduct. A school district may violate Title IX and Title IV if: (1) the harassing conduct is sufficiently serious to deny or limit the student’s ability to participate in or benefit from the educational program; (2) the district knew or reasonably should have known about the harassment; and (3) the
district fails to take appropriate responsive action. A district must take these steps regardless of whether the student who was harassed makes a complaint or otherwise asks the district to take action.

The United States evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases, the district must conduct a prompt, thorough, and impartial inquiry designed to reliably determine what occurred. If harassment is found, the district should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

Other actions may also be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, or other steps that are designed to clearly communicate the message that the district does not tolerate harassment and will be responsive to any reports of harassment by students, parents, employees, or others. The district also should take steps to prevent any retaliation against the student who made the complaint or any student who provided information regarding the complaint.

In addition, the Title IX regulations establish procedural requirements that are important for the prevention and correction of sex-based discrimination, including harassment. These requirements include issuance of a policy against sex discrimination (34 C.F.R. § 106.9) and adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints of sex discrimination (34 C.F.R. § 106.8[b]). The regulations also require that recipients designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance (34 C.F.R. § 106.8[a]).

**Factual Findings**

To investigate this case, OCR conducted extensive witness interviews, including of the Complainant and other members of the Student’s family, individuals identified as friends of the Student, parents of students who attend the School, and School site personnel, including administrators, counselors, school psychologists, security personnel, law enforcement officers, each of the Student’s seventh and eighth grade teachers, and other relevant staff. Also at the School site, OCR interviewed approximately 75 of the Student’s classmates. In addition, OCR reviewed extensive written documentation, including documentation provided by the Complainant and the District, reports of the Tehachapi Police Department and information included in the media coverage of the Student’s death. OCR’s investigation revealed the following findings.
**Harassment of the Student; District Conduct.** As described by family members, friends, and acquaintances alike, the Student was a kind-hearted, social boy with a gentle disposition; witnesses portrayed him as a friendly, intrinsically happy person who was caring and treated others with compassion. Many witnesses characterized him as somewhat effeminate, with occasionally exaggerated mannerisms and speech. He had a strong sense of style, and dressed in stereotypically female clothing and shoes, such as skinny jeans, pedal pushers, scarves, and fitted v-neck t-shirts; carried backpacks with designs not typically favored by middle school boys, such as Hello Kitty; and frequently changed the color and style of his hair. Throughout elementary and middle school, most of his friends were girls. Some of the witnesses interviewed by OCR stated that, beginning in sixth grade, the Student informed them that he was gay.

Among his peers, the Student’s personality, disposition, and physical presentation were concurrently admired and ridiculed. As described by one of the Student’s teachers, his attributes made him both an outcast and a leader. During the Student’s time in the District’s schools, he both made friends and had tormentors, and the harassment against him dated back to elementary school. According to the Complainant, when the Student was in fifth grade she first complained to the Student’s principal and teacher about his peers’ treatment of him, including calling him “gay,” “queer,” and “girl” as pejorative terms. The Student’s brother, who attended the Student’s elementary school that year, said that students teased the Student because his friends were girls and by saying that he acted like a girl.

The Student began attending the School in 2008-2009, when he entered the sixth grade. According to the Complainant, harassment of the Student intensified that year. As the Complainant described, the Student’s peers routinely called him names like those identified above, pushed him into lockers, and mocked him because his friends were predominantly girls.

The District’s Sexual Harassment Policy (BP 5145.7) and Regulation (AR 5145.7) were previously approved by OCR in connection with OCR’s resolution of a separate complaint against the District. The Regulation specifies that, upon receiving notice of possible sexual harassment, the designated administrator is to explain the Regulation to the Complainant, obtain all relevant information from the Complainant and investigate the allegations by, among other steps, interviewing the complaining student, the person accused, anyone who witnessed the harassment, and anyone mentioned as having relevant information. The administrator is then to determine whether harassment has occurred, create a written report of findings, take corrective action, inform the Complainant and student of how to report subsequent problems, and make follow-up inquiries to determine whether there have been new incidents or retaliation. Any employee who receives a report of or observes sexual harassment of a student is to report it to the designated administrator.

At the School, the Principal and Vice Principal are the individuals designated to investigate complaints of sexual, gender-based, and other types of harassment. The

---

Vice Principal\(^3\) told OCR that when the Student was in sixth grade, either the Student or one of his classmates reported to the Vice Principal that the Student was being harassed by his peers. The Vice Principal stated that when he asked the Student about the reported problems, the Student said that he did not want the Vice Principal to take any action because he was afraid of students retaliating against him. The Vice Principal did not take any further action.

At the end of the Student’s sixth grade year, the Complainant met with the Vice Principal to express concern about harassment she anticipated the next year, particularly in the physical education (P.E.) locker rooms. According to the Complainant, the Vice Principal indicated that he was aware of the problems the Student was experiencing and advised her to bring her concerns to him the next school year, but did not otherwise take any action. The Vice Principal told OCR that he remembered the Complainant expressing concerns about harassment in the locker room, but said he did not remember specifically what they discussed. He did recall that, around the same time, the Complainant conveyed that students needed to be more accepting of the Student. The Vice Principal responded to the Complainant that, in a perfect world, the Student would be treated equally, but that the students were at a difficult age and he could not change attitudes originating in the students’ homes.

The Complainant told OCR that the harassment the Student was experiencing became unbearable for him beginning in seventh grade. As described by the Student’s friends and classmates, throughout his attendance at the School, but particularly in seventh grade, his peers routinely called him hostile and demeaning names related to his nonconformity with gender stereotypes and sexual orientation, including “sissy,” “girl,” and vulgar references to female anatomy; insults meant to question his masculinity, including mocking his clothing as “girly,” asking him, “do you sit down” to use the restroom, suggesting he should “get surgery” to become a female, and referring to him as the “girlfriend” of other male students; and anti-gay slurs and epithets.

Students also relayed language of a hostile and demeaning sexual nature, including derogatory remarks related to sex between men and crude questions about sexual acts and behavior in which they suggested the Student had engaged. The Student also was reportedly teased for being attracted to another boy at school. One student recalled a male classmate asking the Student out on a date as a joke. Others said that students spread hostile and patently false sexual rumors about the Student.

Many students also described physical harassment of the Student. This included bumping the Student out of the way as he walked by; hitting items such as food out of his hands; obstructing his path as he tried to walk by; throwing food, water bottles, pencils, and erasers at him; shoving him; and subjecting him to unwanted physical conduct of a sexual nature. This physical conduct was often accompanied by verbal comments such as those cited above. For example, witnesses described students grabbing the Student from behind while suggesting that he would be sexually gratified.

\(^3\) The United States understands that a different person now holds the position of Vice Principal at the School, and that the former Vice Principal now holds another administrative position in the District.
by the contact. On one occasion, a student attempted to shove a pencil up the seat of the Student’s pants.

As described by his friends, the Student suffered this conduct on school grounds on a daily basis, typically during lunch period, breaks, passing periods, P.E. class, and after school. Multiple students said that harassment often occurred in an area behind the snack bar in the School’s cafeteria. Friends described the Student’s avoidance of certain areas of campus where harassment tended to occur, and one friend said that she and the Student would frequently roam the empty hallways during breaks, a time when other students were socializing, and take other measures to avoid harassment. Another friend said that the Student often went to the library during breaks for the same purpose. Students indicated that harassment of the Student was widespread and perpetrated by dozens of individuals, and that students belonging to certain campus cliques were particularly likely to engage in the conduct.

Students told OCR that the Student was also often demeaned and mocked by his peers even when he was not present. One student, as an example, said that a common way to describe something undesirable was, “that’s gay, but not as gay as [the Student].” One friend said that students sometimes approached her and mocked the Student by affecting exaggerated effeminate mannerisms and voices. Students expressed that the negative manner in which the Student was discussed and referred to by others, even when he was not present, had an adverse impact on his environment because it affected the way students treated him when he was present. Some witnesses described students not wanting to sit or be near the Student, and said that, although the Student had many friends, he was also shunned by many people. Two students described instances of former friends ceasing to associate with them because they were friends with the Student. Another student said that she was told not to communicate with the Student because he was “evil.”

Some of the most personally demeaning and hostile incidents, including incidents of physical harassment and assault, regularly occurred in the P.E. locker room. Students interviewed by OCR reported that when the Student was in the seventh and eighth grades, students often shouted insulting words about him in the locker room, including anti-gay slurs and comments suggesting that, because the Student was gay, he would try to engage in inappropriate sexual conduct with them. Students sometimes yelled out derogatory comments about the Student to the P.E. teacher. Members of the Student’s family reported similar conduct, as described to them by the Student. In addition, one family member said that a male peer had threatened to rape the Student. Witnesses also reported that classmates pulled down the Student’s pants in the locker room. Witnesses stated that, as a result, the Student would change his clothes in a corner, and sometimes in a bathroom stall, and at one point ceased to change into clothes for P.E. at all. During P.E. class, according to witnesses, male students did not want to partner with the Student. One female friend said that when she partnered with the Student, many classmates would call out insults to both of them.
The Complainant told OCR that toward the beginning of the Student’s seventh grade year, she called the Principal, who was new to the School that year, and threatened to press criminal charges against the students involved if the harassment did not stop. The Student’s grandmother, who was then a school board member, told OCR that the first time she met the Principal she mentioned that the Student was being harassed. The Principal did not have records of either of these conversations, and did not remember them.

Beginning the first week of November 2009, at the Complainant’s request, the Student was placed on independent study; according to the Complainant, this was in direct response to the harassment. The Student’s friends also told OCR that the independent study placement was meant for the Student to escape the harassment. The Principal told OCR that she did not recall the reason for the Student’s change in placement. The Vice Principal, however, stated that the Complainant told him that it was because of peer harassment. He stated that he asked her at that time whether she wanted to make a report and provide him with names of students involved, but she declined.

According to the Complainant, while she was on campus with the Student to pick up his belongings after he entered the independent study program, she heard another student yell “queer” at the Student from inside a classroom. She personally escorted the student to the office and reported the incident. According to the Vice Principal, he gave the offending student lunch detention. The Vice Principal stated that, during his conversation with the Complainant about this incident, the Complainant suggested that the Vice Principal take steps to increase tolerance among the students. In response, the Vice Principal wrote an article that was included in the School’s November 19, 2009 parent newsletter. The article reads, in part:

The student body is not only diversified by gender, race, and ethnicity, but also by dress style, hair style, likes, dislikes, maturity, and ambition. Some are tolerant of this diversity, others are not...A few make life miserable for those that appear different than “normal” even though these students don’t bother them. The only thing they’ve done is wear their bleached hair in a style covering half their face with black fingernail polish on, along with clothes that don’t match and shoes that should’ve been discarded long ago. Please discuss with your child that while they may find some students different and “odd”, everyone deserves the right to receive an education without being harassed or bullied because of their hairstyle or fashion sense or their mannerisms or their weight or their...you get the picture. While we aren't going to hold hands in a giant circle and sing “Kumbaya” we do need to respect each other and even celebrate our uniqueness.

On January 27, 2010, after several weeks of independent study, the Student returned to the School. The Complainant and the Student’s friends told OCR that he returned because he was lonely and missed socializing with peers. The following day, the Complainant called the Principal to report problems the Student was experiencing with
other students. The Principal’s handwritten notes from her conversation with the Complainant read, “[Student] is homosexual – mom took out of school – is being harassed daily.” Following this call, the Principal immediately met with the Student in her office. Her notes from this conversation indicate that students had made harassing comments toward the student that included both an anti-gay slur and sexually suggestive language. In response to this information, the Principal took written statements from a witness identified by the Student and from the accused student, both of whom confirmed the incident. According to the offending student’s discipline record, he was advised that his behavior was a “very serious hate crime [that] will not be tolerated” and was suspended for three days. The offending student’s written statement indicates that he made the comment to the Student at the urging of another student. His discipline record indicates that he made the comment in front of several students. The Principal told OCR that she did not speak to the other student who was implicated or the students who heard the comment. The Vice Principal explained that there was no reason to do so because they had already confirmed the statement. Neither administrator took any further steps regarding this incident.

The Principal’s notes from her meeting with the Student also indicate the Student told her, “[a] lot of 8th grade boys” were involved in the harassment, and that she “[g]ave [the Student] the picture book to ID students.” Two student names are written beneath this entry. The entry indicates the Student stated, “A lot of them shout at me when I walk by but I can’t identify them. One kid with curly hair that pushed me.” The Principal stated that she spoke to the two specific students identified by the Student, but that those students denied the conduct. She also asked the Student to identify his harassers by pictures in the School yearbook, but the Student was unable to do so. Because the Student could not identify any of the other students involved or name any other witnesses, she did not take any further action in response to the Student’s report. The Principal also told OCR that unless a student reports back to her that a problem is ongoing, she assumes it has been resolved, and that the Student did not indicate to her that the problems had continued.

One of the Student’s friends told OCR that on two occasions during the Student’s seventh grade year, she escorted the Student to the main office to seek help from a counselor in dealing with the harassment. She said that the Student talked with the Vice Principal on both occasions, although she was not allowed to participate in the meetings and therefore was not sure what was discussed. The counselors told OCR that the Student never reported any problems to them. The Vice Principal also said that the Student never directly reported any incidents to him; however, he said that the Complainant called him two or three times and met with him in his office once to report incidents. These contacts occurred during the Student’s seventh grade year, including while the Student was on independent study. The Vice Principal said that the Complainant expressed frustration that the Student was still being harassed by students at the School. The Vice Principal said that he was unable to respond to the Complainant’s reports because she did not provide the names of the students involved and because, rather than the Student reporting incidents as they were occurring, the Complainant was complaining about them “after the fact.”
The Complainant told OCR that the Student’s P.E. teacher called her during his seventh grade year to report that the Student was not changing his clothes for P.E. class, and that she explained to the teacher that the Student was not changing his clothes due to harassment in the locker room. According to the P.E. teacher, the Complainant expressed frustration during this call that the School was not working with the Student. The P.E. teacher advised her co-teacher, who supervised the boys’ locker room, of the conversation; she believed that he looked into the complaint, monitored the locker room, and did not find any problems. She did not take any further action. The P.E. co-teacher told OCR that he had no recollection of the reported conversation with the other P.E. teacher, was not aware of the Student having any problems in the locker room, and never inquired into the matter. Some students who witnessed harassment of the Student in the locker room speculated that the P.E. teacher did not know about the conduct because he stayed in his office with the door closed. Other student witnesses stated that the P.E. teacher alternately told the harassers to stop or simply ignored the harassment.

The School employs four security officers who are responsible for patrolling the campus, ensuring that it is secure, assisting students, and referring them to the office as necessary. The School is divided into zones, and security personnel rotate between the zones. In addition, the Principal said that she and the Vice Principal often monitor common spaces during passing periods and at lunchtime. Every three weeks, the teachers rotate onto yard/hall supervision duty; otherwise, they typically only interact with students in the classroom. With the exception of one security officer, every School employee interviewed by OCR said that she or he had never personally seen the Student experiencing problems with peers.

Many student witnesses said that they did not think adults at the School were aware of the harassment of the Student. Other students, however, said that the conduct was so prevalent and obvious that adults must have known, and close friends of the Student said that they were certain that some adults at the School witnessed it. Several students specifically stated that the security officers heard comments and saw physical conduct directed at the Student, but ignored it. One student stated that he had seen the Vice Principal turn away without responding after hearing a student call the Student an anti-gay slur. Another student told OCR that he had seen an adult intervene when the Student and a male friend were pushed down to the floor because they were holding hands. A third student said that a teacher had given a detention for conduct aimed at the Student in sixth grade. The District did not provide records of any of these incidents. Some students speculated that adults did not intervene on the Student’s behalf because they themselves disapproved of the Student and privately agreed with things that students said about him.

One security officer said that he did not patrol the area in which the Student and his friends usually congregated, but was nonetheless aware that certain students “picked on” the Student. He said that, in one instance, the Student told him about an incident and he responded by taking the student alleged to have perpetrated the incident to the

---

4 According to the Principal, security and monitoring was increased after the Student’s death.
office for administrators to handle. He did not remember the details of the incident, and the District did not provide a record of it. The student taken to the office by the security guard was the same student who was disciplined for making a sexual comment to the Student the day he returned from independent study. The security officer also said that he could tell from the Student’s body language that he was uncomfortable around certain other students.

Another security officer told OCR that she learned of negative comments made by students to and about the Student, but that when she asked the Student about it, he did not seem concerned. She said that she never personally witnessed any harassment and regularly asked the Student how he was doing. A third security officer told OCR that she was never aware of the Student having any problems and that the Student never reported any to her, yet said that she nonetheless regularly checked in with him and told him to let her know if anyone gave him a “hard time.”

The Student’s teachers told OCR that they were completely unaware of the harassment, and students generally indicated that the conduct did not occur in the classrooms. However, student witnesses identified three particular classes in which they believed the Student was regularly taunted by his peers; in each instance, the students said they did not know whether the classroom teacher was aware of the conduct. Witnesses said that, in one of these classes, some of the Student’s classmates “despised him” and made vulgar comments to him. One student recalled a teacher giving a student lunch detention for calling the Student an anti-gay slur in the classroom; however, none of the teachers reported this to OCR.

Many students perceived that the Student was liked by his teachers. However, one of the Student’s friends said that the Student had told her that he did not think he was accepted by his teachers, and that they seemed suspicious of him. She also said that one of the Student’s teachers would mock him in class by, for example, pointing to a picture of something ugly and suggesting it resembled the Student. Another friend said that, although teachers did not overtly mistreat the Student, they also did not “engage” with him the way they did with other students. One student reported a conversation between a classmate and a teacher during which the teacher made fun of gay people and mentioned the Student by name. The Complainant said that the Student told her that one of his teachers made negative comments directly to him; for example, when the Student raised his hand and said he needed help, the teacher responded, “That’s right, you do need help.”

The Student’s transcript shows that, during his sixth grade year, he passed all of his classes and achieved grades of A and B in several of them; he finished the year with a GPA of 2.95. By the end of his seventh grade year, his GPA had dropped to 1.47; in the last quarter, he received a D grade in two courses and an F grade in three. On February 5, 2010, the School sent the Complainant a notice that the Student was in danger of not being promoted to eighth grade. The harassment continued for the remainder of the Student’s seventh grade year.
The Complainant told OCR that the Student was miserable during the first two weeks of his eighth grade year. On September 1, 2010, she met with the Principal to request that the Student again be placed on independent study. According to the Complainant, the Principal indicated to her that she was aware of the reason for the request. Under the “rationale for placement” section on the Student’s Independent Study placement form, on file with the District, the Complainant wrote “sexual orientation ridicule.” The Principal stated she did not see the Complainant’s notation at the time she approved the Independent Study. However, she told OCR that she nonetheless understood peer harassment to be the reason for the placement. The Vice Principal also said that he was aware that this was the basis for the request.

According to both the Complainant and the Principal, the Principal approved the placement without suggesting any alternative means of addressing the environment for the Student at school. Neither the Principal nor the Vice Principal took any steps following the meeting to investigate or respond to the harassment. According to the Vice Principal, although the Principal told him the Student was being placed on Independent Study because the Student was being harassed, and the Vice Principal did not doubt that the harassment was happening, additional investigation was not needed because the Student was no longer attending the School.

The Student’s teachers told OCR that they were not informed of the reason for the Student’s placement on independent study in either the 2009-2010 school year or the 2010-2011 school year. They said that School administrators never asked them whether they had witnessed the Student having problems, nor did any administrator ever suggest that the teachers be vigilant about possible harassment or take any other measures on the Student’s behalf.

Many student witnesses told OCR that they assumed the Student had left school because of the harassment. Students told OCR that the Student generally responded to harassment by trying to ignore it and pretending that it did not bother him. However, according to his friends, the conduct actually impacted him profoundly. Some students said that, despite trying to hide it, the Student seemed lonely and sad. One friend described the Student crying at and after school. Another said that, although the Student did not want people to know, the conduct, “hurt his feelings. It hurt his heart.” One friend said that, during the first month of his eighth-grade year, the Student told her that he did not want to live in Tehachapi anymore because nothing ever got better. An undated note written by the Student reads, in part, “I want to live elsewhere…I feel like utter failure. School, I’m terrified to go to. I was going to leave…but I don’t have money, food, or support. So, I’m staying here.”

On September 19, 2010, shortly after the Student began independent study the second time, he and a female friend had an encounter at the local park with a student from the School and three students from the District’s high school. According to police records from the incident, the Student was threatened, taunted, followed, and physically assaulted. That afternoon, the Student hanged himself from a tree in his backyard. He
was discovered and cut down by his mother and his younger brother. After being in a coma for over a week, the Student died on September 27, 2010.

Prior to hanging himself, the Student wrote a letter to his mother and siblings. The letter reads, in total:

I love you. Thank you for having me. It’s been a pleasure. I know this will bring much pain. But I will hopefully be in a better place than this s**t hole. Please, put my body in burial and visit my used body. And make sure to make the school feel like s**t for bringing you this sorrow. This life was a pleasure, mostly having you guys to bring me through the pain. Hopefully I become the universe.

District Policies and Procedures; Measures to Prevent Harassment. The District’s Sexual Harassment Policy states that the District must “ensure that all district students receive age-appropriate instruction and information on sexual harassment.” The Sexual Harassment Regulation requires the District to take actions to reinforce the Policy, which may include training for students, staff, and parents about how to recognize and respond to harassment. In addition, the Regulation requires that the District provide copies of the Policy and Regulation to parents, students, and employees on an annual basis, and display them at school sites.

The District also has a Board Policy on Hate-Motivated Behavior (BP 5145.9). This Policy prohibits discriminatory behavior or statements that degrade an individual on the basis of his or her actual or perceived sex or sexual orientation, among other things. The Policy specifies that the District will “provide age-appropriate instruction to help promote an understanding of and respect for human rights, diversity and tolerance in a multicultural society and to provide strategies to manage conflicts constructively” and ensure that staff receive “training on recognizing hate-motivated behavior and on strategies to help respond appropriately to such behavior.” It requires that complaints of hate-motivated behavior be handled pursuant to the procedures described in the District Sexual Harassment Regulation.

School administrators have quarterly “discipline talks” with students that touch on a variety of prohibited behaviors, including sexual harassment. Otherwise, witnesses indicated that the School has not had meaningful discussions with or provided instruction to students about sex-based harassment or hate-motivated behavior, either before or after the Student’s death. School staff and administrators also told OCR that they have not received copies of or received any training on the Sexual Harassment Policy and Regulation, or training on how to recognize or respond to student sex-based harassment or hate-motivated behavior. In 2009, District administrators received sexual harassment training from the District’s legal counsel as mandated by OCR in connection with the resolution of a previous complaint; however, the Principal told OCR that the training related primarily to employment. The School Handbook states that harassment is prohibited and specifically defines sexual harassment. It also indicates that “hate
violence” includes harassment of an individual based on, among other things, gender or sexual orientation.

The District has taken the following steps in response to the Student’s death. Following the Student’s suicide, the District made psychologists and mental health counselors available to students at the School. At the Principal’s request, the District permitted the Principal to attend a multi-day Olweus Bullying Prevention Program training which, according to the Principal, was general in nature and did not address sex-based harassment specifically. The Principal told OCR that she intends to implement that program at the School. Also, the School published an article about cyberbullying written by the Vice Principal in the October 2010 Parent Newsletter. It encouraged parents to contact the school if they believe their child is being bullied. In the same newsletter, the Principal recited steps the District was taking to prevent bullying. Additionally, the School posted anti-bullying posters on campus.

The District also posted a statement on its website in response to the Student’s death. The statement was incorrect in certain respects. Specifically, it incorrectly suggested that the Student only briefly attended the School during his seventh-grade year; that the Student had an erratic pattern of transferring in and out of the School; that, as a result of this purportedly erratic attendance, School staff did not know the Student well; and that School personnel were unaware of the harassment. The statement failed to acknowledge that the main reason the Student was placed on independent study was to avoid the harassment he was experiencing at school.

Students told OCR that since the Student’s death, there has been less bullying generally on campus and increased awareness among students of the impact of such conduct; they attributed this increased awareness among students to the Student’s death and to students’ fear of consequences from law enforcement. Many students said that they did not believe the steps taken by the School were effective, that they did not feel comfortable reporting any form of bullying or harassment to the School's administrators, and that they believed other students would retaliate against them if they did so. Some students also told OCR that they were aware that the Complainant had complained to administrators about harassment of the Student, but were not aware of any responsive action taken by the District.

A review of incident statements from the 2009-2010 school year shows that taunting of students based on gender stereotypes is common, and that much of the taunting involves the use of anti-gay slurs.

**Analysis**

*Hostile Environment.* A hostile environment based on sex exists when a student is subject to sex-based harassment that is sufficiently serious to deny or limit the student’s ability to participate in or benefit from his or her educational program. In determining whether a hostile environment exists, the United States examines all relevant circumstances and factors, including the type, frequency, and severity of the harassing
cond; the age, sex, and relationship of the parties; the setting and context in which
the harassment occurred; and whether other incidents have occurred at the school.

The Student’s peers—including his friends, acquaintances, and other students with
whom he had no personal relationship—described continuous and severe verbal and
physical harassment perpetrated against the Student by a large number of his peers on
a daily basis, over a period of years. The harassment suffered by the Student occurred
throughout the school day in numerous, unavoidable locations, and was both
threatening and publicly humiliating. The physical harassment included students
pushing the Student, knocking objects out of the Student’s hands, throwing objects at
the Student, and engaging in more explicitly physically threatening sexual conduct. The
physical harassment was typically accompanied by verbal harassment.

The content of the verbal harassment that the Student suffered suggests that it
stemmed, in part, from the perception among his peers that he was gay. Title IX and
Title IV do not specifically prohibit discrimination based on sexual orientation. However,
lesbian, gay, bisexual, and transgender (LGBT) students, and other students who are
subjected to harassment on the basis of their actual or perceived sexual orientation or
gender identity, may also be subjected to sex discrimination prohibited by Title IX and
Title IV, including sexual and gender-based harassment. Moreover, regardless of a
victim’s actual or perceived sexual orientation, any student who is subjected to
harassment that is sexual and physical in nature is protected when that harassment is
based on the student’s gender. Thus, the fact that harassment of the Student was
partly based on his sexual orientation does not relieve the District of its obligation under
Title IX and Title IV to investigate and remedy overlapping sexual and gender-based
harassment. On the contrary, even where harassment of which a district has or should
have notice appears, at first blush, to be based on sexual orientation (including, for
example, the use of anti-gay slurs and epithets), the district is not relieved of its
obligation to inquire further to determine whether the conduct at issue includes sex-
based harassment arising from, among other things, the student’s nonconformity with
gender stereotypes.

In this case, much of the verbal harassment suffered by the Student was sexual in
nature. It included comments and questions to the Student suggesting that he was
engaging in sex and disparaging the manner in which he was presumed to do so;
insinuations that the Student was a sexual threat to other students in the locker room;
mocking invitations to the Student to engage in sexual acts or go out on dates;
suggestions that the Student would be sexually gratified by accompanying physical
sexual harassment that was occurring; the spreading of sexual rumors about the
Student; and name-calling of a sexual nature.

Most of the other verbal harassment was gender-based, motivated by the Student’s
failure to act as some of his peers believed a boy should act, including his style of
dress, mannerisms, voice, and manner of speech; lack of interest in activities that are
stereotypically male; prevalence of female friends; and gentle manner. The ridicule
included suggestions, intended as insults, that the Student was or wanted to be a girl,
and that he dressed as and had the mannerisms of a girl; mockery because most of his friends were female; insinuations that the Student was the “girlfriend” of other male students; mimicking the Student in a manner suggesting he was effeminate; and prevalent name-calling using words that connote female gender.

The harassment also included the use of anti-gay slurs and other homophobic language. Such language is commonly used in our culture as a means of general derision. It is also often used more pointedly to disparage others specifically for their actual or perceived sexual orientation. Although such conduct is not, by itself, sufficient to establish prohibited harassment under Title IX or Title IV, the evidence in this case indicated that the use of such language stemmed, to a substantial degree, from gender-based animus related to the Student’s nonconformity with gender stereotypes. Specifically, students at the School routinely use homophobic epithets and related insinuations to ridicule those who do not conform to common gender expectations; incident reports show that male students in particular are called anti-gay slurs for conduct such as styling their hair a certain way, wearing makeup, and crying in public. Further, the Student’s peers began using anti-gay slurs to refer to him when he was quite young, before he openly self-identified as gay or they otherwise had a factual basis to know he was gay. This evidence establishes that the use of homophobic epithets in many instances stemmed from commonly held attitudes and perceptions about gender and masculinity from which also flowed the sexual and other gender-based conduct described above. To the extent that it did, such adverse conduct is within the scope of Title IX and Title IV.

These sexual and gender-based acts of verbal and physical aggression, intimidation, and hostility directed toward the Student—particularly in light of their cruel, relentless, and inescapable nature, in conjunction with the Student’s young and vulnerable age—were clearly sufficient to create a hostile environment that limited the Student’s ability to participate in and benefit from the school’s education program. Harassment fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning. This undermines the ability of students to participate in or benefit from their educational program.

In this case, the impact of the harassment significantly limited the Student’s educational opportunities. The Student took extensive steps while at school to try to avoid the harassment, including often spending breaks in isolated areas, such as the library and the hallways, rather than congregating with other students in social areas where the conduct was more likely to occur. The Student also reduced his participation in P.E. to avoid harassment in the locker room, even though his failure to participate could have impacted his grade and resulted in discipline. The Student’s grades deteriorated

---

5 Although such conduct is not covered by Title IX or Title IV, California state law specifically prohibits discrimination and harassment based on both gender and sexual orientation, as well as other categories. See Cal. Ed. Code §§ 200-234.3. While OCR and the DOJ do not enforce state laws, the District is obligated to comply with both federal and state laws.
significantly during the time he attended the School, and the Complainant attributed this decline to the harassment the Student experienced.

Most significantly, the Student was compelled to withdraw from School for a period of several weeks in seventh grade, opting instead for an independent study program. These measures denied the Student important opportunities and occasions to benefit from the educational opportunities afforded to his classmates, socialize with his peers, develop relationships with his teachers, and engage in the types of activities and interactions that are age-appropriate and healthy. The Student faced immediate harassment and ridicule upon his return to the School in eighth grade, such that he again chose this route rather than endure the torment of his peers at school, despite the loneliness and isolation that he experienced on independent study the previous school year. Although the Student is not alive to describe for himself his feelings about school, his written statement that he was terrified to attend the School, and the blame he cast on the School in his suicide note, are indicative of the impact of the harassment he experienced.

Notice of Harassment. Under Title IX and Title IV, districts must respond promptly and equitably to actual or constructive notice of sexual or gender-based harassment. In the context of OCR administrative enforcement actions and suits by the DOJ for injunctive relief under Title IX and Title IV, a school has notice if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment. A “responsible employee” includes any individual who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or who a student could reasonably believe has this authority or responsibility.

In this case, school administrators and employees generally claimed to be unaware of the harassment the Student experienced. However, as repeatedly described by students, the harassment was in plain sight, occurring in hallways and other common areas, P.E. classes, and during breaks, and was widespread and well-known to students and at least some staff. As stated above, a school has notice of, and thus a duty to respond to, harassment about which it reasonably should have known; that is, harassment about which it would have learned if it had exercised reasonable care or made a reasonably diligent inquiry. In the Student’s situation, the obvious nature of the harassment was sufficient to put School officials on notice that it was occurring.

In addition, even had the harassment not been open and obvious, School officials, including the two administrators specifically designated to respond to sexual and gender-based harassment complaints, received actual notice of the conduct via multiple reports made by the Complainant and the Student. These included reports to the Vice Principal by both the Complainant and the Student during the Student’s sixth-grade year and at various points during his seventh-grade year; reports to the Principal by the Complainant and the Student’s grandmother at the beginning of his seventh-grade year; reports to both the Principal and Vice Principal made at the time of, and stated as the basis for, the Student’s placement on independent study in both seventh and eighth
grade, as well as upon his return from independent study in seventh grade; visits by the Student to the main office on at least two occasions during his seventh-grade year, as reported by one of his classmates; the Complainant’s report to the P.E. teacher; and the direct observations of and discipline referral by a security officer. The District has a record of or acknowledges most, though not all, of these reports.

Response. Upon receiving notice of possible harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school’s investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

In light of the information provided to administrators by the Complainant and the Student and the information the School should have known had it exercised reasonable diligence, the School had a duty to investigate and respond to the harassment to which the Student was subjected. As required by law, the District has a sexual harassment complaint procedure that provides District schools with a mechanism for discovering harassment as early as possible and effectively correcting problems, and details the investigative and remedial steps administrators should take upon receiving notice of possible harassment. In 2009, pursuant to a previous finding by OCR that the District was not in compliance with Title IX, the District issued guidance to its school sites on how to implement the Sexual Harassment Regulation. Additionally, School administrators received training on the Sexual Harassment Policy and Regulation in August 2009, at the beginning of the Student’s seventh-grade year, and applied the Regulation to reports of harassment by female students during the 2009-2010 school year. Yet administrators did not utilize the Regulation to investigate and resolve the Student’s complaints, nor explain the Regulation and their rights under it to the Complainant and Student. Although the District was required to report to OCR all complaints of sexual harassment made during the 2009-2010 school year, it did not report any of the complaints made by the Complainant or Student. Most School employees interviewed by OCR seemed unaware of the Regulation’s existence.

While the School responded on two occasions to reports of harassment by the Complainant and Student by taking disciplinary action against the harassing students, those actions were inadequate to fulfill the School’s legal obligations. In response to the November 2009 incident, in which a student shouted a slur at the Student as he and the Complainant walked by a classroom, the Vice Principal gave the offending student a lunch detention and took no further action. When the Student complained of harassment immediately following his return to school from the first independent study placement, the Principal confirmed one of the incidents alleged by the Student and then suspended the offending student. The Student identified two other students who were harassing him but reported that many other students were involved whom he did not
know. When the two identified students denied the harassment, the School took no further action to resolve the Student’s complaint. In addition, the School did not attempt to locate the students the Student could not readily identify. After the Complainant’s report that she was withdrawing the Student a second time, the School did not investigate whether the harassment had in fact continued. The Vice Principal stated that while he knew the Student withdrew because of continued harassment, he did not conduct an investigation because the Student was no longer at the School.

The School’s response to these incidents did not appropriately identify the scope of the harassment or effectively remedy it. An adequate investigation into any of the Complainant’s and Student’s numerous complaints would have revealed the hostile environment to which the Student was subject. Although discipline was a necessary step in the instances described above, it was not a sufficient response in light of the reported nature and pervasiveness of the conduct. Additional steps to eliminate the hostile environment and to prevent further harassment in this instance would have included, for example, counseling the students who witnessed and reportedly instigated and encouraged the incidents to ensure that those students understood that the conduct was not acceptable and would not be tolerated, providing instruction to the classroom where the comments were made, and contacting the parents of the students to communicate the same message. It is notable that when the Complainant independently contacted the parents of one of the students involved, that student apologized to the Student and ceased the behavior, suggesting that such interventions by the School would indeed have been effective.

On each occasion that the Complainant spoke to administrators about placing the Student on independent study, the administrators merely agreed to the placement without taking steps to investigate whether harassment was occurring, to understand the extent of it, or to determine the toll that it was taking on the Student. Had they done so, they would have been in a position to understand what steps were needed to stop the harassment and repair the educational environment so that the Student could continue to attend school with his peers.

The District should also have taken steps to try to ensure that when the Student returned from independent study, he was not subjected to continued harassment. For example, the School could have used the Vice Principal’s letter in the parent newsletter to explain the types of conduct that constitute harassment, and strongly state that such conduct was unacceptable and would result in discipline. Instead, the letter, although intended to promote tolerance, likely identified the Student to the reader through specific and disparaging descriptors; contained elements that validated some students’ perceptions that the Student and other students like him were “odd” and not “normal,” and made light of the harassment the Student was experiencing. The statements in the newsletter were not only inappropriate, but may have emboldened students to persist in harassing and ostracizing students, such as the Student, who did not conform to gender stereotypes.
While the administrators’ ability to respond to the Student’s complaints may have been hampered by his inability to name all of the witnesses and alleged harassers, the School could have taken other steps to identify the parties involved. For example, administrators could have interviewed other students in the vicinity, security officers, and other potential witnesses, reviewed the School’s security cameras, or spoken to the Student’s friends and classmates to confirm the harassment the Student was experiencing. Administrators could also have alerted the Student’s teachers, the security staff, and other employees of the alleged harassment, so that they could keep a closer watch on the Student, more aggressively patrol areas where the harassment typically occurred, and respond to incidents. The School could also have conducted follow-up inquiries to see if the Student had experienced any new incidents of harassment or any instances of retaliation, responded promptly and appropriately to address any new problems, and made sure that the Student and the Complainant knew how to report subsequent problems. Steps such as these are required not only under the law, but also by the District’s own Sexual Harassment Regulation.

Other more comprehensive steps by the District were also necessary, given that the harassment was widespread and perpetrated by such a large number of students. Steps could have included providing instruction to the entire School community, including students, on civil rights and expectations of tolerance, specifically as they apply to sexual and gender-based harassment, and steps to clearly communicate the message that the school does not tolerate harassment and will be responsive to any information about such conduct. Instead, many students interviewed by OCR believed that School officials knowingly allowed the conduct to occur, and perceived this to mean that they did not object to the conduct and, in some students’ eyes, condoned it. When administrators should have been actively communicating to students the importance of treating the Student with respect and of intervening on his behalf when others did not do so, they instead engaged in passive, incomplete action or inaction, creating for some students the perception that the harassment was acceptable.

Finally, although the School environment clearly took a tremendous toll on the Student’s mental health and academic performance, the District did not take any steps to address the impact of the harassment on him, such as providing counseling or academic support services.

**Conclusion**

Based on the above facts and analysis, the United States concludes that the Student was subject to persistent, pervasive, and often severe sex-based harassment that resulted in a hostile educational environment of which the District had notice, and that the District failed to take steps sufficient to stop the harassment, to prevent its recurrence, or to eliminate the hostile environment. Although the District’s Sexual Harassment Policy and Regulation are consistent with the law with respect to sexual harassment, the District did not adhere to its own policy in addressing the multiple forms of notice it received with regard to the treatment of the Student.
In order to resolve the District’s identified noncompliance with Title IX and Title IV, the District voluntarily entered into the attached Resolution Agreement. The United States has determined that, when implemented, the Resolution Agreement will resolve the issues in this complaint. Therefore, the United States is closing this complaint as of the date of this letter. The United States will monitor the implementation of the enclosed Resolution Agreement and may reopen the investigation if the District does not comply with the Agreement. The United States is notifying the Complainant of the closure of this complaint concurrently.

This letter is a letter of findings issued by OCR to address an individual case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such. OCR’s formal policy statements are approved by a duly authorized OCR official and made available to the public.

Under the Freedom of Information Act, this document and related records may be released upon request or made public by OCR and/or DOJ. In the event that OCR and/or DOJ receives such a request or intends to make these documents public, the respective agency will seek to protect, to the extent provided by law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

The United States thanks you and your staff for your cooperation during this investigation. If you have any questions regarding this letter, please contact OCR staff attorneys Suzanne Taylor or Kendra Fox-Davis at (415) 486-5555 or DOJ trial attorneys Whitney M. Pellegrino or Joseph J. Wardenski at (202) 514-4092.

Sincerely,

/s/ Zachary Pelchat, Supervisory Attorney  
U.S. Department of Education  
Office for Civil Rights  
San Francisco Division

/s/ Anurima Bhargava, Chief  
U.S. Department of Justice  
Civil Rights Division  
Educational Opportunities Section
RESOLUTION AGREEMENT

Between the Tehachapi Unified School District,
the U.S. Department of Education, Office for Civil Rights, and
the U.S. Department of Justice, Civil Rights Division

OCR Case No. 09-11-1031
DOJ Case Number DJ 169-11E-38

BACKGROUND AND JURISDICTION

The U.S. Department of Education, Office for Civil Rights (“OCR”), has completed its investigation into a complaint (the “Complaint”) filed against the Tehachapi Unified School District (the “District”) alleging severe and pervasive peer-on-peer harassment of a student in the District (the “Student”). More specifically, OCR investigated whether the Student was subject to sexual and gender-based harassment by his peers while attending school at the Jacobsen Middle School (the “School”), and whether the District failed to take prompt and effective steps reasonably calculated to end the harassment, prevent the harassment from recurring, address the effects of the harassment, and eliminate any hostile environment resulting from the harassment. The U.S. Department of Justice, Civil Rights Division (“DOJ”) has joined OCR in the complaint resolution process.

The Complaint followed the Student’s suicide attempt on September 19, 2010, which led to his death on September 27, 2010.

Based on OCR’s investigation, OCR and DOJ (jointly referred to as the “United States”) have concluded that the District has violated the federal prohibitions against sex-based harassment under Title IX of the Education Amendments of 1972 (“Title IX”) and Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c, et seq. (“Title IV”).  

1 In addition to sexual and gender-based harassment, including harassment based on nonconformity with gender stereotypes, the conduct toward the Student included harassment based on his sexual orientation, which may constitute a violation of California state law prohibitions on discrimination and harassment based on gender, sexual orientation, and other categories. See Cal. Ed. Code §§ 200-234.3. While OCR and the DOJ do not enforce state laws, the District is obligated to comply with both federal and state laws.

2 Throughout this Agreement, the phrase “gender stereotypes” refers to stereotypical notions of masculinity and femininity.

3 Although the standard for administrative enforcement actions and injunctive relief under Title IX and Title IV requires that the harassment be severe, pervasive, or persistent, the United States found that the harassment of the Student satisfied all three standards.
The District disagrees with and disputes the United States’ findings and conclusions. Nonetheless, the Board of Trustees (“Board”) wishes to clearly communicate its commitment to ensuring an educational environment free from harassment, in which the individual civil and constitutional rights of each student are protected. The District therefore agrees that the District will research, develop, and implement policies, procedures, and practices designed to: (i) educate students and staff regarding the harmful effects such behavior may have on individuals; (ii) educate staff regarding the proper investigation and means of eliminating such harassment and its harmful effects; and (iii) monitor the educational climate at its schools in order to regularly assess and appropriately address the presence and effect of peer-on-peer harassment at the District’s schools.

To advance these goals, and to enable the District to reach compliance with its obligations under federal law, the United States and the Board voluntarily agree to resolve OCR Case No. 09-11-1031 and DOJ Case No. DJ 169-11E-38 pursuant to the Terms of the Agreement described below. Although the District enters into this Agreement voluntarily, it acknowledges that the Agreement is binding, and that the District will be bound by its terms so long as it is in effect, regardless of changes in the District’s administration, including of the Superintendent or Board.

**TERMS OF THE AGREEMENT**

In order to resolve the disputed violations, the District will take effective steps designed to prevent harassment in its education programs and activities including, and in particular, sexual and gender-based harassment; fully investigate conduct that may constitute harassment; appropriately respond to all conduct that may constitute harassment; and mitigate the effects of harassment, including by eliminating any hostile environment that may arise from or contribute to harassment. The District also will retain the Equity Alliance at Arizona State University or another third-party consultant mutually agreed upon by the parties (the “Equity Consultant”) to consult with the District in its efforts to comply with the terms of this Agreement as outlined below. In turn, OCR will not initiate enforcement action and DOJ will not initiate litigation regarding the Complaint provided that the District implements the provisions of this Agreement in good faith. As used in this Agreement, the term “sex-based harassment” includes both sexual harassment and gender-based harassment. The term “sexual harassment” means unwelcome conduct of a sexual nature. The term “gender-based harassment” means non-sexual harassment of a person because of the person’s sex and/or gender, including, but not limited to, harassment based on the person’s nonconformity with gender stereotypes. This Agreement will remain in force for at least five (5) school years, and will not terminate prior to the end of the 2015-2016 school year.

**I. REVISED POLICIES AND REGULATIONS**

A. On or before July 15, 2011, the District will submit proposed revisions to the United States of all of its policies, regulations, and internal guidance related to harassment in order to specifically address gender-based harassment, as well as sexual and other forms of prohibited harassment. The District policies and regulations to be revised include, but are not limited to: Board Policy 0410 (Nondiscrimination in District Programs and Activities); Board Policy 5145.3
1. Expand the scope of the Sexual Harassment Policy and Sexual Harassment Regulations so that, in addition to sexual harassment, they apply to gender-based harassment. This will entail, at a minimum:

   a. changing the title of the Sexual Harassment Policy to “Sexual Harassment and Gender-Based Harassment Policy”;

   b. changing the title of the Sexual Harassment Regulation to “Sexual Harassment and Gender-Based Harassment Regulation”;

   c. in the revised Sexual Harassment and Gender-Based Harassment Policy’s introductory paragraph, replacing the sentence reading, “The Board prohibits sexual harassment of students by other students, employees, or other persons, at school or at school-sponsored or school-related activities.” with, “The Board prohibits sexual harassment and gender-based harassment (collectively, “sex-based harassment”) of students by other students, employees, or other persons, at school or at school-sponsored or school-related activities.”, and replacing all subsequent references to “sexual harassment” with “sex-based harassment”;

   d. in the revised Sexual Harassment and Gender-Based Harassment Regulation, adding a section addressing gender-based harassment that will, similar to the existing language on sexual harassment, separately define and provide examples of gender-based harassment; and

   e. in the revised Sexual Harassment and Gender-Based Harassment Regulation, under the heading, School-Level Complaint Process/Grievance Process, replacing the sentence reading, “Any student who believes he/she has been subjected to sexual harassment or who has witnessed sexual harassment may file a complaint with any school employee.” with “Any student who believes he/she has been subjected to sexual harassment or gender-based harassment (collectively, “sex-based harassment”), or who has witnessed or has knowledge of such harassment, may file a

---

4 Except where specific policies, regulations, or other documents are identified by name, all references in this Agreement to the District’s “policies and regulations” refer to all documents identified in this paragraph and all other similar District documents that pertain to discrimination or harassment based on sex that will be revised subject to this Agreement.
complaint with any school employee.”, and replacing all subsequent references to sexual harassment with “sex-based harassment.”

2. Revise the Sexual Harassment and Gender-Based Harassment Regulation, under the heading Investigative Process, to ensure the adequate, reliable, and impartial investigation of complaints. The proposed revisions will include, at a minimum, requirements that:

   a. administrators refer complainants to law enforcement authorities where appropriate;

   b. the District follow the procedure regardless of whether the alleged harassment also is being investigated by another agency, including a law enforcement agency, unless particular procedural steps would directly impede a criminal investigation;

   c. the District utilize a preponderance of the evidence standard to evaluate sex-based harassment complaints (i.e., it is more likely than not that sex-based harassment occurred); and

   d. all persons involved in conducting investigations have training or experience in handling complaints of sex-based harassment and in the applicable District policies and complaint procedures.

3. Provide examples in both the revised Sexual Harassment and Gender-Based Harassment Policy and Regulation of types of corrective action that may be appropriate where sex-based harassment is found to have occurred, including the provision of counseling to students who have been subjected to or who have engaged in sex-based harassment;

4. Revise the District’s other policies and regulations to clarify that each covers all forms of sex-based harassment, including sexual harassment and gender-based harassment;

5. Revise the UCP to specify that sexual and gender-based harassment will be resolved pursuant to the revised Sexual Harassment and Gender-Based Harassment Regulation; and

6. Revise the Administrator Guidance to:

   a. be renamed “Administrator Guidance Regarding Discrimination and Harassment Based on Sex”;

   b. specify that the guidance applies to all forms of sex-based discrimination and harassment, specifically identifying gender-based harassment;
c. state the District’s responsibility to respond appropriately to any notice of possible sex-based harassment or discrimination, regardless of whether a formal complaint is filed; and

d. state that when a student experiences harassment or other discrimination based on both sex and sexual orientation, the District must respond appropriately under its policies and regulations.

B. If the United States chooses to provide comments on the District’s proposed revisions, it will do so no later than August 1, 2011. The District will incorporate the United States’ comments, unless there is disagreement, in which case the District and the United States will work together in good faith to resolve all disagreements. If the parties are unable to agree on the revisions by August 17, 2011, the United States may pursue relief under the enforcement provisions of ¶ VII.B. below.

C. Following the United States’ approval, or enforcement action if necessary, the District will adopt the revised policies, regulations, and internal guidance within fourteen (14) calendar days. It is the intent of the parties that the revised policies, regulations, and internal guidance be adopted no later than August 17, 2011.

D. No later than August 31, 2011, the District will notify all of its students, their parents and guardians, and employees of its revised policies, regulations, and internal guidance by:

1. providing written notice of the revised policies and regulations to all parents in the District by mail and by posting the revised policies and regulations on the District’s website;

2. providing written copies of its revised Administrator Guidance to all school- and District-level administrators;

3. providing the annual notifications required in the “Notifications” section of the revised Sexual Harassment Regulation; and

4. publishing the revised policies and regulations, the name and contact information of the school-level and District-level individuals responsible for receiving sex-based discrimination complaints (including the District’s Title IX Compliance Officer), and contact information for OCR and the DOJ, on the District website and each individual school’s website, and in each school’s student and employee handbooks.

E. Within forty-five (45) school days of the start of the 2011-2012 school year and following the trainings of District officials and employees listed in ¶¶ III.D.-F. below, and then annually thereafter, the District will host a parent and community meeting, at which District officials, including, but not limited to, the Superintendent, Title IX Compliance Officer, and school principals and vice
principals, will: (i) present an overview of and respond to questions about the District’s revised policies and regulations for sex-based harassment, including the steps the District is taking to train its employees and instruct its students on these policies and regulations; (ii) provide information regarding the age-appropriate instruction that will be provided to students pursuant to this Agreement; and (iii) provide information on additional District, local, state, federal, and non-governmental resources for students and parents concerning all forms of discrimination and harassment, including sex-based harassment, bullying, and suicide prevention.

F. Once the District adopts policies and regulations related to sex-based harassment pursuant to the terms above, the District will not substantively modify those policies and regulations during the period of the Agreement without the written approval of the United States. Such approval shall not be unreasonably withheld. All requests to modify such policies and regulations must be made in writing. The United States may reject proposed modifications that are not consistent with the terms of this Agreement or applicable federal civil rights laws.

II. IMPLEMENTATION OF POLICIES AND REGULATIONS

A. To ensure compliance with the District’s revised Sexual Harassment and Gender-Based Harassment Policy and Regulation, the District will develop to the satisfaction of the United States, and institute a District-wide system for District review of school-level investigations and resolutions of student and employee conduct that may constitute sex-based harassment, including sexual and gender-based harassment. That system will require, at minimum, that:

1. the District appoint a designated District-level official (the “Designated Official”), with appropriate training on the requirements of Title IX and expertise in investigating and responding to discrimination and harassment;

2. the Designated Official review all school-level incident reports to ensure that all alleged incidents that involved possible sex-based harassment were properly identified as such;

3. for each incident report, discipline referral, informal complaint, and formal complaint involving possible sex-based harassment, the Designated Official evaluate, within five (5) school days of receiving the report, referral, or complaint:

   a. the investigating official’s findings and the basis for those findings in supporting documentation, including, but not limited to the complaint, names of witnesses, interview notes, correspondence with the parents of the student subject to the harassment and offending student(s), discipline referral(s), and documentation of
any prior incidents of discrimination or harassment involving the student subject to the harassment or the offending student(s); and

b. whether the school or District’s response complied with the revised Sexual Harassment and Gender-Based Harassment Policy and Regulation, including the investigation, the notice provided to the complaining party, and the steps taken to stop the harassment, prevent further harassing incidents and acts of retaliation, remedy harm to the student subject to the harassment, and address educational environment and school climate issues related to or affected by the incident;

4. for each instance of sex-based harassment for which the Designated Official determines that the school or District did not follow the revised Sexual Harassment and Gender-Based Harassment Policy and Regulation, the Designated Official will:

a. promptly identify all areas where the school’s response did not comply with the revised Sexual Harassment and Gender-Based Harassment Policy and Regulation;

b. promptly inform the employee(s) who responded to the complaint of the manner in which the response did not comply with the Policy or Regulation, and provide guidance to help ensure that a proper response is provided in the future;

c. initiate timely steps to remedy the non-compliance with regard to the particular complaint; and

d. within seven (7) school days of receiving the report, referral, or complaint, contact the parents of the student subject to the harassment and offending student(s) to inform them of the Designated Official’s review of the complaint, provide them a copy of the revised Sexual Harassment and Gender-Based Harassment Policy and Regulation, and provide the timeline for resolution of the underlying complaint that does not exceed fourteen (14) school days from the date of parental contact; and

5. maintain documentation supporting compliance with this Agreement and report quarterly to the Superintendent on compliance with the Agreement.

B. For the term of this Agreement, the District also will take the corrective action described in ¶ II.A.4. where the United States determines that the District did not respond to incidents of sexual and gender-based harassment in a timely and effective manner.
III. TRAINING AND PROFESSIONAL DEVELOPMENT

A. The District will work with the Equity Consultant to provide mandatory trainings on harassment to all students and employees, which will occur annually for the term of this Agreement, as follows:

1. For all students in grades 6-12, and all District-level and school-based administrators, faculty, certified staff, and other staff who interact with students at any grade level, training on harassment, with an emphasis on sex-based harassment, including sexual and gender-based harassment. The purpose of the trainings is to ensure that all students and employees understand their rights and obligations under the District’s policies and regulations, as revised. Trainings for students and employees will take place separately.

2. For all students in grades K-5, the Equity Consultant will provide training designed to promote an inclusive and safe educational environment for all students, which will include, but is not limited to, anti-bullying training.

3. The District will work with the Equity Consultant to develop curricula for the trainings specified in ¶¶ III.A.1-2. above. The parties understand that the Board retains its authority under state law to adopt curriculum and materials. The District and/or the Equity Consultant will confer with the United States to ensure that the content of the trainings meets the requirements of this Agreement.

B. By July 15, 2011, the District will retain the Equity Consultant to develop and provide the student instruction, parent education, employee training, and educational climate assessments described in ¶ I.A., ¶¶ III.A. & C.-E., and ¶¶ IV.A.-B. below.

C. Starting with the 2011-2012 school year, and then annually thereafter for the term of this Agreement, the District, through consultation with the Equity Consultant, will provide age-appropriate instruction to all of its students as follows. Students in grades 6-12 will receive instruction on harassment, including sexual and gender-based harassment, including: (1) what types of conduct constitutes such harassment; (2) the negative impact that such harassment has on the educational environment; and (3) how students are expected to respond to such harassment that they experience or witness, or of which they otherwise know, including the reporting avenues available. The instruction will be designed to promote sensitivity to and tolerance of the diversity of the student body, and will specifically address harassment issues related to sex, gender, and nonconformity with gender stereotypes. Students in grades K-5 will receive instruction designed to promote an inclusive and safe educational environment for all students,
including on issues related to bullying. The parties understand that the Board retains its authority under state law to adopt curriculum and materials.5

D. Within thirty (30) school days of the start of the 2011-2012 school year, and then annually thereafter for the term of this Agreement, the District, through consultation with the Equity Consultant, will provide training(s) to its employees on the following topics:

1. in-depth instruction on what type of conduct constitutes sex-based harassment, specifically addressing examples of sexual and gender-based harassment, and a discussion about the negative impact that such harassment has on the educational environment;

2. in-depth discussion on the importance of sensitivity to and tolerance of the diversity of the student body, including, but not limited to, sex, gender, and nonconformity with gender stereotypes;

3. a facilitated discussion on the root causes of sex-based harassment, specifically addressing gender-based harassment, and the harms resulting from such conduct;

4. specific guidance and discussions of steps to take to foster a nondiscriminatory educational environment for students who do not conform to gender stereotypes;

5. a review of the revised policies and regulations; the District’s responsibility to respond to sexual and gender-based harassment; how students and employees are expected to respond to incidents of harassment that they experience, witness, or of which they otherwise have knowledge (including specific reporting procedures that are available); and how the school and District are required to respond when such an incident comes to their attention, including, but not limited to, remedial and disciplinary actions;

6. identification of designated staff at each school who are available to answer questions or concerns regarding the policies and regulations or other issues related to sexual and gender-based harassment;

7. clarification that failure by school officials to respond appropriately to sexual and gender-based harassment of which they knew or should have known violates District policy and federal law; and

5 California law provides individual parents/guardians certain rights related to the education of their children. No provision of this Agreement is intended to address such rights. While parents may exercise their rights under state law, the District remains obligated to comply with this Agreement and federal law.
8. clarification that under federal law, the District is required to take effective action to end harassment, prevent its recurrence, and as appropriate, remedy its effects.

E. In addition to the employee training described above, on or before August 17, 2011, the District will submit a proposed plan to the United States, developed in consultation with the Equity Consultant, to provide targeted training(s) for certain school-level employees whom the United States believes require additional training regarding their obligations under Title IX and District policies and regulations. The United States will inform the District of the individuals who require this training, based on the information revealed by OCR’s investigation. The Equity Consultant will conduct the targeted training within fifteen (15) school days of the start of the 2011-2012 school year. The identified employees will receive the targeted training in addition to any other training on discrimination and harassment provided by the District to its employees. The District’s superintendent, Title IX Compliance Officer, the Designated Official, and the principal of each school will also attend the targeted training session(s).

F. In addition to the employee trainings described above, OCR will provide trainings for school- and District-level administrators, the District’s Title IX Compliance Officer, the Designated Official, and all other employees responsible for receiving, investigating, or supervising investigations of complaints of sexual and gender-based harassment on how to identify, investigate and respond to such complaints. Prior to the OCR training, the District will designate a District-level official to attend the trainings who will be responsible for conducting similar trainings within the District on an annual basis thereafter. This training will be provided within thirty (30) school days of the start of the 2011-2012 school year.

G. The parties understand that the Equity Alliance at Arizona State University, if retained by the District to serve as the Equity Consultant, will provide the services specified in ¶¶ III.A.-E. and ¶¶ IV.A.-B. at no charge to the District or its personnel. Additionally, OCR will provide the services specified in ¶ III.F. at no charge to the District or its personnel. All services provided by the Equity Consultant and OCR in connection with ¶¶ III.A.-F. and ¶¶ IV.A.-B. will be provided at a Board-operated facility in Tehachapi at no cost to participants. The District will be responsible for providing facilities, utilities, payment of employee salaries, and any miscellaneous costs that may be associated with the required trainings. If the District selects a third-party consultant to serve as the Equity Consultant other than the Equity Alliance at Arizona State University, the District will be responsible for any costs associated with the retention of that consultant. In the event that, through no fault of the District, the Equity Alliance at Arizona State University becomes unable to provide the services specified in this Agreement, or becomes unable to provide the services at low or no cost, the United States will agree to a reasonable period of time to allow the District to secure a mutually-agreeable alternative consultant to provide the services specified in this Agreement.
IV. EDUCATIONAL CLIMATE

A. The District will consult with the Equity Consultant to develop one or more school climate surveys for all students in grades 6-12 and all staff to assess the presence and effect of harassment, including sex-based harassment, at each school in the District. The District may create separate, age-appropriate surveys for middle and high school students. The District will consult with the Equity Consultant to develop a separate, age-appropriate school climate survey for students in grades K-5 to assess the inclusiveness and safety of the elementary school environment for all students. Student surveys will be designed and administered consistent with the requirements of California Education Code § 51513. It is the intent of the parties that the student surveys will include no content that would result in the application of California Education Code § 51513. Surveys administered to teachers will be designed and administered consistent with the requirements of California Education Code § 49091.24.

1. The student and staff surveys will be administered in the month of October 2011, the month of April 2012, and annually thereafter in the month of April, and will allow for respondents to answer the survey anonymously.

2. The District will submit an analysis of the results of the survey prepared by the Equity Consultant to the United States within sixty (60) calendar days of the date the surveys are administered for each year this Agreement is in force. The analysis will include recommendations for the climate issues identified through the surveys.

3. Based on a review of the results of the climate surveys and the recommendations of the Equity Consultant, the District will work together in good faith with the Equity Consultant to agree on appropriate corrective actions by the District to address all climate issues related to harassment, including sex-based harassment, identified through the surveys and the Equity Consultant’s analysis. The District will implement the agreed upon actions and notify the United States of its actions.

B. In conjunction with the Equity Consultant’s assessment and analysis described in ¶ IV.A., the Equity Consultant will assess whether each school should designate a staffed “safe space” location that is available for all students. If the Equity Consultant recommends the creation of such a location, the District will:

1. ensure that the designated locations are supervised by teachers or staff who have been trained on the District’s revised policies and regulations and who have the necessary training and expertise to recognize and respond to all forms of discrimination and harassment, including sex-based harassment;

2. notify all parents, students, and employees at each respective school in writing, on the District’s website, and through prominently displayed
posters of the availability, location, and hours of operation of the designated location;

3. verify in a written statement to the United States that the designated locations have been created; the date and hours the locations it will be operational; the location and description of the space; the name and title of all employees who will staff the designated location; the date that each individual was trained on the District’s revised policies and regulations; and the manner in which notice of the staffed location was provided to students, parents, and employees; and

4. annually reevaluate, in consultation with the Equity Consultant, whether students use the designated locations and whether they are effective in improving the climate for students who have experienced and/or are concerned about harassment, including sex-based harassment.

C. Within thirty (30) school days of the start of the 2011-2012 school year, the District will form an Advisory Committee (“Committee”) that includes a District-level administrator, one administrator each from Jacobsen Middle School and Tehachapi High School, at least two students each from Jacobsen Middle School and Tehachapi High School, at least three parents of students who attend those schools, and other individuals that the District determines appropriate, such as representatives from relevant community-based organizations, to advise the District regarding how best to foster a positive educational climate free of sexual and gender-based harassment. The District will consider the recommendations of the Equity Consultant when determining the composition and functions of the Committee.

1. The District will designate an employee to coordinate the Committee’s meetings and work (“Committee Coordinator”).

2. The Committee will meet a minimum of two (2) times each semester.

3. The Committee will maintain documentation of the date and duration of each meeting and notes from the meeting.

4. The Committee Coordinator will prepare a written summary of the recommendations and suggestions of the Committee, including but not limited to:

   a. strategies for preventing harassment and ensuring that District students understand their right to be protected from discrimination, including sexual and gender-based harassment, and to be protected from retaliation for reporting alleged discrimination;

   b. strategies to ensure that students understand how to report possible violations of the policies, regulations, and internal guidance related to harassment, including sex-based harassment, and that students
are aware of the District’s obligation to promptly and effectively respond to complaints alleging harassment; and

c. specific suggestions for developing an effective student orientation program that promotes respect and tolerance for others and takes steps reasonably designed to prevent the creation of a hostile environment, with an emphasis on sex-based harassment, including what role students can play in the orientation program.

5. The Committee will recommend outreach strategies to families related to the District’s anti-harassment program.

D. At each school with locker room facilities, the District will designate employees to monitor the locker rooms during all changing times for physical education and after-school activities. The designated employees will be trained on sexual and gender-based harassment and the District’s policies and regulations.

E. The District will accommodate any student who, out of concern about harassment, wishes to change his or her clothes for physical education classes and after-school activities in an alternative private space or during an alternative changing time.

1. The District will provide the alternative changing space or time in a manner which protects the student’s confidentiality, minimizes stigmatization, and affords the student an equal opportunity to participate fully in physical education classes and athletic activities.

2. The District will provide parents and students with written notification of the availability of, and instructions on how to make a request for, these accommodations.

F. The District will develop a monitoring program to assess the effectiveness of its anti-harassment efforts. At the conclusion of each school year, the District will conduct an annual assessment of the effectiveness of its anti-harassment efforts. Such assessment will include:

1. Consultation with the Committee established pursuant to item ¶ IV.C. above;

2. Student and parent surveys (see ¶ IV.A above) and at least one public meeting (see ¶ I.E. above) each school year to identify student and parent concerns and to determine where and when sexual and gender-based harassment occurs;

3. A review of all reports of harassment and District responses (see ¶ II.A. above);
4. Evaluation and analysis of the data collected, including a disaggregated assessment of whether the reported incidents of harassment have increased or decreased in number and severity;

5. Evaluation of all measures designed to prevent or address sexual and gender-based harassment to ensure that they do not expose students to further harassment, unnecessarily restrict any student’s full access to all educational opportunities offered by the school, or result in disciplinary actions for any student who opts to utilize one or more of the accommodations provided to students concerned about harassment; and

6. Proposed recommendations for improvement of the District’s anti-harassment program and timelines for the implementation of the recommendations.

G. Based on the Letter of Finding issued by the United States, District policies and procedures, the terms of this Agreement, and any other relevant information in the District’s possession, the District, within sixty (60) calendar days of the execution of this Agreement, will conduct an investigation to determine whether any employee, including but not limited to the Principal and former Vice Principal of Jacobsen Middle School, and the teachers assigned to the Student’s Middle School Physical Education classes, should be subject to corrective action because those employees had notice of the harassment of the Student and failed to take timely and appropriate action. The District will notify the United States of its findings and actions.

V. CORRECTION OF PREVIOUSLY RELEASED INFORMATION

A. Within thirty (30) calendar days of the entry of this Agreement, the District will review for accuracy the information it has previously provided to parents and members of the school community, including information posted on its website, notices and newsletters sent to staff, parents, and community members, and other publicly available information released by the District, related to its investigation and resolution of all allegations of harassment against the Student, and will take appropriate action to correct any inaccurate information. The District will submit drafts of any written statements to the United States for its review and approval prior to releasing such statements publicly. Additionally, within thirty (30) days of the entry of this Agreement, the District will submit to the United States a draft statement for inclusion in Jacobsen Middle School’s Parent Newsletter designed to promote tolerance of diversity at school, specifically regarding sex and nonconformity with gender stereotypes.
VI. **REPORTING**

A. The District will provide the United States all documents and information identified in Sections I through V in accordance with the timelines set forth above. If the District, despite its good faith efforts, anticipates its inability to meet any timeline set forth in this Agreement, it will immediately notify the United States of the delay and the reason for it. The United States may provide a reasonable extension of the timeline at issue.

B. The District will provide documentation of its compliance with this Agreement through written compliance reports, which will be produced to the United States on December 1 and June 1 of each year this Agreement is in force. Each compliance report will cover the immediately preceding semester, and will include the following information and documents:

1. The date and duration of each training session required by this Agreement; copies of all agendas for such training sessions; and copies of the training materials distributed at student and employee trainings.

2. The name and position of the employees who attended each training; the name and position of employees who were required to attend a training, but did not; the number of students, by school and grade, who did not attend a training; and the rescheduled training date for those employees who did not attend a mandatory training. The District will provide additional verification of completed training for those individuals who received rescheduled training.

3. The date and duration of all targeted trainings provided pursuant to ¶ III.E.

4. For each individual who receives targeted training, a signed statement by the individual acknowledging that he or she has reviewed the District’s revised policies and regulations, has received the general employee training, has received the targeted individual training, and understands his or her obligations to respond to sexual and gender-based harassment under District policy and federal law.

5. Copies of all incident reports, discipline referrals, informal complaints, and formal complaints related to sexual and gender-based harassment and harassment based on sexual orientation, and all documentation related to such incidents (e.g., interview notes, correspondence with the parents of the student subject to the harassment and offending student(s), discipline referral(s), statements of findings and remedial action, and prior incidents of discrimination or harassment involving the student subject to the harassment or the offending student(s)).

6. Certification by the Designated Official that he or she has reviewed all incident reports, discipline referrals, informal complaints, and formal complaints related to bullying, discrimination, and harassment based on
sex, including nonconformity with sex stereotypes, and sexual orientation, and all documentation related to such incidents, to determine whether any incidents, allegations, or complaints were not properly identified, investigated, or resolved consistent with District policies and procedures.

7. Certification by the Designated Official that for each instance where the school or District did not follow the District’s policies and procedures when responding to an incident, allegation, or complaint related to bullying, discrimination, and harassment based on sex, including nonconformity with sex stereotypes, and sexual orientation, the Designated Official, at a minimum, took the following corrective action: (a) reviewed all documentation from the incident, (b) identified all areas where the school or District response did not comply with District policies and procedures, (c) initiated timely steps to remedy violations of District policies and procedures, and (d) contacted the parents of the student subject to the harassment and the offending student to inform them of the Designated Official’s involvement in the matter, the applicable policies and procedures, and the timeline for resolution of the underlying complaint.

8. Documentation supporting each element of the Designated Official’s certification of corrective action, described in ¶ VI.B.7. above.

VII. ENFORCEMENT

A. The United States may enforce the terms of this Agreement, Title IX, Title IV, and all other applicable federal laws.

B. If OCR or the DOJ determines that the District has failed to comply with the terms of this Agreement or has failed to comply in a timely manner with any requirement of this Agreement, one or both agencies will so notify the District in writing and will attempt to resolve the issue(s) in good faith with the District. If the United States is unable to reach a satisfactory resolution of the issue(s) within thirty (30) days of providing notice to the District, OCR may initiate administrative compliance proceedings6 and DOJ may initiate civil enforcement proceedings in federal court.

C. The District understands that the United States will monitor this Agreement until it determines that the District has fulfilled the terms of this Agreement and is in compliance with all applicable federal civil rights laws regarding the issues identified in the Letter of Findings in this case. This Agreement may not be terminated prior to July 1, 2016.

D. The District further understands that the United States retains the right to evaluate the District’s compliance with this Agreement, including the right to conduct site

---

6 OCR may initiate compliance proceedings under 34 C.F.R §§ 100.8-100.12 and 34 C.F.R Part 101.
visits, observe trainings, interview District staff and students (including ex parte communications with students and employees other than school and District administrators), and request such additional reports or data as are necessary for the United States to determine whether the District has fulfilled the terms of this Agreement and is in compliance with federal law.

E. By signing this Agreement, the District agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this Agreement.

VIII. MISCELLANEOUS

A. This Agreement is entered into and shall be construed and interpreted in accordance with the laws of the United States and the State of California.

B. This Agreement is for the purpose of resolving a disputed claim and is not, and shall not be construed as, an admission of liability, fault, or wrongdoing of any kind by the District.

C. It is the District’s intent that any actions of the District or its personnel taken to comply with this Agreement are subsequent remedial or precautionary measures, evidence of which is inadmissible to prove negligence or culpable conduct in connection with the events underlying this Complaint pursuant to California Evidence Code § 1151.

D. The parties will bear their own attorneys’ fees and costs in connection with the Complaint.

E. No earlier than July 1, 2016 and upon full compliance with the terms of this Agreement, any and all claims associated with the Complaint which the United States may have against the District, its predecessors, successors, boards, board members, employees, representatives, or agents will be resolved.
FOR THE UNITED STATES OF AMERICA:

For the U.S. Department of Education:

/s/

ARTHUR ZEIDMAN
Director, OCR San Francisco

Zachary Pelchat
Suzanne Taylor
Kendra Fox-Davis
Paul Grossman
U.S. Department of Education
Office for Civil Rights
50 Beale Street, Suite 7200
San Francisco, CA  94105
Tel: (415) 486-5555
Fax: (415) 486-5570
Arthur.Zeidman@ed.gov
Zachary.Pelchat@ed.gov
Suzanne.Taylor@ed.gov
Kendra.FoxDavis@ed.gov
Paul.D.Grossman@ed.gov

Date:______________________________

For the U.S. Department of Justice:

/s/

ANURIMA BHARGAVA
Chief, Educational Opportunities Section

Emily H. McCarthy
Whitney M. Pellegrino
Joseph J. Wardenski
U.S. Department of Justice
Civil Rights Division
Educational Opportunities Section
950 Pennsylvania Avenue, NW
Washington, DC  20530
Tel: (202) 514-4092
Fax: (202) 514-8337
Anurima.Bhargava@usdoj.gov
Emily.McCarthy@usdoj.gov
Whitney.Pellegrino@usdoj.gov
Joseph.Wardenski@usdoj.gov

Date:______________________________

FOR THE TEHACHAPI UNIFIED SCHOOL DISTRICT:

/s/

DR. RICHARD L. SWANSON
Superintendent
400 South Snyder
Tehachapi, CA  93561

Date:______________________________
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JANE DOE, et al.,

Plaintiffs,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor

v.

ANOKA-HENNEPIN SCHOOL
DISTRICT NO. 11, et al.,

Defendant.

and

E.R., by her next friend and parent,
Quana Hollie,

Plaintiff,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor

vs.

ANOKA-HENNEPIN SCHOOL
DISTRICT NO. 11, et al.,

Defendant.
CONSENT DECREE


WHEREAS, the U.S. Department of Justice and the U.S. Department of Education, through its Office for Civil Rights, (together, the “United States”), after receiving and investigating a complaint that the District failed to adequately address peer-on-peer harassment on the basis of sex, filed a Complaint-in-Intervention in this action against the District alleging discrimination on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title IV of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c–2000c-9 (“Title IV”), and Title IX;

WHEREAS, the District denies any violation of the Equal Protection Clause, Title IV, Title IX, or any other state or federal law and denies all liability for any alleged
statutory or regulatory violation, by the District or any of its employees, agents, or School Board members;

WHEREAS, the Student Plaintiffs, the Defendants, and the United States have conferred in good faith and have negotiated the terms of this Consent Decree to fully and finally settle the Title IV and Title IX claims raised by the United States and the equal protection and federal and state law claims raised by the Student Plaintiffs; and

WHEREAS, after reviewing the terms of this Consent Decree, the Court finds them to be fair, just, reasonable, and consistent with federal law, and the Student Plaintiffs, the Plaintiff-Intervenor United States, and the District agree that entry of this Consent Decree, without further litigation, is in the public interest;

ACCORDINGLY, THE COURT ORDERS, ADJUDGES, AND DECREES:

I. JURISDICTION AND VENUE


B. Venue in the District of Minnesota is proper pursuant to 28 U.S.C. § 1391(b).

II. DEFINITIONS

A. “Harassment” includes the use of derogatory language, intimidation, and threats; unwanted physical contact and/or physical violence, or the use of derogatory
language and images in graffiti, pictures or drawings, notes, e-mails, electronic postings and/or phone messages related to a person’s membership in a protected class.

B. “Sex-based harassment” includes both sexual harassment and gender-based harassment.

1. “Sexual harassment” means harassment (see supra Section II.A. at pp. 3-4) of a sexual nature.

2. “Gender-based harassment” means non-sexual harassment of a person because of the person’s sex, including harassment based upon gender identity and expression. Gender-based harassment includes, but is not limited to, harassment based on the person’s nonconformity with gender stereotypes, regardless of the actual or perceived sex, gender identity, or sexual orientation of the harasser or target of the harassment.

C. “Gender stereotypes” refers to stereotypical notions of masculinity and femininity or expectations of how boys or girls should act.

D. “Sexual orientation” means having or being perceived as having an emotional, physical or sexual attachment to another person without regard to the sex of that person; or having or being perceived as having an orientation for such attachment; or having or being perceived as having a self image or identity not traditionally associated with one’s biological maleness or femaleness. Minn. Stat. § 363A.03, subd.44.

E. “Sexual orientation-based harassment” means non-sexual harassment of a person because of the person’s actual or perceived sexual orientation or association with
or advocacy for a person or group (e.g., family members or friends) who are lesbian, gay, bisexual or transgender (“LGBT”).

F. The primary purpose of this Consent Decree is to address sex-based and sexual orientation-based harassment. Accordingly, for purposes of this Consent Decree, the use of the term “harassment” means sex-based harassment and sexual orientation-based harassment, as defined supra.

G. A “hostile environment” exists when harassment is sufficiently severe, persistent, or pervasive to interfere with or limit one or more students’ abilities to participate in or benefit from the educational program.

III. BACKGROUND

A. Student Plaintiffs are six current or former students of the District who filed complaints seeking injunctive and declaratory relief, nominal, compensatory, and punitive damages, and attorneys’ fees, expenses, and costs.

B. For purposes of this Consent Decree, “United States” refers to the United States Department of Justice (“DOJ”) and the United States Department of Education, through its Office for Civil Rights (“OCR”).

1. DOJ is the federal agency responsible for pursuing enforcement proceedings in federal courts for violations, or suspected violations, of Title IV. See Title IV. DOJ also enforces Title IX in federal courts either by intervention or as amicus curiae in private lawsuits, or upon referral from OCR. See 20 U.S.C. § 1682; Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980); 28 C.F.R. § 0.51 (1998).
2. OCR is the office within the Department of Education responsible for administratively enforcing Title IX, which prohibits discrimination on the basis of sex in any educational program or activity receiving federal financial assistance. See Title IX.

C. The District administers a system of one or more public schools and is responsible for the assignment of students to or within such system; therefore the District is subject to Title IV. The District is a recipient of federal financial assistance and is therefore also subject to Title IX and its implementing regulations, 34 C.F.R. § 106.31. The District is an educational institution and therefore subject to the MHRA.

D. Following its investigation of the complaint it received, the United States began settlement discussions with the District prior to the commencement of the Student Plaintiffs’ lawsuit. After Student Plaintiffs filed their lawsuit and pursuant to the Court’s request, the United States joined the settlement negotiations of the Student Plaintiffs and the District in an attempt to resolve the complaints and avoid protracted litigation. These negotiations resulted in the agreement of the parties as set forth in this Consent Decree.

IV. GENERAL REQUIREMENTS

A. The District shall take action, in accordance with the requirements of Title IV and Title IX, their implementing regulations, and OCR Guidance, to eliminate and prevent future instances of harassment in its education programs and activities. To accomplish this, the District agrees to make all necessary and appropriate revisions to its harassment policies; appropriately and immediately respond to and stop all conduct that
may constitute harassment; ensure it fully investigates reported conduct that may constitute harassment; escalate remedial efforts by instituting additional measures when students are harassed on a repeated basis; and mitigate the effects of harassment that occurs. The District shall also take proactive measures to address issues in the school climate that have arisen from or may arise from and/or contribute to a hostile environment.

B. No later than April 9, 2012, the District shall retain the Great Lakes Equity Center, an Equity Assistance Center based at Indiana University-Purdue University Indianapolis, or another qualified third-party consultant mutually agreed upon by the District and the United States, to consult with the District to study and determine what additional measures the District needs to take to effectively address, prevent, and respond to harassment at District schools and comply with the terms of this Consent Decree. The entity or individual retained shall be called the “Equity Consultant” throughout this Consent Decree. The District will be responsible for any costs associated with the retention of the Equity Consultant. The District shall give the Equity Consultant access to any and all data, documents, or information the Consultant deems necessary to fulfill his or her duties under this Consent Decree.¹

C. This Consent Decree shall remain in force for five (5) years from the date it is entered by the Court.

¹ The Equity Consultant’s access to personally identifiable information shall be in accordance with the regulations of the Federal Educational Rights and Privacy Act, 34 C.F.R. § 99.31(a)(1).
V. SPECIFIC REQUIREMENTS

A. Revisions to District Policies and Procedures

1. The District shall engage the Equity Consultant to review and recommend revisions as necessary to all of the District’s policies and procedures related to the issues identified in this Consent Decree, including, but not limited to, any policy that impacts harassment, to ensure that they specifically and appropriately address harassment pursuant to the Equal Protection Clause, Title IV, Title IX, and the MHRA.

2. For purposes of this Consent Decree, the policies and procedures encompassed by the preceding paragraph that the Equity Consultant shall review are referred to as “relevant policies and procedures” and shall include, but not be limited to: Bullying Prohibition Policy (Board Policy 514.0); Equal Educational Opportunity Policy (Board Policy 102.0); Harassment, Violence and Discrimination Policy (Board Policy 413.0) (“HVD Policy”); Harassment, Violence and Discrimination Reporting Form; and Language of Harassment procedures, attached as Exhibits A, B, C, D, and E, respectively.

3. In addition to the recommendations of the Equity Consultant, revisions to the District’s relevant policies and procedures shall also include:

   a. Adding all of the terms and definitions set forth in Section II of this Consent Decree, specifying that all harassment, including that based on nonconformity to gender stereotypes and/or gender identity and expression, is prohibited in the District;
b. Written guidance providing examples of the types of harassment prohibited by the District’s policies;

c. A requirement that District personnel investigate, address, and respond appropriately to every harassment incident, in accordance with the requirements of Title IV and Title IX, their implementing regulations, and OCR Guidance, whether reported (verbally or in writing) by the harassed student, a witness, a parent, or any other individual; observed by any District employee; or brought to the District’s attention by any other means;

d. Adding the contact information, including the physical address, phone number and email address, for the District’s Title IX Coordinator and Equity Coordinator (see infra Sections V.B. and V.C. at pp. 16, 21);

e. A protocol for (i) when an incident or series of incidents of harassment of a particular student or group of students rises to a level of severity or persistence requiring District staff to notify the parent(s)/guardian(s) of the harassed student(s), ensuring that the individual notifying parents/guardians of the harassment is sensitive to any personal concerns of the student in discussing the basis/bases of the harassment with the harassed student’s parent/guardian, and (ii) when an incident or series of incidents of harassment by a particular student or group of students rises to a level of severity or persistence requiring District staff to notify the parent/guardian of the harassing student(s);
f. A requirement that the District’s procedures involve tracking electronically all harassment incidents (including any written or verbal report, discipline referral, or complaint involving possible sex-based or sexual orientation-based harassment (“harassment incidents”) ) and that the tracking includes: relevant information related to the student harassed; the person reporting the harassment (if different than the student harassed); the alleged harasser; all known witnesses to the alleged incident(s); specific details on the date(s), time(s), nature, content, and location(s) of the harassment incident(s); the date the complaint or other report was made; the date the alleged harasser was interviewed; a brief summary of the investigating officials’ findings and the basis for those findings (consistent with the District’s current practice and subject to any recommendations of the Equity Consultant); and the District’s response to the incident; except that for incidents involving no identified student target(s), the District will develop a district-wide system for tracking the frequency of each incident, including, for example, taking a photo or otherwise recording the date and location of the incident in a matter that can then be sent for tracking and investigation purposes to the Title IX Coordinator and/or Equity Coordinator, as appropriate;

g. In order for the District to identify, address, and eliminate harassment, a requirement that, at a minimum, the District tracks all incidents of harassment that are directed at a particular student or students as well as written or graphic statements (e.g., graffiti) located or distributed before, during or after school hours on all school property, including the school bus, at school functions, or at school-
sponsored events held at other locations; and any off campus conduct that has a continuing effect on campus.

i. At the end of the 2012-2013 school year, the District and the Equity Consultant shall confer with the United States concerning whether the District should track additional types of incidents in the 2013-2014 school year and beyond.

ii. The District shall consider additional recommendations of the Equity Consultant, if any.

iii. The District, the Equity Consultant, and the United States will work together in good faith to resolve any disagreements. If the District and the United States are unable to resolve any disagreements in a reasonable period of time, either party may request that the Court mediate the dispute.

h. A requirement that any supporting written documentation related to any harassment incident be maintained for the duration of this Consent Decree, including but not limited to: any written report or complaint; interview notes; any written statements of the student(s) harassed and/or person(s) reporting the harassment; any records of correspondence with the parent(s) or guardian(s) of the student(s) harassed and the alleged harasser(s) or his or her parents or guardian(s) regarding the incident; and existing documentation of any prior incidents of discrimination or harassment involving the student(s) subject to harassment or the alleged harasser(s).

4. Procedures and Timeline for Revision and Implementation
a. No later than April 23, 2012, the Equity Consultant shall communicate to the District and to the United States his or her: (1) findings or conclusions regarding areas needing editing, clarification, or improvement in the relevant policies and procedures, and (2) recommendations for revisions to the relevant policies and procedures.

b. No later than May 15, 2012, the District shall submit to the United States for review and approval its proposed revisions to its relevant policies and procedures incorporating all of the Equity Consultant’s recommendations, or proposing alternative revisions and explaining how the District’s proposed alternative revisions are less burdensome, more feasible, or more appropriate and still address or remedy the Equity Consultant’s findings and conclusions.

c. Under the terms of this Consent Decree, the United States has authority to review and approve the District’s proposed revisions for compliance with Title IV and Title IX, their implementing regulations, OCR Guidance, this Consent Decree, and the underlying reasons for this Consent Decree. Such approval will not be unreasonably withheld, and the United States shall complete such review within thirty (30) calendar days of receipt of the proposed revisions. If, however, the District and the United States initially disagree regarding the proposed revisions, the District, the Equity Consultant, and the United States will work together in good faith to resolve any disagreements. If the District and the United States are unable to resolve any
disagreements in a reasonable period of time, either party may request that the Court mediate the dispute.

d. After the United States approves the proposed revised policies and procedures, the Board will review the proposed revised policies and procedures at its next scheduled meeting.

   i. If the Board receives the United States’ approval of the revised policies and procedures six (6) or more calendar days before its next scheduled meeting, it shall conduct a vote on whether to adopt the revisions within two (2) public meetings. If the Board receives the United States’ approval of the revised policies and procedures within five (5) calendar days of its next scheduled meeting, it shall conduct a vote on the revisions within three (3) public meetings.

   ii. If the Board modifies or rejects the proposed revised policies and procedures, the District shall resubmit a new proposal for revisions to the relevant policies and procedures to the United States.

   iii. Under the terms of this Consent Decree, the United States has authority to review and approve the District’s proposed revisions to its relevant policies and procedures for compliance with Title IV and Title IX, their implementing regulations, OCR Guidance, this Consent Decree, and the underlying reasons for this Consent Decree. Such approval will not be unreasonably withheld, and the United States shall complete such review within thirty (30) calendar days of receipt of the proposed revisions. The District, the Equity Consultant, and the United States will work together
in good faith to resolve any disagreements. If the District and the United States are unable to resolve any disagreements in a reasonable period of time, either party may request that this Court mediate the dispute.

e. The District will continue to distribute annually its student and employee handbooks, and such handbooks shall contain the revised relevant policies and procedures printed in full along with the title and contact information of the school-level and District-level individuals responsible for receiving and/or responding to harassment complaints, including the names and contact information for the Title IX Coordinator and Equity Coordinator. If the District has not yet identified or hired the school-level and District-level individuals responsible for receiving and/or responding to harassment complaints, Title IX Coordinator, or Equity Coordinator at the time it prints the annual student and employee handbooks, the handbooks shall provide full contact information, including an email address that the later-identified employee will access (e.g., titleix@anoka.k12.mn.us for the Title IX Coordinator).

f. The District’s website shall contain the revised relevant policies and procedures in full; the name and contact information of the school-level and District-level individuals responsible for receiving harassment complaints, including the Title IX Coordinator and Equity Coordinator; and a statement encouraging students to report incidents of harassment immediately.

g. The District shall make available a hyperlink to the revised Harassment, Violence and Discrimination Reporting Form (Exhibit E) on the District’s
website in a form-fillable PDF allowing direct electronic submission of the completed document to school and/or District officials, available in the languages represented in the District, and the District shall publicize the availability of this online form to all its students and their parents or guardians.

h. When the District revises any of the relevant policies or procedures during a school year pursuant to Section V.A.1-4 at pp. 8-15 of this Consent Decree, it shall disseminate notice of the revised policies and procedures to its students, parents and guardians, and employees and ensure all students, parents and guardians, and employees are able to access a full copy of the revised policies and procedures (e.g., by announcement on the District’s website, email distribution to parents/guardians and employees, distribution of a written notice to students to take home with information on where hard copies of the revised policies are available, posting on school bulletin boards, etc.) not to exceed thirty (30) days after board approval.

i. The District will work with the Equity Consultant to determine appropriate ways to explain and address questions or concerns regarding the revised policies and procedures from students, parents and guardians, and employees.

5. Once the District revises its relevant policies and procedures pursuant to the terms above, the District will not modify those policies and procedures, rescind any of the policies or procedures, or adopt any new policies or procedures that relate to, are relevant to, or affect harassment during the period of the Consent Decree without following the process set forth in Sections V.A.4.b-d. at pp. 12-15.
B. **Title IX Coordinator**

1. Under 34 C.F.R. § 106.8(a), the District, as a recipient of federal funding, is required to “designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities” under Title IX, “including any investigation of any complaint communicated to such recipient” alleging noncompliance or actions that would violate Title IX. The District must also “notify all its students and employees of the name, office address, and telephone number” of the Title IX Coordinator.

2. The District will hire or appoint a qualified person knowledgeable in all aspects of Title IX law (as applied to school districts) with experience conducting training on harassment or related civil rights issues and in carrying out the duties and responsibilities enumerated in Sections V.B.3 *infra* at pp. 17-18, to serve as Title IX Coordinator. This individual is vested with responsibility from the District to ensure proper implementation of the District’s sex-based harassment policies and procedures.

   a. If the District has already engaged its Equity Consultant, the Equity Consultant shall assist the District in hiring or appointing the Title IX Coordinator.

   b. Prior to making an offer of employment or an appointment of a Title IX Coordinator, no later than April 30, 2012, the District shall submit the name and resume or curriculum vitae of the individual it would like to hire or appoint as the Title IX Coordinator to the United States. Under the terms of this Consent Decree, the
United States has authority to review and approve the hiring or appointment of the individual the District selects for Title IX Coordinator for compliance with Title IV and Title IX, their implementing regulations, OCR Guidance, this Consent Decree, and the underlying reasons for this Consent Decree. Such approval shall not be unreasonably withheld.

i. No later than five (5) school days after the Court enters this Consent Decree, the District shall appoint an Interim Title IX Coordinator.

ii. The Interim Title IX Coordinator shall be responsible for the duties referenced in Section V.B.1 at p. 16 until the start date of the District’s permanent Title IX Coordinator.

c. Should the Title IX Coordinator, once hired or appointed, leave that position during the term of this Consent Decree, the District shall immediately notify the United States and shall work with the Equity Consultant to hire or appoint a replacement pursuant to the terms in Section V.B.2. at pp. 16-17.

3. The Title IX Coordinator’s duties shall include:

a. Ensuring the District complies with and carries out the requirements of and its obligations under Title IX;

b. Implementing District policies and procedures related to sex-based harassment and ensuring administrators, staff and students comply with those policies and procedures;
c. Monitoring all complaints of sex-based discrimination and harassment pursuant to Section V.B.4., *infra* at pp. 18-20;

d. Identifying trends or common areas of concern related to Title IX compliance and assisting schools in addressing such issues;

e. Coordinating between and among school and District staff, students, and parents regarding Title IX issues including, but not limited to, issues related to sex-based harassment;

f. Training District employees and students regarding sex-based discrimination and harassment, and District policies and procedures pursuant to Section V.D., *infra* at pp. 22-29; and

g. Consulting with security personnel and administrative staff following any physical incidents of sex-based harassment or assault.

4. The District and its Title IX Coordinator will establish a system for District review of school-level investigations and resolutions of student conduct that may constitute sex-based harassment in order to ensure both compliance with the District’s HVD Policy and that the District properly identifies all sex-based harassment as a means to assess the effectiveness of its efforts in preventing and eliminating harassment. The Equity Consultant will assist in the development and implementation of those procedures. That system will require, at minimum, that:

a. The Title IX Coordinator review all school-level harassment incident reports to ensure that all alleged incidents that involved possible sex-based
harassment were properly identified as such and responded to appropriately, in accordance with the requirements of Title IV and Title IX, their implementing regulations, and OCR Guidance. The Title IX Coordinator will follow up with any particular schools or personnel who could improve their identification of or response to sex-based harassment to address the mistake(s);

b. For each harassment incident involving possible sex-based harassment, including but not limited to situations that result in assaults, the Title IX Coordinator will evaluate, within ten (10) school days of receiving the report, referral, or complaint of the harassment incident:

i. The investigating official’s findings and the basis for those findings in supporting documentation; and

ii. Whether the school or District’s response complied with the HVD Policy and Title IX.

c. For each instance of sex-based harassment for which the Title IX Coordinator determines that a school’s response could be improved pursuant to the policies and procedures established in the HVD Policy or Title IX, the Title IX Coordinator will:

i. Promptly identify all areas where the school’s response could be improved pursuant to the HVD Policy or Title IX;

ii. Promptly inform the Designated Person at that school who has been designated pursuant to Section V.D.4 at p. 26 below and the employee(s)
who responded to the complaint of the manner in which the response could be improved under the HVD Policy or Title IX, and provide guidance and support necessary to ensure that a proper response is provided in the future, including, but not limited to, additional training and professional development;

iii. Initiate timely steps to remedy the non-compliance with regard to the particular complaint; and

iv. Within seven (7) school days of completing the investigation, contact the parents of both the student(s) subject to the harassment and the offending student(s) to inform them of the Title IX Coordinator’s review of the complaint, being sensitive to any personal concerns of the student related to the basis for the harassment, provide the parents a copy of the HVD Policy, as well as the timeline for any additional processing and/or resolution of the underlying complaint. That timeline shall not exceed fourteen (14) school days from the date of parental contact without good cause.

d. The Title IX Coordinator shall submit for the United States’ approval written copies of the system developed pursuant to Section V.B.4 at pp. 18-20 by August 1, 2012. Under the terms of this Consent Decree, the United States has authority to review and approve the District’s proposed system for review of school-level investigations and resolutions of student conduct that may constitute sex-based harassment for compliance with Title IV and Title IX, their implementing regulations, OCR Guidance, this Consent Decree, and the underlying reasons for this Consent Decree.
Such approval will not be unreasonably withheld, and the United States shall complete such review within thirty (30) calendar days of receipt of the proposed system. If, however, the District and the United States initially disagree regarding the proposed system, the District, the Equity Consultant, and the United States will work together in good faith to resolve any disagreements. If the District and the United States are unable to resolve any disagreements in a reasonable period of time, either party may request that the Court mediate the dispute.

C. Equity Coordinator

1. The District shall hire or appoint a qualified person knowledgeable in all aspects of the MHRA and in sexual orientation-based harassment, as applied to school districts, to serve as the Equity Coordinator. This individual will ensure proper implementation of the District’s sexual orientation-based harassment policies and procedures.

2. If the District has already engaged its Equity Consultant, the Equity Consultant shall assist the District in hiring or appointing the Equity Coordinator.

3. The Equity Coordinator shall have the same duties and responsibilities as the Title IX Coordinator under Sections V.B.3-4 at pp. 17-21, except that the Equity Coordinator shall focus on sexual orientation-based harassment instead of sex-based harassment.
4. Additionally, the Equity Coordinator or other qualified individual shall supervise, offer resources to, and act as a District liaison to Gay-Straight Alliance groups (GSAs) in the District, and his or her duties in this regard shall include:

   a. Organizing regular meetings of GSA facilitators;

   b. Providing resources and support to gender nonconforming students, to students of diverse sexual orientations, and to students whose family members have diverse sexual orientations;

   c. Providing resources (consistent with the level of resources provided to other non-curricular student groups under the Equal Access Act) on gender identity, gender nonconformity, and sexual orientation for District teachers, staff, administrators, and GSA facilitators; and

   d. Collaborating with external agencies and organizations for support and assistance.

5. The District may elect to have the same individual act as both the Title IX Coordinator and the Equity Coordinator.

D. Training and Professional Development

1. The District will work with the Equity Consultant, the Title IX Coordinator, and the Equity Coordinator to review and recommend additions and improvements to the trainings on harassment, consistent with best practices, for all students and employees who interact with students in the District. All such trainings
shall be mandatory and the District will ensure that any student or employee who misses a scheduled training receives the training in a timely manner.

2. The District provides, and shall continue to provide, age-appropriate instruction to all of its students on harassment on an annual basis and on a make-up basis for students who miss the annually scheduled training. By September 1, 2012, the Equity Consultant shall review and recommend improvements to the content of the District’s training program for students. The Equity Consultant’s recommendations for student training content shall include, but are not limited to:

a. The importance of, sensitivity to, and respect for the diversity of the student body, specifically addressing harassment, including but not limited to issues related to sex and gender, including nonconformity with gender stereotypes.

b. For students in grades 6-12:

i. Instruction on the types of conduct that constitute harassment, including the use of multiple examples of the different types of behaviors that can constitute harassment;

ii. Instruction on the negative impact that such harassment has on students and on the educational environment;

iii. Information regarding how students are expected to respond to harassment they experience or witness, or of which they otherwise know or become aware, including the reporting avenues available;
iv. Information regarding how teachers, administrators, and staff are expected to respond to harassment they witness or to incidents that are reported to them;

v. A discussion of potential consequences for students who harass their peers, including a statement that the District and every school in the District will not tolerate harassment and will address all such incidents;

vi. An introduction of the Title IX Coordinator and an explanation of his/her role; and

vii. An introduction of the Equity Coordinator and an explanation of his/her role.

c. For students in grades K-5, instruction designed to promote an inclusive and safe educational environment for all students, including issues related to the prevention of bullying and violence.

3. The District provides, and will continue to provide, training to all of its teachers and administrators on harassment on an annual basis, and on a make-up basis for those employees who miss the annually scheduled training. By July 1, 2012, the Equity Consultant shall review and recommend improvements to the content of the District’s staff training program. The District shall ensure all staff who interact with students receive mandatory annual training. The Equity Consultant’s recommendations for training content shall include, but are not limited to:
a. In-depth instruction on the type of conduct that constitutes harassment, specifically addressing examples of sex-based and sexual orientation-based harassment, and a discussion about the negative impact that such harassment has on students, employees, and the educational environment;

b. In-depth discussion on the importance of, sensitivity to, and respect for the diversity of the student body. Such discussions will include the following topics: gender identity, gender expression, level of conformity to gender stereotypes, and sexual orientation;

c. A facilitated discussion on the root causes of harassment and the harms resulting from such conduct;

d. Specific guidance and discussions of steps to foster a nondiscriminatory educational environment for all students, specifically students who do not conform to gender stereotypes and/or who are or might be perceived to be lesbian, gay, bisexual, or transgender;

e. A review of the revised harassment policies and procedures with emphasis on the District’s and its employees’ responsibility to respond to all harassment, and to take effective action to end harassment, prevent its recurrence, and as appropriate, remedy its effects;

f. An introduction of the Title IX Coordinator and an explanation of his/her role;
g. An introduction of the Equity Coordinator and an explanation of his/her role;

h. Identification of designated staff at each school who are available to answer questions or address concerns regarding the harassment policies and procedures or other issues related to harassment (see infra Section V.D.4 at p. 26);

i. Clarification that failure by school officials to respond in a timely, reasonable, effective, and appropriate manner, in accordance with the requirements of Title IV and Title IX, their implementing regulations, and OCR Guidance, to harassment of which they knew or should have known violates District policy as well as federal and/or state laws;

j. Clarification that in countering harassment, staff should inform harassers that the District is accepting of all students, regardless of gender nonconformity or sexual orientation, and that comments to the contrary are inappropriate and harmful;

k. Clarification that statements of staff that expressly affirm the dignity and self-worth of students and any protected characteristic of such students are consistent with District policies, subject to the Equity Consultant’s recommendations.

4. The District has designated at least one administrator or staff member (“Designated Person”) at each middle and high school who will be responsible for overseeing reports and investigations of harassment and answering staff and student questions regarding the harassment policies and procedures in his or her school.
a. By the first day of school each year, the District shall provide the name and contact information of the Designated Person for each school on its website and on a prominent bulletin board in each school’s main office. If the Designated Person is identified at the time the annual student and employee handbooks are printed, the District shall also include the name of the Designated Person in the handbooks. If the Designated Person has not yet been identified when the handbooks are printed, the District shall include in the handbooks the full contact information for each Designated Person, including an email address (e.g., DPblainehs@anoka.k12.mn.us).

b. Each middle and high school in the District shall also identify and introduce its Designated Person to all students during student orientation at the beginning of each school year.

5. By the first day of school each year, and then at least annually thereafter for the term of this Consent Decree, the District, with the Equity Consultant, the Title IX Coordinator, and the Equity Coordinator, will provide additional mandatory training(s) on harassment to every Designated Person. The training shall include, but is not limited to:

a. In-depth instruction on talking with students who have been subject to harassment, including specific guidance on talking with students struggling with sexual orientation and/or gender identity or expression issues who may have concerns about unsupportive environments; and
b. Instruction on talking with students who repeatedly harass their peers on the basis of sex and/or sexual orientation, including examples of age-appropriate interventions for these students.

6. The District, with the Equity Consultant, may develop a train-the-trainer model for some or all of the required trainings in Section V.D.1-5, supra at pp. 22-28. If the District uses a train-the-trainer model, it shall ensure that all individuals leading trainings are sufficiently trained to do so. If, and only if, the Equity Consultant and the District cannot agree on the details and procedures of a train-the-trainer model program, the District shall propose its model to the United States. The United States may reject proposed train-the-trainer models that are not consistent with the terms and spirit of this Consent Decree and/or applicable civil rights laws.

7. The District shall work with the Equity Consultant to determine an appropriate format for each annual and make-up training included in Section V.D.1-6 at pp. 22-28. The District and the Equity Consultant shall ensure that the group sizes and potential inclusion of discussions, role-plays, and/or time for questions and answers conform to best practices in the field, as determined by the Equity Consultant.

8. The District is responsible for assuming any and all costs associated with the required trainings referenced in Section V.D.1-7 at pp. 22-28.

9. Under the terms of this Consent Decree, the United States has authority to review and approve the District’s design and content of the student and employee trainings incorporating all of the requirements in Section V.D.1-7 at pp. 22-28
for compliance with Title IV and Title IX, their implementing regulations, OCR Guidance, this Consent Decree, and the underlying reasons for this Consent Decree. The review and approval process shall encompass the following:

a. The District and the Equity Consultant shall work together to submit a written proposal to the United States for its student trainings incorporating all of the requirements in Section V.D.1-7 at pp. 22-28 and including any additional recommendations by the Equity Consultant, to the extent permitted by law, by September 30, 2012. The District and the Equity Consultant shall work together to submit a written proposal to the United States for its employee trainings incorporating all of the requirements in Section V.D.1-7 at pp. 22-28 and including any additional recommendations by the Equity Consultant, to the extent permitted by law, by July 27, 2012.

b. The proposal shall include detailed descriptions of the content of the trainings, the intended audience, the size of the audience, the schedule and length of the trainings, and the identity of the individual(s) providing the training.

c. The United States shall have thirty (30) calendar days from the day of receipt of the proposed trainings to review and approve the District’s proposed trainings for compliance with Title IV and Title IX, their implementing regulations, OCR Guidance, this Consent Decree, and the underlying reasons for this Consent Decree. If, however, the District, the United States, and/or the Equity Consultant initially disagree regarding the proposed training design and/or content, the District, the Equity Consultant,
and the United States will work together in good faith to resolve any disagreements. If the District and the United States are unable to resolve any disagreements in a reasonable period of time, either party may request that the Court mediate the dispute.

E. Mental Health Needs of Students

1. The District agrees that a counselor or other professional qualified to assist students with mental health concerns will always be available during school hours to assist students who have mental health concerns.

2. By September 4, 2012, the District agrees to hire or appoint a qualified individual who holds a Masters degree or a PhD in a mental health field, a current licensure, and has previous experience as a clinician, to act as a consultant (“Mental Health Consultant”). The Mental Health Consultant will review and assess current practices in the District with regard to assisting middle and high school students who are targets of harassment, including students who may be at risk for mental health problems that include, but are not limited to depression, anxiety, cutting and other self-injurious behaviors, and/or suicidal ideation or suicide attempts.

3. By December 31, 2012, the Mental Health Consultant will prepare a report (the “Mental Health Report”) recommending action steps for the District to effectively address, assist, and respond to middle and high school students who are targets of harassment, including students who may be at risk for mental health problems that include, but are not limited to depression, anxiety, cutting and other self-injurious behaviors, and/or suicidal ideation or suicide attempts.
4. At a minimum, the Mental Health Report shall include the following:
   
   a. Assessment of the mental health needs of middle and high school students in the District who were targets of harassment;
   
   b. Recommendations for ways in which the District can better meet the mental health needs of such middle and high school students;
   
   c. A review of the District’s procedures for identifying risk factors for such middle and high school students struggling with serious mental health issues and recommendations for improvements, if necessary;
   
   
   e. A review of the District’s procedures for tracking such middle and high school students at risk for depression, anxiety, cutting and other self-injurious behaviors, and suicide, and recommendations for improvements, if necessary;
   
   f. A review of the District’s policies and procedures for handling suicidal ideation, suicide attempts, and other mental health crises among students in the District and recommendations for improvements, if necessary; and
5. The District, after hiring or appointing its Mental Health Consultant, shall provide the Mental Health Consultant with all information he or she believes is necessary to prepare the Mental Health Report pursuant to the requirements set forth in Sections V.E.3-4, *supra* at pp. 30-31.²

6. Within seven (7) calendar days of its receipt, the District shall provide the United States with a copy of the Mental Health Report.

7. By January 31, 2013, the District shall submit to the United States for its review and approval a plan detailing how the District intends to address the recommendations contained in the Mental Health Report for the 2012-2013 school year and subsequent school years. Under the terms of this Consent Decree, the United States has authority to review and approve the District’s plan for addressing the Mental Health Report recommendations for its compliance with Title IV and Title IX, their implementing regulations, OCR Guidance, this Consent Decree, and the underlying reasons for this Consent Decree. Such approval will not be unreasonably withheld, and the United States shall complete such review within thirty (30) calendar days of receipt of

² The Mental Health Consultant’s access to personally identifiable information shall be in accordance with the regulations of the Federal Educational Rights and Privacy Act, 34 C.F.R. § 99.31(a)(1).
the District’s plan. If, however, the District and the United States initially disagree regarding the proposed plan, the District and the United States will work together in good faith to resolve any disagreements. If the District and the United States are unable to resolve any disagreements in a reasonable period of time, either party may request that the Court mediate the dispute.

F. Anti-Bullying Survey

1. The District will continue to administer an Anti-Bullying Survey (“Survey”) and will do so once per school year. The District shall ensure that the Survey includes questions regarding the “hot-spots” (see infra Section H at pp. 36-37) within each school where harassment is occurring.

2. In consultation with the Equity Consultant, the District shall review the Survey to ascertain its effectiveness in assessing the presence and impact of harassment at each middle and high school in the District. By October 16, 2012, the Equity Consultant shall make recommendations to enhance the Survey’s effectiveness.

3. In making his or her recommendations regarding the Survey, the Equity Consultant shall consider (i) the number and adequacy of the questions related to harassment; and (ii) the appropriate survey participants.

4. The District shall implement the Equity Consultant’s recommendations in revising the content and participants of the Survey, unless the District disagrees with the recommendations. If the District disagrees with the Equity Consultant’s recommendations regarding the Survey, the District shall submit to the
United States an alternative proposal regarding the Survey, detailing the Equity Consultant’s recommendations and explaining why the District disagrees with them. Under the terms of this Consent Decree, the United States has authority to review and approve the District’s alternative Survey proposal for compliance with Title IV and Title IX, their implementing regulations, OCR Guidance, this Consent Decree, and the underlying reasons for this Consent Decree. Such approval will not be unreasonably withheld, and the United States shall complete such review within thirty (30) calendar days of receipt of the District’s plan. If the District and the United States are unable to resolve any disagreements in a reasonable period of time, either party may request that the Court mediate the dispute.

6. With assistance from the Equity Consultant, the District will analyze the results of the Survey in writing. The analysis will include any climate issues identified through the Surveys and recommendations to address harassment as needed. Within 30 days of when the District receives the survey results, the District will produce a copy of the Survey analysis and recommendations to the United States.

7. The Equity Consultant will train the District administrators on how to properly interpret the results of its Survey and respond to the findings (e.g., modify policies or procedures as necessary, according to the terms of this Consent Decree).
G. Anti-Bullying/Anti-Harassment Task Force

1. The District has formed an Anti-Bullying/Anti-Harassment Task Force (“Task Force”) to advise the District regarding how best to foster a positive educational climate free of harassment.

2. The District shall work with the Equity Consultant to assess and expand the composition, mission, and functions of the Task Force pursuant to the guidelines outlined herein by July 31, 2012. At a minimum, members of the Task Force shall include, but are not limited to: the Title IX Coordinator, the Equity Coordinator, students (including at least two Gay-Straight Alliance (“GSA”) members, so long as there are two GSA members who wish to participate), parents of students in the District (including at least two parents of GSA members, so long as there are two GSA parents who wish to participate), teachers or school counselors, and school administrators. The Equity Consultant shall ensure that parents and students have meaningful representation on the Task Force.

3. The Title IX Coordinator, or his or her designee, shall coordinate and schedule the Task Force’s meetings and work.

4. The Task Force shall meet at least twice per school year and maintain documentation of the date and duration of each meeting as well as meeting minutes.

5. At least once per school year, and more often if the Task Force deems it appropriate, the Title IX Coordinator or his/her designee will prepare a written
report ("Task Force Report") summarizing the Task Force’s recommendations and suggestions. Each annual Task Force Report shall be completed no later than June 30 of each year that the Consent Decree is in effect. The Task Force Report shall include, but not be limited to:

a. Concerns of students and parents related to harassment incidents and the District’s overall climate;

b. Recommendations for strategies to prevent harassment and improve the climate;

c. Outreach strategies to parents and families to build awareness around, address concerns related to, and gain feedback regarding the District’s anti-harassment efforts.

6. Within seven (7) calendar days of receiving the Task Force Report, the District shall provide the Equity Consultant and the United States with copies of the Report. The District shall carefully consider the findings and recommendations of the Task Force.

H. Harassment Hot-Spots

1. In consultation with the Equity Consultant in 2012-2013 and on its own for the remainder of the term of the Consent Decree, at least once each trimester during the school year, the District will identify “hot-spots” in its middle and high schools where harassment is most often occurring, including outdoor locations on each
school property where students congregate (e.g., parking lots) and on school buses. The District shall seek and consider student input in identifying hot-spots.

2. Based on a review of the data and the recommendations of the Equity Consultant, the District will work in good faith with the Equity Consultant to agree on appropriate corrective actions by the District to eliminate harassment in the identified hot-spots. The corrective actions may include, but are not limited to, training students to assist in monitoring hot-spots, assigning staff to monitor hot-spots, and/or adding additional cameras in certain school locations or on buses and monitoring those cameras. The District will implement the agreed actions and promptly notify the United States of its actions no later than fourteen (14) school days after the last day of each trimester.

3. The District shall ensure that any person designated to monitor a harassment hot-spot has attended trainings on the District’s harassment policies and procedures. The District will ensure that those employees who begin employment after such annual training has occurred will work with the Title IX Coordinator and Equity Coordinator to ensure each new employee receives training on the District’s harassment policies and procedures.

4. The parties acknowledge that the school bus drivers who work in the District are not District employees, but rather are the employees of vendors with whom the District contracts. The District will work with its school bus vendors to ensure that school bus drivers receive annual training on the District’s harassment policies and
procedures, and to ensure that the bus vendors have processes in place to provide each new bus driver with training on the District’s harassment policies and procedures.

I. Peer Leadership

1. The District shall ensure that all of its middle and high schools have a peer leadership program addressing harassment by the beginning of the second trimester of the 2012-2013 school year.\(^3\) The District may tailor its peer leadership programs to the specific needs of each individual middle and high school, so long as every program has an anti-harassment component. The Equity Consultant may assist the District in setting up or improving its peer leadership programs and in tailoring the programs to each school building.

2. The District will work with the Equity Consultant to review the need for additional training on responding to or preventing harassment for students in the peer leadership programs.

J. Student Meetings

1. The Superintendent or an Associate Superintendent of the District shall continue the District’s practice of convening annual meetings with students at every middle school and high school, including alternative schools, in the District. Each school administration shall select 15-20 students to attend the Superintendent meeting, making

\(^3\) See, e.g., Roosevelt Middle School’s peer leadership program, in which student leaders are identified in each grade level to establish a student-led anti-bullying group that leads team-building, anti-bullying activities during advisory periods, stands up against bullying when they see it, assists targeted students who are struggling with bullying, and makes videos, posters, and other displays to raise awareness.
every effort to choose students with a diversity of backgrounds, interests, and experiences. Each school shall endeavor to choose at least two students who are members of the school’s GSA.

2. The meetings shall last at least one class period, and students must be specifically asked about and provided with the opportunity to discuss any concerns they have about incidents of harassment.

3. During each meeting, the District will emphasize its commitment to having a school environment free from all harassment and inform attendees about the Task Force (see Section V.G. at pp. 34-36 of this Consent Decree), including identifying the representatives on the Task Force from that particular school.

4. If students identify any specific incidents of harassment during or after the meeting, the District will commence an investigation of each incident as soon as possible, in accordance with the HVD Policy. If students express concerns about the school climate, the District will address the concerns consistent with the terms of this Consent Decree.

5. During each meeting, the District will also remind the students of their right to file a complaint of harassment at any time they believe they have been subjected to harassment and will advise the students of the procedure they should follow if they wish to do so.

6. During each meeting, the District will inform students that if they have concerns they wish to share with the Superintendent or Associate Superintendent
privately, they may do so immediately after the group meeting or at any other time by email.

7. The Superintendent or an Associate Superintendent shall submit a written summary of all meetings, identifying key issues by school and all necessary follow-up tasks, if any, to the Equity Consultant, the Title IX Coordinator, the Equity Coordinator and the United States no later than thirty (30) calendar days after all of the middle and high school meetings have taken place in that school year.

K. Monitoring and Assessment of Program Effectiveness

1. By September 4, 2012, the District will develop and begin implementing a monitoring program to assess the effectiveness of its anti-harassment efforts. In developing the monitoring program, the District will consider the recommendations and suggestions made by the Equity Consultant.

2. At the conclusion of each school year, the District, in collaboration with the Equity Consultant, the Title IX Coordinator, and the Equity Coordinator, will conduct an annual assessment of the effectiveness of the District’s anti-harassment efforts. Such assessment shall include, but is not limited to:

   a. A review of the Anti-Bullying/Anti-Harassment Task Force Report(s);

   b. A review of the anti-bullying surveys and related analysis;
c. The Title IX Coordinator’s review of all reports of sex-based harassment and District responses thereto in its electronic database, including any and all supporting documentation and/or underlying analyses;

d. The Equity Coordinator’s review of all reports of sexual orientation-based harassment and District responses in its electronic database;

e. An analysis of all harassment incidents in the District disaggregated by the sex, school, and grade of both the accused harasser and harassed student;

f. Evaluation and analysis of the data collected, including an assessment of whether the reported incidents of harassment have increased or decreased in number and severity; whether certain students are repeatedly harassed or repeated alleged perpetrators in harassment complaints; and differences between and among individual District schools in the numbers, types, and severity of harassment incidents.

3. Based on the annual assessment conducted pursuant to Section V.K.2. at pp. 40-41, the District shall develop recommendations for ways to improve its anti-harassment program.

4. By July 15 of each year this Consent Decree is in effect, the District shall submit to the United States for review: (1) a report analyzing all of the information collected and reviewed pursuant to Section V.K.2. at pp. 40-41; (2) its proposed recommendations for improvements to its anti-harassment program pursuant to Section V.K.3. at p. 41; and (3) timelines for the implementation of the recommendations.
5. If the United States provides comments on the District’s proposed recommendations for improvement actions and timelines for their implementation, it will do so no later than the first Friday in August of each year. The District shall incorporate the United States’ comments into the District’s action plans, unless the District disagrees with the recommendations. If the parties disagree about the United States’ comments to the District’s proposed recommendations, the District and the United States will work together in good faith to resolve any disagreements. If the District and the United States are unable to resolve any disagreements in a reasonable period of time, either party may request that the Court mediate the dispute.

L. Reporting

1. The District will provide all reports, documents, and information required to be produced to the United States, including all information required pursuant to this Consent Decree, in electronic form, usable by the United States, or in written form if the data in electronic form would not be usable, in accordance with the timelines set forth herein.4

4 The District shall provide to DOJ and OCR one copy of all documents and information it is required to produce to the United States in this Consent Decree, directed to the following attorneys:

Torey Cummings and Tamica Daniel   Leticia Soto
U.S. Department of Justice          U.S. Department of Education
Civil Rights Division               Office for Civil Rights
Educational Opportunities Section, PHB 4300  Citigroup Center
601 D Street NW 500 W. Madison Street Suite 1475
Washington, DC 20004  Chicago, IL 60661-7204
a. The District shall produce to the United States all reports, documents, and information required by this Consent Decree, including those that contain private student information. The law enforcement exception to the Family Educational Rights and Privacy Act ("FERPA") applies to the United States in this matter, allowing it to receive documents containing private student information. See 20 U.S.C. § 1232g (b)(1)(C)(ii); see also United States v. Bertie Cnty. Bd. of Educ., 319 F. Supp. 2d 669, 671–72 (E.D.N.C. 2004). The United States shall maintain the confidentiality of any protected private student information it receives from the District.

b. The District acknowledges that, pursuant to the Minnesota Government Data Practices Act, Minn. Stat. § 13.01–13.99 ("MGDPA"), the Student Plaintiffs are entitled, upon request, to copies of all documents that the District is required to provide to the United States pursuant to this Consent Decree, with any private data redacted as required by statute. The District agrees that it will provide those documents to counsel for the Student Plaintiffs pursuant to their request under Minn. Stat. § 13.03, subd. 3, appended hereto as Exhibit F. Such reports will be provided concurrently with the District’s delivery of those reports to the United States. However, the District shall not produce to Student Plaintiffs any documents or information containing private student information subject to FERPA, see 20 U.S.C. § 1232g, and the MGDPA. Instead, the District will provide documents or information containing private student information to the United States only. The United States will then provide Student Plaintiffs with summaries or redacted reports so that Student Plaintiffs do not receive any private student
information. The District agrees to promptly notify Student Plaintiffs and the United States of the submission of any reports to the United States that are in need of redaction.

2. If the District, despite its good faith efforts, is unable to meet any timeline set forth in this Consent Decree, it will immediately notify the United States, of the delay and the reason therefor. The United States may provide a reasonable extension of the timeline at issue and will consider any request for extension of time in good faith.

3. At the end of each trimester, the District will provide documentation of its compliance with this Consent Decree through written electronic compliance reports, which will be produced to the United States within fourteen (14) school days of the last day of each trimester of each year this Consent Decree is in force. Each compliance report will cover the immediately preceding trimester, and will include the following information and documents:

   a. The date and duration of each training session required by this Consent Decree; copies of all agendas for such training sessions; and copies of any training materials distributed at the trainings, including videos or Power Point presentations;

   b. The number of people, by position and school, who did not receive each required training and the District’s plan for these individuals to receive the training(s) they missed. The District will provide additional verification of completed training for those individuals who received rescheduled training;
c. A summary of harassment incidents that includes data, by school, on: the number and types of complaints; the prevalence of each type of harassment (e.g., physical, verbal, or written); the remedial or disciplinary actions taken; the sex of harassed student and accused harasser; and any other relevant information. Copies of all supporting documentation shall be maintained at the Title IX Coordinator or the Equity Coordinator’s office for review, upon request, by the United States;

d. Copies of any District policies and procedures related to harassment or discrimination that the District has revised, adopted, or rescinded since the last compliance report;

e. Certification by the Title IX Coordinator that he or she has reviewed all harassment incidents related to bullying, discrimination, and harassment based on sex, and all documentation related to such incidents, to determine whether all harassment incidents were properly identified, investigated, and resolved consistent with District policies and procedures, or, if not, that he or she has taken appropriate corrective action pursuant to Section V.B.4. at pp. 18-21 of this Consent Decree;

f. Certification by the Equity Coordinator that he or she has reviewed all harassment incidents related to bullying, discrimination, and harassment based on sexual orientation, and all documentation related to such incidents, to determine whether all harassment incidents were properly identified, investigated, and resolved consistent with District policies and procedures, or, if not, that he or she has taken appropriate corrective action pursuant to Section V.C.3. at p. 21 of this Consent Decree;
g. Certification by the Title IX Coordinator that, if and when corrective action was necessary for Title IX compliance pursuant to Section V.B.4.c at pp. 19-20 of this Consent Decree, he or she, at a minimum, took the following corrective action: reviewed all documentation from the incident; identified all areas where the school or District response did not comply with District policies and procedures; initiated timely steps to remedy violations of District policies and procedures; and contacted the parent(s) of the student(s) subject to the harassment and parent(s) of the offending student(s) to inform them of the Title IX Coordinator’s involvement in the matter, the applicable policies and procedures, and the timeline for resolving the underlying complaint;

h. Certification by the Equity Coordinator that, if and when corrective action was necessary for MHRA compliance pursuant to Section V.C.3. at p. 21 of this Consent Decree, he or she, at a minimum, took the following corrective action: reviewed all documentation from the incident; identified all areas where the school or District response did not comply with District policies and procedures; initiated timely steps to remedy violations of District policies and procedures; and contacted the parent(s) of the student(s) subject to the harassment and the parent(s) of the offending student(s) to inform them of the Equity Coordinator’s involvement in the matter, the applicable policies and procedures, and the timeline for resolving the underlying complaint; and

i. Certification by the District that it has fully and sufficiently addressed all incidents alleging harassment.
M. Enforcement

1. The United States will monitor and review compliance with this Consent Decree.

2. As part of its responsibility to monitor and review compliance with this Consent Decree, the United States may observe trainings, interview District staff and students (including ex parte communications with students and employees other than school and District administrators), and request such additional reports or data as are necessary for the United States to monitor the District and to determine whether the District is in compliance with this Consent Decree. A response to a request by the United States for additional reports or data necessary to determine if the District is in compliance with this Consent Decree shall not be unreasonably withheld. Also, with ten (10) calendar days advance notice, the United States may visit any school in the District to monitor compliance with the terms of this Consent Decree and the District agrees to provide full access to the United States to perform such monitoring.

3. In the event that the United States believes that the District has violated any provision of this Consent Decree, the United States will provide written notice (including the relevant section(s) of this Consent Decree and the factual basis) of such violation to all parties, and the District shall then respond to such notice and/or cure such non-compliance within thirty (30) calendar days. The parties shall negotiate in good faith in an attempt to resolve any dispute relating thereto before the United States seeks relief with the Court. If the District and the United States are unable to resolve any
disagreements in a reasonable period of time, any party may request that the Court mediate the dispute.

4. Where there is a requirement in this Consent Decree that the District submit material to the United States for review and approval for compliance with Title IV and Title IX, their implementing regulations, OCR Guidance, this Consent Decree, and the underlying reasons for this Consent Decree, and the District is unable to obtain approval that it believes has been unreasonably withheld, the District will raise its concerns in writing with the United States and the United States shall then respond to such notice and/or issue the approval within thirty (30) calendar days of receipt of written notice. The United States and the District shall negotiate in good faith in attempt to resolve any dispute relating thereto before seeking relief. If the District and the United States are unable to resolve any disagreements in a reasonable period of time, any party may request that the Court mediate the dispute.

5. If any dispute under this Consent Decree is not resolved pursuant to Sections V.M.1-4, supra at pp. 46-47, any aggrieved party may file a motion with the Court for such further orders as may be necessary for, or consistent with, the enforcement of this Consent Decree.

VI. **STUDENT PLAINTIFFS’ RELEASES, REPRESENTATIONS AND WARRANTIES**

The terms and conditions in this Section VI are by and between only the Student Plaintiffs and the District:
A. In exchange for the full and final release of claims as set forth in Section VI.B., the District’s insurance carrier shall pay to the Student Plaintiffs the total amount of Two Hundred Seventy Thousand Dollars ($270,000) within ten (10) business days of the entry of the Court’s approval of the Petitions for Approval of Settlement of Claims of Minor Plaintiffs. Such payments shall be consistent with Minn. Stat. § 540.08, where applicable.

B. In consideration of the terms set forth in this Consent Decree, the sufficiency of which is hereby acknowledged, each Student Plaintiff does hereby release and forever discharge the District; the School Board; the members of the School Board, and any and all of the District’s departments or divisions; together with all past and present Board members, officers, employees, agents, insurers, reinsurers, and self-insurers; attorneys and each and every one thereof, from all actions, claims, causes of action, suits, debts, sums of money, controversies, trespasses, and demands whatsoever in law or in equity, including claims for attorneys’ fees or costs, that were or could have been asserted in the Complaints.

C. The Student Plaintiffs certify, represent, and warrant that they are authorized to enter into and consent to the terms and conditions of the Consent Decree and to execute and legally bind the parties to it.

D. The Student Plaintiffs hereby certify, represent, and warrant that (a) they are the only and lawful owners of the claims and causes of action arising out of the facts giving rise to the allegations described in the Action, and (b) they have not assigned or
otherwise transferred to any other third party or entity any interest in any claim or cause of action arising out of the facts giving rise to the allegations described in the Action.

E. Each Student Plaintiff certifies that to the extent he or she has received Medicare or Medicaid benefits arising out of and/or relating in any manner to the Action he or she has provided notice of the Action and will provide additional notice of this Consent Decree as mandated by applicable law. Each Student Plaintiff further certifies that he or she will honor such subrogation claims as are ultimately asserted relating to his or her receipt of Medicare and/or Medicaid benefits. Student Plaintiffs acknowledge that any and all past, present and/or future medical expenses and/or benefits, expenses, reimbursements, liens and/or costs of any kind arising out of and/or relating in any manner to the Action shall be their sole and continuing responsibility and not that of the District or its insurer. Each Student Plaintiff further certifies that he or she will honor any valid subrogation claims that are asserted relating to his or her receipt of non-governmental medical benefits.

F. The Student Plaintiffs represent and warrant that—other than the complaints filed in this Action—they have filed no other complaints, charges or other claims against the District in any court or administrative or regulatory body (including but not limited to the Minnesota Department of Education or the U.S. Department of Education).

G. The Student Plaintiffs agree that they shall not represent this Consent Decree or any agreements contained herein as an admission of liability or wrongdoing on
the part of the District or any of the individual defendants named in the Action. The
Student Plaintiffs further agree that they will not identify individual District defendants or
other District employees by name in public statements concerning the allegations in the
Complaints or resolution of this matter. If the District believes that one or more of the
Student Plaintiffs has violated this provision, the District may seek an order of the Court
requiring the violating Student Plaintiff(s) to issue a corrective statement, but only after
first providing the Student Plaintiff(s) the opportunity to issue a corrective statement
within 10 days of receipt of notice of any claimed violation of this provision.

I. Each of the Student Plaintiffs and the District is responsible for the tax
implications that may occur to the party or their attorneys in connection with the payment
or receipt of funds pursuant to this Consent Decree. The District has made no
representation regarding the taxability of the payments made to Student Plaintiffs
pursuant to this Consent Decree. The District will not be liable for any tax consequence
to the Student Plaintiffs as a result of the payments made pursuant to this Consent
Decree.

J. The Student Plaintiffs, by their signatures to this Consent Decree,
acknowledge and agree that they have carefully read and understood all provisions of this
Consent Decree and that they have entered into this Consent Decree knowingly and
voluntarily. The Student Plaintiffs acknowledge that they have been represented by their
own attorneys, and that they are voluntarily entering into this Consent Decree to resolve
the causes of action that were or could have been brought in the Complaints, and that this
Consent Decree is agreed to and signed with the intent that it be final, binding, and
enforceable. The Student Plaintiffs also acknowledge that they have agreed to settle their
claims based on the advice and recommendation of their own attorneys, and that the
District has not made any representations or advised them as to the terms of this Consent
Decree.

K. The Student Plaintiffs are permanently barred and enjoined from asserting,
commencing, prosecuting, or continuing any of the claims that were settled and released
in this Consent Decree.

VII. MISCELLANEOUS

A. This Consent Decree shall remain in effect for five (5) years from the date
of entry. The Court shall retain jurisdiction for the duration of this Consent Decree to
enforce the terms of the Consent Decree.

B. In consideration of, and consistent with, all the terms of this Consent
Decree, the United States agrees to refrain from undertaking further investigation into, or
pursuing further legal proceedings regarding, all matters contained within the Consent
Decree, except those rights and remedies identified in the Consent Decree.

C. The requirements and procedures in this Consent Decree shall be
implemented consistent with the rights and protections afforded under the MGDPA;
FERPA; 20 U.S.C. § 1232g; 34 C.F.R. Part 99; Health Insurance Portability and
(“HIPAA”); and other applicable law.
D. In consideration of, and consistent with, all the terms of this Consent Decree, the Student Plaintiffs’ Complaints are hereby dismissed with prejudice and without taxing costs to any party. Student Plaintiffs retain the right to petition the Court for the purpose of enforcing their individual rights under Sections V.L.1.b. at p. 42-43 and VI.A. at p. 48 of this Consent Decree. In the event that the Student Plaintiffs believe that the District has violated either Sections V.L.1.b. at p. 42 or VI.A. at p. 48, the Student Plaintiffs will provide the District written notice of such violation, and the District shall have ten (10) calendar days to cure any violation.

E. In consideration of, and consistent with, all the terms of this Consent Decree, the United States’ Complaint-in-Intervention is hereby dismissed with prejudice and without costs to any party. The United States retains the right to petition the Court, at any time during the duration of this Decree, for the purpose of enforcing the Decree consistent with Section V.M.3 at p. 47 of this Consent Decree.

F. The individual defendants named in the Student Plaintiffs’ Complaints shall not have any individual responsibility to carry out any of the requirements of this Consent Decree, except (to the extent applicable) as employees of the District.

G. The parties agree that, as of the date of entry of this Consent Decree, litigation is not “reasonably foreseeable” concerning the matters described herein. To the extent that any party previously implemented a litigation hold to preserve documents, electronically stored information, or things related to the matters described herein, the
party is no longer required to maintain such a litigation hold. Nothing in this paragraph relieves any party of any other obligations imposed by this Consent Decree.

H. This Consent Decree, including its attached exhibits, constitutes the entire agreement by the parties and no other statement, promise, or agreement, either written or oral, made by any party or agents of any party, that is not contained in this written Consent Decree, shall be enforceable regarding the matters raised in this Decree.

I. This Consent Decree is final and has binding effect on the parties, including all principals, agents, executors, administrators, representatives, employees, successors in interest, beneficiaries, assigns, and legal representatives thereof.

J. Failure of a party to seek enforcement of this Consent Decree pursuant to its terms with respect to any instance or provision shall not be construed as a waiver to such enforcement with regard to other instances or any provisions.

K. This Consent Decree does not cover any other pending or future complaints or investigations by OCR and/or DOJ.

L. This Consent Decree does not affect the District’s duty to comply with the Equal Protection Clause, Title IV, Title IX, the MHRA, or any other law.

M. The District (including its officers, agents, affiliates, subsidiaries, servants, employees, and all other persons or entities in active concert or privity with it) agrees not to retaliate against any student or employee who in relation to the allegations outlined above has testified, assisted, or participated in a proceeding or investigation under the Equal Protection Clause, Title IV, Title IX, or the MHRA.
N. The undersigned representatives of the parties certify that they are authorized to enter into and consent to the terms and conditions of the Consent Decree and to execute and legally bind the parties to it.

O. All parties to this Consent Decree shall undertake all reasonable and necessary action to facilitate approval of this Consent Decree, including but not limited to jointly petitioning the Court for approval under applicable Minnesota Statutes and governing law for minor settlements and school district settlements.

P. If any provision of this Consent Decree is determined by any court to be unenforceable, the other terms of this Consent Decree shall nonetheless remain in full force and effect, provided however, that if the severance of any such provision materially alters the rights or obligations of the parties, the United States, Student Plaintiffs, and the District shall engage in good-faith negotiations in order to adopt such mutually agreeable amendments to this Decree as may be necessary to restore the parties as closely as possible to the initially agreed-upon relative rights and obligations.

Q. The Court orders that nothing in this Consent Decree shall be construed as an acknowledgement, admission, or evidence of liability of the District or any individual defendant. The Court further orders that nothing in this Consent Decree may be used as evidence of District liability by Student Plaintiffs or any other private litigants in any other proceeding.

R. The Court hereby refers to the Magistrate Judge all matters regarding the management and execution of the Consent Decree, pursuant to 28 U.S.C. § 636.
SO ORDERED

____________________________________
Honorable Joan N. Ericksen
United States District Judge

Dated: ______________________________
FOR THE UNITED STATES OF AMERICA:

B. TODD JONES  
United States Attorney  
District of Minnesota  
United States Department of Justice

THOMAS E. PEREZ  
Assistant Attorney General  
Civil Rights Division  
United States Department of Justice

GREGORY G. BROOKER, #0166066  
ANA H. VOSS, #0483656  
Assistant United States Attorneys  
United States Attorney’s Office  
District of Minnesota  
600 United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
Tel: 612-664-5600  
greg.brooker@usdoj.gov  
anna.voss@usdoj.gov

ANURIMA BHARGAVA, Chief  
KATHLEEN S. DEVINE, Senior Counsel  
Civil Rights Division  
Educational Opportunities Section

TOREY B. CUMMINGS  
(admitted pro hac vice)  
TAMICA H. DANIEL  
(admitted pro hac vice)  
Trial Attorneys  
U.S. Department of Justice  
Civil Rights Division  
Educational Opportunities Section  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530  
Tel: 202-305-4204  
torey.cummings@usdoj.gov  
tamica.daniel@usdoj.gov

Dated: March 1, 2012
FOR DEFENDANT ANOKA-HENNEPIN SCHOOL DISTRICT:

Dated: March 5, 2012

s/ Paul Cady
Paul Cady, #0189406
General Counsel
Anoka-Hennepin School District
11299 Hanson Blvd. N.W.
Coon Rapids, MN 55433
Tel: 763-506-1089
paul.cady@anoka.k12.mn.us
STUDENT PLAINTIFFS:

Dated: March 1, 2012

s/ Jane Doe
Jane Doe

E.R., by her next friend and parent, Quana Hollie

Dated: March 1, 2012

s/ Quana Hollie
Quana Hollie

K.R., by his next friends and parents,
Rebecca Rooker and Jim Rooker

Dated: March 1, 2012

s/ Rebecca Rooker
Rebecca Rooker

Dated: March 1, 2012

s/ Jim Rooker
Jim Rooker

D.F., by his next friends and parents,
Burnetta Frei and Jeffrey Frei

Dated: March 1, 2012

s/ Burnetta Frei
Burnetta Frei

Dated: March 1, 2012

s/ Jeffrey Frei
Jeffrey Frei

B.G., by her next friends and parents, Marty Geldert and Michael Geldert

Dated: March 1, 2012

s/ Marty Geldert
Marty Geldert

Dated: March 1, 2012

s/ Michael Geldert
Michael Geldert

D.M.-B., by his next friends and parents,
Michael McGee and Jason Backes

Dated: March 1, 2012  

s/ Michael McGee  

Michael McGee

Dated: March 1, 2012  

s/ Jason Backes  

Jason Backes

AS TO FORM, COUNSEL FOR STUDENT PLAINTIFFS  
JANE DOE, K.R., D.F., B.G. and D.M.-B.

Dated: March 1, 2012  

FAEGRE BAKER DANIELS LLP  

s/ Michael A. Ponto  

Michael A. Ponto, #203944  
Martin S. Chester, #031514X  
Christopher H. Dolan, #0386484  
Zack L. Stephenson, #0391533  
2200Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-3901  
(612) 766-7000  
michael.ponto@FaegreBD.com  
martin.chester@FaegreBD.com  
chris.dolan@FaegreBD.com  
zach.stephenson@FaegreBD.com

SOUTHERN POVERTY LAW CENTER  
Mary Bauer (admitted pro hac vice)  
Christine P. Sun (admitted pro hac vice)  
Samuel Wolfe (admitted pro hac vice)  
400 Washington Avenue  
Montgomery, AL 36104  
mary.bauer@splcenter.org  
christine.sun@splcenter.org  
sam.wolfe@splcenter.org  
(334) 956-8200
AS TO FORM, COUNSEL FOR STUDENT PLAINTIFF E.R.

Dated: March 1, 2012

CULBERTH & LIENEMANN, LLP

s/ Celeste E. Culberth
Celeste E. Culberth, #228187
Leslie E. Lienemann, #23019
1050 UBS Plaza
444 Cedar Street
St. Paul, MN 55101
cculberth@clslawyers.com
llienemann@clslawyers.com
(651) 290-9305

NATIONAL CENTER FOR LESBIAN RIGHTS
Christopher Stoll (admitted pro hac vice)
870 Market Street, Suite 370
San Francisco, CA 94102
cstoll@nclrights.org
(415) 365-1335
March 15, 2012

Mr. Dennis Carlson  
Superintendent  
Anoka-Hennepin School District  
11299 Hanson Blvd N.W.  
Coon Rapids, MN 55333

Re: OCR Case Number 05-11-5901

Dear Mr. Carlson:

On November 2, 2010, the U.S. Department of Justice (DOJ) received a complaint alleging that a District student was being harassed by peers because the student did not act and dress in ways that conformed to traditional gender stereotypes. Upon receiving the complaint, DOJ opened an investigation of sex-based harassment in the District pursuant to its authority under Title IV of the Civil Rights Act of 1964 (Title IV), 42 U.S.C. §§ 2000c–2000c-9, which prohibits discrimination against public school students on the basis of, among other things, sex.

In January 2011, the U.S. Department of Education, Office for Civil Rights (OCR) joined the investigation pursuant to its authority under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, and its implementing regulation, 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance.\(^1\)

OCR opened its investigation under OCR case number 05-11-5901. The regulation implementing Title IX, at 34 C.F.R. § 106.71, incorporates by reference the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, including 34 C.F.R. § 100.7(c). The Title VI regulation, at 34 C.F.R. § 100.7(c), provides that OCR will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with the laws enforced by OCR.

The purpose of this letter is to advise you of the resolution of the above-referenced investigation conducted by OCR in Anoka-Hennepin School District #11 (District).

The investigation addressed the issue of harassment of District students on the basis of sex, including peer-on-peer harassment based on not conforming to gender stereotypes, and focused on the District’s middle and high schools and the District’s harassment policies and procedures.

---

\(^1\) The District receives Federal financial assistance and is, therefore, subject to Title IX and its implementing regulation.
DOJ and OCR visited the District multiple times and interviewed over 60 individuals, including current and former students, parents, teachers, and District staff and administrators. DOJ and OCR also requested and reviewed over 7,000 pages of documents from the District.

The Title IX implementing regulation, at 34 C.F.R. §106.31(a), provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity operated by a recipient.

Harassment on the basis of sex is a form of prohibited discrimination. Title IX prohibits harassment of both male and female students regardless of the sex of the harasser -- i.e., even if the harasser and target are members of the same sex. It also prohibits gender-based harassment, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. It can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity. Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.²

To determine whether a hostile environment based on sex exists, OCR considers whether there was harassing conduct that was sufficiently serious so as to deny or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a school. If a recipient school district knows or reasonably should have known about sex-based harassment that creates a hostile environment, Title IX requires the school district to take immediate action to eliminate the harassment, prevent its recurrence and address its effects. When responding to alleged harassment, a school district must take immediate and appropriate action to investigate or otherwise determine what occurred. If an investigation reveals that harassment has occurred, a school district must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. These duties are a recipient’s responsibility, regardless of whether a student has complained, asked the school district to take action, or identified the harassment as a form of discrimination.

The District is the largest school district in the state of Minnesota, enrolling approximately 40,000 students in twenty-four elementary schools, six middle schools, five high schools, and nine alternative, transitional, or special needs programs.

Information obtained during the investigation revealed that multiple students were harassed on the basis of sex in District middle and high schools and that the harassment included both verbal and physical harassment. District students told OCR and DOJ investigators that they were constantly harassed (some almost every day for years) because of their failure to conform to

² See OCR’s 2010 Dear Colleague letter on Harassment and Bullying, which is available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html
gender stereotypes. Female students reported being called “manly,” “guy,” or “he-she”; male students reported being called “girl,” and “gay boy,” and being told, “you’re a guy, act like it.” A female student reported being told to “go kill herself” and students said they were threatened and subjected to physical assaults because of their nonconformity to gender stereotypes. Some of these students suffered from physical and mental health problems. Some students stopped attending school for periods of time, left the District, or dropped out of school entirely.

On June 2, 2011, prior to the completion of the DOJ/OCR investigation, DOJ and OCR met with the District to discuss options for resolving the investigation. On July 21, 2011, the Southern Poverty Law Center (SPLC) and the National Center for Lesbian Rights (NCLR) filed federal lawsuits (later consolidated) in the United States District Court, District of Minnesota, on behalf of six students alleging that each student suffered severe and pervasive gender-based harassment and/or harassment on the basis of their actual or perceived sexual orientation in District schools (see Case Nos. 11-cv-01999-JNE-SER and 11-cv-02282-JNE-SER). In August 2011, at the request of U.S. District Federal Magistrate Judge Steven E. Rau, DOJ and OCR joined settlement discussions with the District, SPLC and NCLR designed to resolve both the DOJ/OCR investigation and the SPLC and NCLR lawsuit.

After extensive negotiations, the parties entered into a Consent Decree (enclosed with this letter) on March 5, 2012, which, when fully implemented, will resolve the issues identified in the DOJ/OCR investigation. On March 5, 2012, DOJ and OCR filed a Complaint-in-Intervention against the District alleging discrimination on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title IV, and Title IX (see Case No. 11-cv-01999-JNE-SER). The complaint alleges that the District students experienced harassment on the basis of sex that was sufficiently serious to deny or limit their ability to participate in or benefit from the educational program in the middle and high schools in the District and thereby created a hostile environment for these students in the District. The complaint further alleges that the District knew about the harassment, yet failed to take effective action to stop the harassment and that, as a result, the harassment continued and in certain instances escalated. U.S. District Court Judge Joan N. Ericksen granted the motion to approve the consent decree on March 6, 2012.

Pursuant to the Consent Decree, the District has agreed to take all reasonable steps to prevent and eliminate sex-based harassment, and to respond promptly and appropriately to all reports of harassment. To that end, the District has agreed, among other things, to: (1) review and improve its policies and procedures concerning harassment to address sex-based harassment, including harassment based on gender stereotypes by working with an Equity Consultant; (2) hire or appoint a Title IX and Equity Coordinator to ensure proper implementation of the District’s policies and procedures; (3) conduct training of all District faculty, staff and students on the issue of harassment, and clarify District policies for reporting and responding to harassment; (4) hire a Mental Health Consultant to assist students who are subjected to harassment; (5) create an Anti-Bullying/Anti-Harassment Task Force; (6) administer an Anti-Bullying Survey once per year; (7) identify harassment “hot spots” and assign personnel to monitor these trouble areas; (8) ensure that all of its middle and high schools have a peer leadership program addressing harassment;
(9) convene annual meetings between the Superintendent and students at every middle and high school in the District; and (10) provide compliance reports to DOJ and OCR each trimester.

The Consent Decree will remain in force for five years from the date it was entered by the Court. During this period, DOJ and OCR will carefully monitor the District’s progress to ensure that the District complies with the terms of the Consent Decree, and will offer technical assistance as needed. We look forward to receiving the District's continued cooperation during the implementation of the Consent Decree.

We wish to thank you and your staff for the cooperation extended to OCR during our investigation and settlement negotiations. If you have any questions regarding this letter, you may contact Adele Rapport, Chief Attorney, (312) 730-1495/ Adele.Rapport@ed.gov or Leticia Soto, Senior Attorney, (312) 730-1740/ Leticia.Soto@ed.gov.

Sincerely,

/s/
Debbie Osgood
Director

Enclosure

cc: Ms. Jeanette M. Bazis, Esq.
District Counsel

Ms. Torey B. Cummings
Trial Attorney
U.S. Department of Justice

Ms. Tamica Daniel
Trial Attorney
U.S. Department of Justice
June 21, 2016

Via US Mail and Facsimile

Mr. Joseph R. Pye
Superintendent
Dorchester County School District Two
102 Green Wave Boulevard
Summerville, South Carolina 29483

Re: OCR Complaint No. 11-15-1348
Letter of Findings

Dear Superintendent Pye:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the above-cited complaint, received on August 31, 2015. The complaint alleged that Dorchester County School District Two (District) discriminated against his daughter, an elementary school transgender student (Student), on the basis of sex by prohibiting her from using the girls’ student restrooms at her elementary school and requiring that she use a private restroom in her school’s office or nurse’s station.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance from the Department. The District is a recipient of Federal financial assistance from the Department of Education, and is therefore subject to the requirement of Title IX and its implementing regulations.

During the investigation OCR reviewed documents provided by the complainant and the District. Additionally, OCR interviewed the complainant, the School Principal, and the District Assistant Superintendent.

For the reasons set forth below, OCR finds that the District violated Title IX by subjecting the Student to different treatment on the basis of sex.
**Legal Standards**

Under Title IX, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a).

The regulation implementing Title IX, at 34 C.F.R. § 106.31(a), provides, in relevant part, that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, or other education program or activity operated by a recipient which receives Federal financial assistance.

The regulation implementing Title IX, at 34 C.F.R. § 106.31(b), further provides that a recipient may not, on the basis of sex, deny any person such aid, benefit or services; treat an individual differently from another in determining whether the individual satisfies any requirement or condition for the provision of such aid, benefit, or service; provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; subject any person to separate or different rules of behavior; or otherwise limit any person in the enjoyment of any right, privilege or opportunity.

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

The Title IX regulation at 34 C.F.R. § 106.8(a) requires schools to designate at least one employee to coordinate the responsibilities to comply with Title IX. Schools are further required, by the Title IX implementing regulation at 34 C.F.R. § 106.9(a), to notify all students and employees of the name (or title), office address, and telephone number or e-mail address of the designated coordinator.

The Title IX regulation at 34 C.F.R. § 106.8(b) requires schools to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints of Title IX violations.

**Statement of Facts**

**The Student**

The Student was enrolled in the XXXX (School) since XXXX. Although the Student’s sex assigned at birth was male, her parents stated that she never exhibited male traits. In the middle of the Student’s XXXX grade year, the Student’s parents contacted the Student’s teacher and indicated that the Student wanted to start wearing dresses to school. The School supported the parents’ request to have the Student wear dresses to School and the School changed the Student’s name in the classroom to her preferred girl’s name. There was a private restroom in the Student’s XXXX grade classroom, which all the students used. In XXXX grade, students began using communal, sex-segregated restrooms located in the School’s hallways. At the beginning of the Student’s XXXX grade school year, the School informed the complainant that the Student must use the private restroom located in the nurse’s office, which was located in a different wing.
of the School, or the private restroom that was located in the office of the Assistant Principal, which was at the end of the hallway from where the Student’s classroom was situated. XXXX grade students generally would take restroom breaks as a group, on their way to or from lunch or recess, and the Student joined the group with the other female students. However, while the Student’s friends used the girls’ restroom, the Student was required to leave the group and use the Assistant Principal’s private restroom. This embarrassed the Student because she was forced to separate from her friends, who would often request to accompany her to the restroom, and because it required the Student to address questions from her classmates about why she was using a different restroom.

In XXXX, at the end of the Student’s XXXX grade year, the Student’s parents met with the School principal (Principal) and requested that for XXXX grade (the XXXX school year) the Student be allowed to use the girls’ restroom. In addition, the Student’s parents asked that the Student’s name be changed in PowerSchool1 because the Student is identified by her former male name on standardized tests and other PowerSchool generated documents.2 The Principal informed the Student’s parents that the School cannot change her name unless they provide a birth certificate that states the name change. During the meeting, the Principal informed the Student’s parents that the Student would be permitted to use the girls’ restroom. However, on or about XXXX, the Principal had a meeting with the Student’s parents, during which she informed them that the Student would not be permitted to use the girls’ restroom and that she would be required to use one of the previously identified private restrooms in the School (i.e., the private restroom that was located in the office of the Assistant Principal or the private restroom located in the nurse’s office). The complainant requested clarification from the Assistant Superintendent, who confirmed that the Student would not be granted access to the girls’ restroom facilities. On XXXX, the Principal of the School sent a letter to the Student’s parents in which she stated the following:

Based on our recent discussion regarding accommodations and modifications of school procedures with respect to your daughter [female name], the school is providing the following accommodations/modifications for [female name] while at school:

1. [Your daughter] will be referred to as [female name];
2. School records will indicate [your daughter] is a female; however, because the school cannot modify state reporting requirements, state records, including PowerSchool, will indicate [your daughter] is a male;
3. [Your daughter] will be subject to any school dress code applicable to females;
4. [Your daughter] will be provided a hall pass to the guidance and/or nurse and be authorized to use private restrooms: . . . Work Room [room formerly used

---

1 PowerSchool is an education technology platform that enables school districts to manage school processes and data, including, for example, grading, attendance, and state reporting.
2 For example, when the Student was selected for participation in the School’s gifted and talented program, the letter that announced her selection referred to the Student by her former male name. Because of this reference, the Student’s parents did not show her the letter. In addition, because the Student’s ID states her former male name, the School puts a piece of tape over the name and writes the Student’s name on it.

In XXXX, the complainant again requested that the Student’s first name be changed in PowerSchool. The District contacted the State Department of Education, which initially advised the District that they could only use the name on the birth certificate or other legal documentation to change the Student’s name in PowerSchool. The District informed the complainant via email that “if a parent has a legal name change through the courts, then that legal document can be used as the source” to change the name in PowerSchool. In late XXXX, the complainant informed the District that he had petitioned the court for a name change for the Student and was waiting for a court date. The District communicated this information to the State Department of Education and renewed its request for permission to change the Student’s name in PowerSchool. On XXXX, the District e-mailed the complainant stating that it had received permission from the state to change the Student’s name in PowerSchool, “... since you have indicated that you are awaiting a court date to make this happen.” The District changed the Student’s name in PowerSchool on XXXX. The Student’s name was legally changed by the court on XXXX.

On XXXX, the District informed OCR that as of XXXX, it permitted the Student to utilize the girls’ restroom.

The District’s policies

The District has identified the Assistant Superintendent of Administration and Personnel as the Title IX coordinator. The appropriate contact information for the Assistant Superintendent is included in the Student Handbook and is available on the District’s website. The District’s statement of nondiscrimination complies with the regulatory requirements of Title IX.

The District’s Title IX grievance procedures, which are codified in District Policy JII, are published on the District’s website and are provided to students and parents/guardians at the beginning of each school year. OCR has determined that the grievance procedures comply with the regulatory requirements of Title IX.

Analysis and Conclusion

The District acknowledged that it denied the Student access to the restrooms designated for girls, and confirmed that it provided her access only to private bathrooms located in the nurse’s station, the assistant principal’s office, and the room formerly used for behavior intervention purposes.

Accordingly, OCR concludes that the District treated the Student differently, on the basis of sex in determining whether she satisfies any requirement or condition for the provision of benefits, or services; by providing her different benefits or benefits in a different manner; and by subjecting her to separate or different rules of behavior, or otherwise limiting her in the enjoyment of rights, privileges or opportunities, in violation of the Title IX regulation, at 34 C.F.R. § 106.31. OCR further determined that there was insufficient evidence to conclude that the District violated the Title IX regulations at 34 C.F.R. §§ 106.8(a) and (b), and 106.9(a).
On June 16, 2016, the District signed the enclosed Resolution Agreement (Agreement), which commits the District to take specific steps to address the identified areas of noncompliance. The Agreement voluntarily entered into by the District is designed, when fully implemented, to resolve this complaint and the District’s Title IX violation. Pursuant to the Agreement, the District agreed to take the following specific actions:

- Provide the Student with equal access to the girls’ restrooms at school;
- Establish a support team, if requested by the Student and her parents, to ensure that she has access and opportunity to participate in all District programs and activities and is otherwise protected from gender-based discrimination at school;
- Revise its policies, procedures, and regulations to ensure that all students, including transgender and gender non-conforming students, are provided with equal access to and an equal opportunity to participate in all education programs and activities offered by the District;
- Provide annual training to all District-level and school-based administrators regarding the District’s obligations to prevent and address gender-based discrimination and provide age-appropriate instruction to all students on gender-based discrimination.

OCR will monitor closely the District’s implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information as necessary to determine whether the District has fulfilled the terms of the Agreement and is in compliance with Title IX with regard to the issue raised. As stated in the Agreement entered into by the District on June 16, 2016, if the District fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This concludes OCR’s investigation of the complaint. This letter should not be interpreted to address the District’s compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR’s determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR’s formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, OCR will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.
We appreciate the District’s cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Sebastian Amar or Josie Evola, the OCR attorneys assigned to this complaint. You may contact Mr. Amar at 202-453-6023 or by email at Sebastian.Amar@ed.gov or Ms. Evola at 202-453-5908 or by email at Josie.Evola@ed.gov.

Sincerely,

/s/

Alessandro Terenzoni
Supervisory Attorney, Team II
Office for Civil Rights
District of Columbia Office

Encl.: Resolution Agreement

cc: John Reagle, District counsel
Resolution Agreement
Dorchester County School District Two
OCR Complaint No. 11-15-1348

Dorchester County School District Two (the District) agrees to fully implement this Resolution Agreement (the Agreement) to resolve the Office for Civil Rights (OCR) Complaint No. 11-15-1348. This Agreement does not constitute an admission by the District of a violation of Title IX of the Education Amendments of 1972 or any other law enforced by OCR.

I. INDIVIDUAL MEASURES

A. For the duration of the Student’s enrollment in the District, the District will provide the Student access to sex-specific facilities designated for female students at school consistent with her gender identity; however, the Student may request access to private facilities based on privacy, safety, or other concerns, and the District will work with the Student to honor that request in the least disruptive manner possible for the Student.

Reporting Requirement: By July 18, 2016, the District will provide OCR with written confirmation of its compliance with Item I.A.

B. No later than thirty (30) days after the execution of this Agreement, the District will notify the Student and her parents that they may, at any point during the Student’s enrollment in the District, request the District to establish a support team to ensure the Student’s access and opportunity to participate in all programs and activities is not denied or limited based on her gender identity, and is otherwise protected from gender-based discrimination at school. If the District receives such a request, it will form a support team that will:

1. Include individuals knowledgeable about the Student, including individuals such as her parents, an advocate or representative of the parents’ choice (if any), a medical professional of the parents’ choice (if any), and relevant District personnel familiar with the Student;

2. Develop a student-specific support plan to ensure that the Student’s access to all school and District facilities and activities is not denied or limited based on her gender identity; in so doing, the team will address any particular issues raised by the Student or her parents;

3. Document its meetings, recommendations, and decisions, including, but not limited to, the date and location of each meeting, the names and positions of all participants, the basis for its recommendations and decisions, and supporting third-party opinions and information considered and/or relied upon in the meeting; and

4. At least once each school year or more often as reasonably requested by the Student or her parents, review the Student’s circumstances to determine...
whether existing arrangements related to the Student’s gender identity, gender transition, or transgender status are meeting her educational needs and ensuring that the Student has access and opportunity to participate in the District’s education programs and activities. Once constituted, the support team will be in place for the remainder of the Student’s enrollment in the District or until her parents request in writing that it be terminated.

**Reporting Requirement**: Within 30 calendar days of the execution of this Agreement, the District will provide OCR with written documentation of its compliance with item I.B, including a copy of the notice issued to the Student’s parents.

## II. DISTRICT-WIDE MEASURES

### A. POLICIES, PROCEDURES, AND REGULATIONS

1. The District will revise all existing policies, procedures, regulations, and related documents and materials (e.g., complaint forms, handbooks, notices to students and parents, website information) related to discrimination to:
   
   (a) include gender-based discrimination as a form of discrimination based on sex;
   
   (b) state that gender-based discrimination includes discrimination based on a student’s gender identity, gender expression, gender transition, transgender status, or gender nonconformity, and

2. Ensure that its policies, procedures, and regulations applicable to or governing student participation in all programs and activities offered by the District provide all students, including transgender and gender non-conforming students, equal access to all such programs and activities in a manner that does not discriminate on the basis of sex.

The District will:

(a) revise those policies, procedures, and regulations as necessary to ensure that all students, including transgender and gender non-conforming students, are provided with equal access to all such programs and activities and an equal opportunity to participate in all education programs and activities offered by the District.

**Reporting Requirement**: By July 1, 2016, the District will provide OCR with draft revised policies and procedures for OCR’s approval pursuant to items II.A. Within 90 days of OCR’s approval of the revised policies and procedures, the District will publish the revised policies and procedures on its website, and
provide OCR a copy of all relevant policies, procedures, regulations, and related materials (e.g., handbooks) that were revised.

B. TRAINING

1. Beginning in the 2016-17 school year and annually thereafter the District will provide training to all District-level and school-based administrators regarding the District’s obligations to prevent and address gender-based discrimination; implementation of the policies, procedures, and regulations adopted under this Agreement; and best practices for creating a nondiscriminatory school environment for transgender and gender-nonconforming students. The initial training will be conducted no later than July 30, 2016. Site administrators will, throughout each school year, integrate this information into existing trainings, meetings, and other appropriate opportunities to reinforce the protections of federal law to prevent gender-based discrimination.

2. Consistent with the policies and procedures adopted in this Agreement, the District will in its bullying prevention and sexual harassment programs, provide age-appropriate instruction to all students on gender-based discrimination and will provide examples of prohibited conduct, including harassment, in various school-related contexts, including the types of conduct prohibited in sex-specific facilities and elsewhere at schools.

**Reporting Requirements:**

By July 1, 2016, the District will submit a draft plan for implementation of the training developed in accordance with Section II.B for OCR’s review and approval, including the training date(s), the name and expertise of each presenter and a description of the training content.

By August 30, 2016, and by October 1 of each school year thereafter throughout the monitoring of this agreement, the District will provide a detailed description of or documentation related to all trainings provided to District employees pursuant to this Agreement, including the date(s) of each training; and the name, position, and school/work site of each employee who attended the training.

III. MONITORING AND REPORTING

The District understands that OCR will not close the monitoring of this Agreement until OCR determines that the District has fulfilled the terms of this Agreement and is in compliance with the regulation implementing Title IX, at 34 C.F.R. Part 106.

The District understands that by signing this Agreement, it agrees to provide data and other information in a timely manner. Further, the District understands that during the monitoring of this Agreement, OCR may visit the District, interview staff and students, and request such
additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this Agreement and is in compliance with the regulation implementing Title IX at 34 C.F.R. Part 106, which was at issue in this case.

The District understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings to enforce this Agreement, OCR shall give the District written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

Signed: Date:

/s/ June 16, 2016

Superintendent or Designee
Dorchester County School District Two, South Carolina
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; C.A., a minor, by and through her parent and guardian, N.A.; A.M., a minor, by and through her parents and guardians, S.M. and R.M.; N.G., a minor, by and through her parent and guardian, R.G.; A.V., a minor, by and through her parents and guardians, T.V. and A.T.V.; and B.W., a minor, by and through his parents and guardians, D.W. and V.W., Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR., in his official capacity as United States Secretary of Education; UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, in her official capacity as United States Attorney General, and SCHOOL DIRECTORS OF TOWNSHIP HIGH SCHOOL DISTRICT 211, COUNTY OF COOK AND STATE OF ILLINOIS, Defendants.

VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff Students and Parents for Privacy, along with the plaintiffs identified by their initials in the caption above (the “Plaintiffs”), state as follows:
INTRODUCTION

1. This is a civil rights action to stop the Department of Education ("DOE") and Township High School District 211 ("District 211" or "District") from continuing to trample students’ privacy and other constitutional and statutory rights by forcing 14- to 17-year-old girls to use locker rooms and restrooms with biological males; and to set aside DOE’s *ultra vires* legislative rule redefining “sex” in Title IX to include gender identity which, despite originating in a non-binding guidance document and being adopted without following the procedures mandated by the Administrative Procedure Act, is being enforced against schools across the country; and, to enjoin DOE’s enforcement of this rule against District 211 to the detriment of Plaintiffs.

2. The DOE threatened District 211 with the loss of $6 million of federal funding if it did not give a biologically male student ("Student A"), who perceives himself\(^1\) to be female, the right of entry to, and use of, the girls’ locker rooms.

3. District 211 entered into an agreement with DOE that grants Student A the right to enter and use all girls’ locker rooms at District 211 schools. OCR Case No. 05-14-1055, Agreement to Resolve, December 2, 2015, *available at*

\(^1\) Both Title IX and the legal precedent regarding bodily privacy recognize that distinctions based on biological sex are necessary to protect privacy. Therefore, although Plaintiffs are aware that Student A identifies as a female, it is his biological status as a male, as both the November 2, 2015, Letter of Findings from the DOE’s Office of Civil Rights and the Plaintiffs’ personal knowledge confirm, that is relevant to determining whether Plaintiffs’ rights have been violated by Defendants’ actions. Therefore, to reflect the biological facts that are necessary knowledge for this Court’s adjudication of Plaintiffs’ claims, Plaintiffs use masculine pronouns throughout this Complaint.

4. Previously, the District granted Student A, and all other students, permission to use school restrooms according to the students’ perceived gender identity. (the “Restroom Policy”).

5. Because of the Locker Room Agreement and the Restroom Policy, Student A currently uses both the girls’ locker rooms and the girls’ restrooms at William Fremd High School (“Fremd”).

6. This creates an intimidating and hostile environment for the girl members of Students and Parents for Privacy, some of whom are as young as 14, because Student A—who is biologically a male—actively uses their private facilities at the same times as Plaintiffs.

7. As a direct result of Defendants’ Policies and actions, every day these girls go to school, they experience embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation, and loss of dignity because they will have to use the locker room and restroom with a biological male.

8. Because of Defendants’ Policies and actions, they are afraid of being seen by, and being forced to share intimate spaces with, a male while they are in various states of undress.

9. Because of Defendants’ Policies and actions, these girls are also afraid they will have to see a male in a state of undress.
10. Because of Defendants’ Policies and actions, the girls are afraid of having to attend to their most personal needs, especially during a time when their body is undergoing often embarrassing changes as they transition from childhood to adulthood, in a locker room or restroom with a male present.

11. The embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation, and loss of dignity these girls experience because of Defendants’ Policies and actions are heightened because as adolescents they are at a time in their lives when they are the most shy, embarrassed, and aware of their bodies and the differences between their bodies and the bodies of their male classmates.

12. The Locker Room Agreement and Restroom Policy have had and continue to have a profoundly negative effect on the girls’ access to educational opportunities, benefits, programs, and activities at their schools:
   a. some girls actively avoid the locker rooms at school;
   b. one girl has started wearing her gym clothes underneath her regular clothes all day, so she only has to peel off a layer instead of exposing her unclothed body in the presence of a biological male in the locker room;
   c. other girls are changing as quickly as possible in the locker room, avoiding all eye contact and conversation, all the while experiencing great stress and anxiety over whether a biological male will walk in while they are unclothed;
d. some girls are avoiding the restroom altogether, and others are waiting as long as possible to use the restroom, so they won’t have to share it with a biological male, thus risking certain health problems; and

e. still other girls are risking tardiness by running to the opposite end of the school, during short 5 minute passing periods, to try to find an empty restroom.

13. These negative effects on the girls’ access to educational opportunities, benefits, programs, and activities at their school are a direct result of DOE’s adoption and enforcement of the legislative rule redefining the term “sex” in Title IX to include gender identity, the Locker Room Agreement following from that rule, and District 211’s Restroom Policy.

14. The DOE’s action violates the Administrative Procedure Act; and, the Locker Room Agreement and Restroom Policy violate the Plaintiffs’ right to privacy, discriminate on the basis of sex under Title IX by creating a hostile environment, and violate additional constitutional and statutory rights of Plaintiffs. They therefore seek redress from this Court.

JURISDICTION AND VENUE


17. The Court has jurisdiction to issue the requested declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57.


21. Venue lies in this district pursuant to 28 U.S.C. § 1391(b) and (e), because a substantial part of the events or omissions giving rise to all claims occurred in this district where Township High School District 211 is located.

PLAINTIFFS

22. All Plaintiffs are citizens of the United States and residents of Cook County, Illinois.
Students and Parents for Privacy

23. Plaintiff Students and Parents for Privacy is a voluntary unincorporated association of 51 families (136 individuals – 73 parents and 63 students), who are directly impacted by the DOE’s adoption and enforcement of the legislative rule redefining the term “sex” in Title IX to include gender identity, and also the Locker Room Agreement and/or the Restroom Policy.

24. Members of Students and Parents for Privacy include both students and their parents.

25. Student Plaintiffs object to being required to share restrooms, locker rooms, and shower rooms with students of the opposite biological sex.

26. The Student Plaintiffs currently attend a District 211 high school or will attend a District 211 high school starting in Fall 2016. These schools include William Fremd High School ("Fremd"), Palatine High School, James B. Conant High School, and Schaumburg High School.

27. Nineteen of the student members of Students and Parents for Privacy are girls who attend Fremd, and so are currently subject to both the Locker Room Agreement and the Restroom Policy, while another eight student members are girls who will attend Fremd beginning in Fall 2016 and so will be subject to those policies.

28. In addition, there are seven girl members of Students and Parents for Privacy who attend other District 211 schools and so are subject to the Restroom Policy.
29. There are also 16 boy members of Students and Parents for Privacy who attend District 211 schools or will attend District 211 schools beginning Fall 2016, and so are subject to the Restroom Policy.

30. Each plaintiff who is individually identified by initials is also a member of Students and Parents for Privacy.

The Individually Identified Plaintiffs

31. Plaintiff C.A., a minor, currently attends Fremd and is subject to the Locker Room Agreement and the Restroom Policy. Plaintiff N.A. is her parent and guardian.

32. Plaintiff A.M., a minor, currently attends Fremd and is subject to the Locker Room Agreement and the Restroom Policy. Plaintiffs S.M. and R.M. are her parents and guardians.

33. Plaintiff N.G., a minor, currently attends Palatine High School and is subject to the Restroom Policy. Plaintiff R.G. is her parent and guardian.

34. Plaintiff A.V., a minor, will attend Fremd starting in the Fall of 2016, and at that time will be subject to the Locker Room Agreement and the Restroom Policy. Plaintiffs T.V. and A.T.V. are her parents and guardians.

35. Plaintiff B.W., a minor, currently attends Fremd and is subject to the Restroom Policy. Plaintiffs D.W. and V.W. are his parents and guardians.

36. The factual statements and allegations of law below may apply to a number of individual plaintiffs. For clarity, when used below: “Student Plaintiffs” refers to all students who are part of Students and Parents for Privacy (including
those who are individually identified by initials); “Parent Plaintiffs” refers to all parents who are part of Students and Parents for Privacy (including those who are individually identified by initials); and “Girl Plaintiffs” refers to all girl students who attend Fremd, or will attend Fremd in fall 2016, and are part of the Students and Parents for Privacy (including those who are individually identified by initials). Girl Plaintiffs are subject to the Locker Room Agreement and the Restroom Policy. Student Plaintiffs are subject to the Restroom Policy.

DEFENDANTS

Defendant Department of Education

37. Defendant Department of Education (“DOE”) is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of Title IX, 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106.

38. The DOE, through its Office for Civil Rights (“OCR”), exercised its authority to promulgate, administrate, and enforce its new legislative rule for Title IX in the instant matter against District 211, to the detriment of the Girl Plaintiffs.

Defendant Secretary John B. King, Jr.

39. Defendant John B. King, Jr., is the United States Secretary of Education. In this capacity, he is responsible for the operation and management of the DOE. King is sued in his official capacity only.
**Defendant Department of Justice**

40. Defendant Department of Justice (“DOJ”) is an executive agency of the United States government and is responsible for the enforcement of Title IX, 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106. Pursuant to Executive Order 12250, the DOJ has authority to bring enforcement actions to enforce Title IX.

**Defendant Attorney General Loretta E. Lynch**

41. Defendant Loretta E. Lynch is the United States Attorney General. In this capacity she is responsible for the operation and management of the DOJ. Lynch is sued in her official capacity only.

**Defendant School Directors of Township High School District 211, County of Cook and State of Illinois**

42. District 211 is organized under the laws of the State of Illinois, and pursuant to those laws it may be sued in all courts including this one. 105 Ill. Comp. Stat. Ann. 5/10-2.

43. District 211 is comprised of public educational institutions that provide a high school education to both male and female students.

44. The schools that comprise District 211 receive federal funds and so are subject to the requirements of Title IX.

45. Defendant District 211 is charged with the formulation, adoption, implementation, and enforcement of its policies for its schools, including the Locker Room Agreement and Restroom Policy challenged herein.
46. Defendant District 211 is responsible for the enforcement of its policies by its Superintendent, administrators, teachers, and all its other employees.

STATEMENT OF FACTS

The DOE Mandates An Unlawful Policy

Title IX and its meaning

47. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…” 20 U.S.C. § 1681.

48. The regulations implementing Title IX provide, in relevant part, that “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular...or other education program or activity operated by a recipient which receives Federal financial assistance.” 34 C.F.R. § 106.31(a).

49. The implementing regulations also provide that a funding recipient shall not, on the basis of sex: “Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; ... Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; ... Deny any person any such aid, benefit, or service; ... Subject any person to separate or different rules of behavior, sanctions, or other treatment; ...[or] Otherwise limit any
person in the enjoyment of any right, privilege, advantage, or opportunity.” 34
C.F.R. § 106.31(b).

50. Nothing in Title IX’s text, structure, legislative history, or
accompanying regulations addresses gender identity.

51. The term “gender identity” does not appear in the text of Title IX.

52. The term “gender identity” does not appear in the regulations
accompanying Title IX.

53. Indeed, recognizing that Title IX does not protect against
discrimination because of “gender identity” (but only against discrimination because
of biological sex), beginning in 2011, Senator Al Franken has repeatedly introduced
legislation modeled after Title IX that would protect against gender identity
discrimination in the education context.

54. That legislation has failed to pass every year it has been introduced.

55. Title IX, and the accompanying regulations, use the term “sex,” not
“gender identity,” in describing the type of discrimination prohibited.

56. The term “sex” as used in Title IX and its implementing regulations
means male and female, under the traditional binary conception of sex consistent
with one’s birth or biological sex.

57. Title IX also states that “nothing contained herein shall be construed
to prohibit any educational institution receiving funds under this Act, from
maintaining separate living facilities for the different sexes[.]” 20 U.S.C. § 1686,
indicating that Congress intended that Title IX should respect student privacy
rights, and not violate them by compelling introduction of opposite-sex students into private areas designated for one biological sex.

58. Title IX’s accompanying regulations confirm that schools “may provide separate toilet, locker room, and shower facilities on the basis of sex, [as long as] such facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex.” 34 C.F.R. § 106.33.

59. Preventing the mixing of biological boys and girls in intimate environments like restrooms, locker rooms, and showers is the very reason Congress allowed for separate living facilities, and that Title IX regulations allow for separate restrooms, locker rooms, and changing areas, for the different sexes.

**DOE acts without legal authority by adopting and enforcing a legislative rule redefining “sex” in Title IX to include gender identity**

60. Under the Administrative Procedure Act, any “rules which do not merely interpret existing law or announce tentative policy positions but which establish new policy positions that the agency treats as binding must comply with the APA’s notice-and-comment requirements, regardless of how they initially are labeled.” 72 Fed. Reg. 3433.

61. Regulations enacted under Title IX must also be “approved by the President” before they become effective. 20 U.S.C. § 1682.

62. The DOE has declared that the term “sex” as used in Title IX’s prohibition on sex discrimination now means, or at least includes, “gender identity.”

63. The DOE announced this new legislative rule redefining “sex” to schools nationwide in several DOE guidance documents published over the last few

64. DOE’s new rule requires schools to treat students consistently with their perceived gender identity, regardless of biological sex.


66. OCR then informed District 211 that it discriminated on the basis of gender identity, in violation of Title IX, by refusing a biological male, who perceives himself to be female, access to the girls’ locker and shower rooms.

67. DOE threatened District 211 with the loss of $6 million dollars in federal funds if it failed to grant a biologically male student access to the girls’ locker and shower rooms.
68. DOE is treating its declaration that Title IX bars gender identity discrimination as a legislative rule that is binding on all schools that are subject to Title IX.

69. The DOE is actively enforcing its legislative rule that Title IX includes gender identity against schools across the country, not just District 211.

70. DOE did not comply with APA’s notice-and-comment requirements when it adopted its legislative rule redefining “sex” in Title IX to include gender identity and mandating that schools give students seeking access to opposite sex facilities based on their gender identity the access they desire.

District 211’s Locker Room Agreement

71. Student A is currently an 11th grade student at Fremd High School.

72. He was born a boy and is anatomically male.

73. Throughout most of his school career, Student A identified to his classmates, including Student Plaintiffs, as a boy, consistent with his biological sex.

74. He used the restrooms and locker rooms consistent with his biological sex prior to high school.

75. At some point during middle school, Student A decided to publicly identify himself as female.

76. When he entered high school, although he had been using the boys’ facilities in middle school, Student A and his parents requested that he be allowed to use the girls’ locker rooms.

77. District 211 initially refused.
78. The District told Student A that he could not use girls’ locker rooms because his presence would invade the privacy of female students.

79. From approximately the summer of 2013 to January 14, 2016, District 211 refused to give Student A access to the girls’ locker rooms.

80. In December 2013, Student A (or his representatives) filed a complaint with OCR, alleging that District 211 violated his rights under Title IX, when it denied him use of the girls’ locker rooms.

81. OCR commenced an investigation of District 211’s locker and shower room policies as applied to Student A.

82. District 211 defended its policy.

83. District 211 told OCR that it “based its decision” not to allow Student A to use the girls’ locker and shower rooms “on the needs of all students,” explaining that it came to this decision after “balancing Student A’s rights and interests with the privacy concerns of . . . female students.”

84. Student A asked to use a private stall to change, but District 211 said that would not be practicable in part because there are too few stalls and too many students.

85. When word of OCR’s investigation became public, District 211 informed parents in a public newsletter that the District’s goal was “to protect the privacy rights of all students when changing clothes or showering before or after physical education and after-school activities.”
86. Superintendent Cates stated that the District would continue to provide “individual accommodations” to students seeking access to opposite sex facilities based on their gender identity “in a manner that does not infringe on the privacy concerns of other students.”

87. District 211 provided Student A with several private facilities to change his clothes for physical education and athletics from the fall of 2013 through January 14, 2016.

88. Student A expressed dissatisfaction with the private arrangements.

89. In response to Student A’s complaints, District 211 provided different options and installed lockers, mirrors, and other equipment in the private rooms for Student A’s use.

90. When Student A complained about changing alone, District 211 offered to put lockers in the restroom adjoining the PE locker room so Student A could invite his friends to change with him.

91. Student A spoke with several friends but no girls would agree to change with him.

92. Despite District 211’s policy prohibiting any biological males from entering the female locker rooms, Student A entered girls’ locker rooms on at least six occasions.

93. He entered the girls’ PE locker room during his PE class.

94. He entered the girls’ swim locker room during the swim unit in PE, while girls were present and using the swim locker room.
95. He entered the girls’ gymnastics’ locker room on at least four occasions, while he was on the girls’ gymnastics team and while girls were present and using the locker room.

96. At least once, Student A undressed and changed his clothes in the girls’ gymnastics locker room while girls were present.

97. Four girls and one parent contacted the coach and expressed how embarrassed, anxious, uncomfortable, and distressed the girls felt using a locker room and being forced to change with a biological male.

98. District 211 responded by again instructing Student A to use one of the private facilities designated for his use.

99. In July 2015, OCR informed District 211 that its investigation of Student A’s complaint was complete and that he was entitled to use the girls’ locker rooms pursuant to Title IX.

100. On October 12, 2015, District 211 informed OCR it would not voluntarily resolve the alleged Title IX violation, but would continue to provide Student A an accommodation so he would not have to use the boys’ locker rooms if he did not want to do so.

101. The District again cited concerns for the girls’ privacy.

102. Despite the District’s privacy concerns, on November 2, 2015, OCR issued a Letter of Findings against District 211 stating that it had violated Title IX by not granting Student A access to the girls’ locker rooms.
103. The letter also stated that District 211 had “30 calendar days [from] the date of this Letter of Findings” to give Student A access to the locker rooms, or OCR would “issu[e] a Letter of Impending Enforcement Action.”

104. DOE’s announcement of its intent to issue a Letter of Impending Enforcement Action was a threat to begin proceedings to remove millions of dollars in federal funding if the District did not give Student A right of entry to and use of the girls’ locker rooms and shower rooms.

105. On December 2, 2015, despite public outcry from Plaintiffs and many other parents and students, District 211 signed an agreement with OCR by which the District agreed, among other things, to give Student A right of entry to and use of any and all of the girls’ locker rooms and shower rooms in Fremd High School and all of the girls’ locker rooms and shower rooms throughout the District when he visits other schools. (The “Locker Room Agreement”).

106. The Agreement states that Student A represented that he would change in private changing stations in the locker rooms, but nothing in the agreement requires him to do so.

107. There is also no penalty under the Agreement if Student A decides not to change in the private stalls.


109. The Locker Room Agreement is an official policy of District 211.
The Damaging Effects of the Locker Room Agreement on Girls

110. Because of the Locker Room Agreement, Student A is currently using the girls’ locker rooms while female students are present, including some of the Girl Plaintiffs.

111. He has right of entry to and use of all three girls’ locker rooms: the locker room near the main gymnasium, used for physical education (“PE locker room”); the locker room used for particular athletic sports, including girls’ gymnastics (“gymnastics locker room”); and the locker room near the pool, used for swimming activities (“swim locker room”).

112. There are Girl Plaintiffs who use each of the three locker rooms to change their clothes.

113. There are Girl Plaintiffs who regularly use the showers in the swim locker room.

114. Girl Plaintiffs live in constant anxiety, fear, and apprehension that a biological boy will walk in at any time while they use the locker rooms and showers and see them in a state of undress or naked.

115. This anxiety, fear, and apprehension stays with the Girl Plaintiffs throughout the day as they anticipate having to use the locker rooms again.

The Damaging Effect on Girls: the PE Locker Room

116. Girl Plaintiffs cannot escape forced interactions with Student A in the locker rooms because physical education (“PE”) is a mandatory, daily course, all four years of school in District 211, and is a requirement to graduate.
117. The PE locker room is a long rectangular room with several banks of lockers and a long row of lockers along the periphery wall.

118. There are approximately 130 students in physical education classes during a given class period.

119. At a minimum, 65 girls must change their clothing in the locker rooms at one time.

120. It is mandatory that girls in PE class change into clothing appropriate for PE class.

121. Some Girl Plaintiffs also change into sports bras, resulting in even greater bodily exposure while in the locker rooms.

122. Currently, three of the Girl Plaintiffs have physical education during the same class period as Student A, and so must use the PE locker room with him.

123. These Girl Plaintiffs object to being forced to use a locker room with any male.

124. All three Girl Plaintiffs are afraid of, and embarrassed and humiliated by, changing their clothing in the same locker room as Student A, because he is a biological male.

125. The dread, anxiety, stress, and fear these three Girl Plaintiffs feel over having to use the same PE locker room as a biological male is an ever-present distraction throughout the school day, including during class instruction time.
126. All Girl Plaintiffs, including the three who currently must share the Locker Room with Student A, are afraid and embarrassed to be seen in a state of undress by him, because he is a biological male.

127. These three girls, and all Girl Plaintiffs, are also afraid to see Student A in a state of undress because he is a biological male, and are embarrassed and anxious worrying that they might see him in such a state.

128. So, all three Girl Plaintiffs in Student A’s PE period change their clothing as quickly as possible, while trying not to look at anyone.

129. Because of the Defendants’ actions, all three experience humiliation, embarrassment, stress, anxiety, and fear while changing.

130. Because of the Defendants’ actions that allow a male into the girls’ locker room, all three have come to view the PE locker room as a scary and intimidating environment.

131. One of these Girl Plaintiffs has started wearing her gym clothes underneath her regular clothes all day at school so she can avoid undressing in the locker room.

132. When it is time for physical education, she goes to the locker room, removes her outer layer as fast as possible while looking at her feet, and then leaves as quickly as possible.

133. She then repeats this process after class, putting the layer back on and leaving as quickly as possible, wearing her dirty gym clothes underneath her street clothes for the rest of the day.
134. Even with this method of changing, the Defendants’ actions have resulted in this Girl Plaintiff being forced to have direct interactions with a biological male in the PE locker room, which makes her very scared and uncomfortable.

135. On one recent occasion, Student A stood next to her while she was using the mirror and repeatedly lifted his shirt, presumably to look at his body in the mirror.

136. Girl Plaintiffs who are not in Student A’s gym period are also afraid, anxious, stressed, and apprehensive when they use the locker rooms because, pursuant to the Defendants’ actions, a biological male has permission to enter and use any of the girls’ locker rooms at any time of the school day.

137. Therefore, because of Defendants’ actions, Girl Plaintiffs know that a biological male could walk in on them when they are undressing for PE.

*The Damaging Effect on Girls: The Privacy Stalls Do Nothing to Stop the Harm*

138. District 211 constructed five stalls in the PE locker room where students could change their clothes.

139. These five stalls do nothing to address the Girl Plaintiffs’ fears about sharing a locker room with a biological male for numerous reasons.

140. First, students who use the stalls are ridiculed and harassed by other students to such an extent that the stalls are not a practical option.

141. Because students know that their use of the stalls will subject them to ridicule and harassment, they generally do not use the stalls to change for PE class.
142. A Girl Plaintiff in Student A’s PE period used one of the changing stalls on a single occasion because she is uncomfortable changing in the same locker room with a biological boy.

143. While she was in the changing stall, other girls who were in the locker room began calling her names, including “transphobic” and “homophobic.”

144. Word spread that she had used the stall to change during PE class and she began being harassed by other students in the hallways.

145. Both boys and girls called her names, yelled derogatory, slang words for female body parts at her, and accused her of being transphobic and homophobic.

146. As a result of the ridicule and harassment this Girl Plaintiff received over her use of the stalls, she has not used them again.

147. This Girl Plaintiff is the student described above who now wears two sets of clothes to school so as to avoid having to undress at all in the locker room.

148. Second, District 211 has, through various announcements to the students at Fremd, and also through community meetings on gender identity that the District has organized and sponsored, conveyed to the Student Plaintiffs the message that any objection to the Locker Room Agreement (or the Restroom Policy) will be viewed by District administration as intolerance and bigotry.

149. For example, District 211 has organized and sponsored “community education meetings” for each of its schools.

150. The District represents the speakers at these meetings as experts on gender identity issues.
151. These speakers have exclusively supported the Locker Room Agreement and Restroom Policy and condemned any objection to these policies.

152. The message the District conveys to parents and students in these community education meetings is that any restriction on Student A’s use of opposite sex facilities is discrimination and that any objection to sharing a restroom or locker room with a person seeking access to the opposite sex’s facilities based on gender identity is born of bigotry, ignorance, and a lack of education.

153. Because of the District’s message that differing views will not be tolerated, most of the Student Plaintiffs have not asked for a separate, private locker room or restroom.

154. Because of the District’s message, the Student Plaintiffs are afraid to be named publicly in this lawsuit, for fear that other students and their schools will retaliate against them.

155. Third, even if the Girl Plaintiffs could use the stalls without suffering ridicule and harassment, they do not remedy the privacy violation caused by the presence of a biological male sharing the same small, intimate settings where Girl Plaintiffs are naked or in other various states of undress.

156. The five stalls in the PE locker room also do nothing to address the Girl Plaintiffs’ fears about being seen in a state of undress by a biological male.

157. The stalls are located in the middle of the locker room such that, if Student A chooses to use the stalls, he must walk past girls who are in a state of undress to go to and from the stalls.
158. The stalls do not fully shield the Girl Plaintiffs from being seen in a state of undress because there are large gaps above and below the stall doors, and gaps along the sides of the door that another student could see through even inadvertently.

159. Nor do the stalls guarantee that Girl Plaintiffs will not see Student A in a state of undress if he chooses not to use the stalls for undressing and changing.

160. While Student A said he planned to use the stalls when the Agreement was signed, nothing in the Agreement prevents him from deciding later that he does not want to use the stalls.

161. Also, there are no changing stalls in the gymnastics and swimming locker rooms, which the Agreement gives Student A permission to use.

162. Fourth, even if Student A uses the privacy stalls, this is still not a satisfactory option and does not guarantee that he will not see the Girl Plaintiffs in a state of undress.

163. Because the stalls are located in the middle of the locker room, Student A must walk through the locker room to reach them.

164. There is no requirement that Student A enter a privacy stall before the girl students begin changing their clothes.

165. There is also no requirement that Student A remain in a privacy stall until the girl students have finished changing their clothes.
166. Under the terms of the Locker Room Agreement, Student A may enter the locker rooms at any time, including after the girl students begin changing clothes.

167. And, since the Locker Room Agreement does not require Student A to use a privacy stall, if he chooses to use one he may exit it any time he likes, including while the girl students are in various stages of undress or fully unclothed.

168. Thus, even if Student A uses a privacy stall, the Girl Plaintiffs are still at risk of being seen in stages of undress, or fully unclothed, by a biological male.

169. Every Girl Plaintiff uses the PE locker room with the fear that a male will see her in state of undress or that she will see a male in a state of undress.

170. The stress and anxiety the three Girl Plaintiffs feel over having to use the locker room with Student A is an ever-present distraction throughout the school day, including during class instruction time.

_The Damaging Effect on Girls: Girls in Gymnastics and Other Athletics_

171. The girls’ gymnastics locker room is a separate room, where girls, including at least one Girl Plaintiff, change into leotards for gymnastics.

172. The girls’ gymnastics locker room is small and open, with a few banks of lockers and an open shower area with two poles with showerheads attached.

173. In the girls’ gymnastics locker room, girls must change in the open room, fully in view of each other.

174. There are no private changing stalls in the girls’ gymnastics locker room.
175. Girl Plaintiffs (and any other girls) who take part in gymnastics must remove all of their clothing to change into leotards.

176. Student A has taken part in girls’ gymnastics in the past.

177. The team is “no cut” so any student who wants to participate can join the team.

178. One Girl Plaintiff was on the girl’s gymnastics team in 2015-16 and plans to be on the team again in 2016-17.

179. Student A was on the girls’ gymnastics team in 2013-14 and 2015-16.

180. On information and belief, Student A intends to participate in gymnastics in 2016-17.

181. In 2013-14, Student A was not allowed in the locker room because the Locker Room Agreement had not yet been adopted.

182. The school gave Student A a separate, private place to change for gymnastics because he is biologically male.

183. In 2015-16, Student A left the team before the Locker Room Agreement took effect in January.

184. The Locker Room Agreement permits Student A to change with the other gymnasts in the girls’ locker room.

185. The Girl Plaintiff, with her friends on the gymnastics team, do not want to change into leotards in front of a biological male.

186. They are anxious and afraid that they will have to expose their fully unclothed bodies in front of a biological boy.
187. They are also anxious and afraid that Student A will fully expose his unclothed body to change into his leotard in front of them.

188. Absent an injunction from this Court, a male student will be allowed to use the gymnastics locker room to change his clothing and these girls’ fears will be realized.

189. In addition to gymnastics, Girl Plaintiffs participate in a number of extracurricular athletics, including cheerleading, track and field, cross country, water polo, swimming, lacrosse, volleyball, badminton, and soccer.

190. Each of these activities requires students to change their clothing in the girls’ locker rooms that, because of Defendants’ actions, are open to a male student’s use.

191. This makes all of the Girl Plaintiffs who participate in extracurricular athletics apprehensive and fearful.

*The Damaging Effect on Girls: Swimming Activities*

192. Swimming is a required part of PE for freshman and sophomore students.

193. There are also elective swim classes available to junior and senior students, like Student A.

194. The Girl Plaintiffs who are freshman or sophomores and who are enrolled in mandatory swim class must use the swimming locker room.
195. The Girl Plaintiffs who are eighth graders will also be required to use the swimming locker rooms for their mandatory swim class during their Freshman year.

196. The girls’ swim locker room contains an open area with lockers in the middle and mirrors, shelves, dryers, and benches along the outside.

197. There are no private changing stalls in the girls’ swim locker room.

198. Girl Plaintiffs who take swimming class or participate in water-related athletics must change into and out of their swimsuits in this open area where they are visible to anyone in the locker room.

199. Many girls shower.

200. In order to rinse off the chlorine from the pool, girls regularly pull the top half of their bathing suits down to their waist when they shower.

201. This is done in open showers visible to other students in the locker room.

202. Students do not have enough time to use the bathroom stalls to change into and out of their swimsuits before and after PE.

203. Girl Plaintiffs in swimming activities must be fully unclothed at some point in the locker room.

204. The Locker Room Agreement allows Student A to access the girl’s swim locker room at anytime, including when girls are present, regardless of whether he is taking a swimming class or involved in a swimming sport.
205. Because of Defendants’ actions, Girl Plaintiffs experience anxiety, stress, fear and apprehension when they have to use the swim locker room and throughout their day, knowing they will have to use the swim locker room again.

*The Damaging Effect on Girls: 8th Grade Girls*

206. Some of the Girl Plaintiffs are eighth graders who will attend Fremd next year and who face the likelihood, like the other Girl Plaintiffs, that they may be assigned to Student A’s physical education period and so may have to use the PE locker room while he is present.

207. Specifically, Plaintiff A.V. is an eighth grade girl who will attend Fremd next year.

208. A.V. is fearful, uncomfortable, and apprehensive about using restrooms, locker rooms, and showers with a biological male.

209. A.V., along with several of her friends, told her mother, A.T.V., that they are “petrified” of changing or taking care of private matters, including feminine hygiene needs, in restrooms or locker rooms with a biological male.

210. These eighth graders are already experiencing stress, fear and apprehension because of both the Locker Room Agreement and the Restroom Policy, because they know that next year their privacy will be invaded and their dignity will be violated as a direct result of Defendants’ actions.

*The Restroom Policy*

211. Prior to the summer of 2013, all of the schools in District 211 separated their restrooms by biological sex.
Only biological females were allowed to use the restrooms designated for girls, and only biological males were allowed to use the restrooms designated for boys.

This policy protected the privacy and safety of all children.

This policy was changed sometime in summer 2013.

When Student A started high school and he and his parents requested access to the girls’ locker rooms, they also requested access to the girls’ restrooms.

District 211 agreed to give him the same access to the girls’ restrooms as is enjoyed by biological girls.

District 211 then extended this new policy to all students and all schools in the District, so that every District 211 student may use the restroom that is consistent with his or her perceived gender identity, irrespective of his or her biological and anatomical sex (“Restroom Policy”).

The Damaging Effects of the Restroom Policy

District 211 did not notify parents or students of the new Restroom Policy.

Some Girl Plaintiffs found out about the new policy when they walked into their restroom and came face-to-face with Student A.

They were startled, shocked, embarrassed, and afraid by the sight of a biological male in the girls’ bathroom.

Currently, there are biological males who perceive themselves to be female at a number of schools in District 211.
222. There are also biological females who perceive themselves to be male at a number of schools in District 211.

223. There is at least one student attending a District 211 school who self-identifies as “gender fluid.”

224. Because of the Restroom Policy these students who identify as transgender or gender fluid are permitted to use restrooms with students of the opposite sex.

225. That means all Student Plaintiffs must use the restroom with the knowledge that a student of the opposite biological sex could walk in on them at any time.

226. This causes Student Plaintiffs to experience embarrassment, humiliation, anxiety, intimidation, fear, apprehension, stress, degradation, and loss of dignity.

227. Using the toilets in the stalls does not resolve the embarrassment, humiliation, anxiety, intimidation, fear, apprehension, and stress produced by using the restroom with students of the opposite sex, because the stalls are not fully private; and, besides, the Student Plaintiffs are still attending to private bodily needs in the immediate presence of the opposite sex.

---

2 “Gender fluidity” is generally defined to mean that one’s gender identity can change day-to-day, or even moment-to-moment, and is not limited to the two binary genders (i.e., to “male” or “female”). So, for example, one may identify as female one moment, as male the next, and as neutrois (a neutral gender that is neither male nor female) the next. See, e.g., Gender Diversity, “Gender Fluidity,” available at http://www.genderdiversity.org/resources/terminology/; Nonbinary.org, “Genderfluid,” available at http://nonbinary.org/wiki/Genderfluid (both websites last visited May 3, 2016).
228. In both the boys’ and girls’ restrooms, there are large gaps above and below the stall doors, and gaps along the sides of the door, that another student could see through even inadvertently.

229. These gaps mean that the Student Plaintiffs, both boys and girls, must risk exposing themselves to the opposite sex every time they use the restroom.

230. District 211 cannot guarantee that Student Plaintiffs’ partially unclothed bodies will not be exposed to members of the opposite biological sex while using the restroom.

231. Girl Plaintiffs frequently run into Student A when they use the schools’ restrooms.

232. One Girl Plaintiff saw Student A four times in one week in the restrooms.

233. Other Girl Plaintiffs have experienced Student A staring at them in the restroom, which makes them uncomfortable.

234. One Girl Plaintiff has experienced Student A walking into a restroom while she was washing her hands and staring at her in a way that made her feel very awkward and uncomfortable.

235. As a consequence, some Girl Plaintiffs are using the restroom as little as possible while at school so they will not have to risk using the restroom with a male student present. This may increase their risk for various health conditions, like bladder infections.
236. Some girls risk tardiness by running to the opposite end of the school, during short 5 minute passing periods, to try to find a restroom not likely to be used by a male student.

237. The stress and anxiety some Girl Plaintiffs feel over having to use the restroom with biological males is an ever-present distraction throughout the school day, including during class instruction time.

The Policies’ Additional Harms

238. Each Parent Plaintiff who has a daughter or daughters adamantly objects to their daughters using locker rooms and shower rooms with a biological male.

239. All of the Parent Plaintiffs also adamantly object to their sons and daughters using restrooms with students of the opposite sex.

240. These Parent Plaintiffs do not want their children exposed to a student of the opposite biological sex while that student is in a state of undress.

241. These Parent Plaintiffs do not want their children’s bodies to be exposed to a student of the opposite biological sex while naked or otherwise in a state of undress, nor do they want their children to attend to their private bodily needs in the presence of the opposite biological sex.

242. Some Parents have asked the District for private options for their daughters to change their clothes and use the restroom.

243. The options offered are inadequate and inferior to the facilities provided to boys in the school.
244. The options offered are inadequate and inferior to the girls’ facilities now open to Student A.

245. Additionally, the options offered are also unworkable in terms of the practical locker room needs of the Girl Plaintiffs.

246. In response to the request for a private locker room facility, the Fremd Principal told Parent Plaintiffs that their daughters could use the stalls in the PE locker room, the swimming or athletic locker rooms, or the nurses’ office.

247. None of these are acceptable alternatives.

248. The stalls in the PE locker room are no alternative at all for the reasons described above. See supra at ¶¶ 138-170.

249. The swimming and athletic locker rooms also are not alternatives because Student A has access to them at all times, including when the Girl Plaintiffs use them to change clothes.

250. Additionally, to use the swim/athletic locker rooms or the nurse’s office, Girl Plaintiffs would have to go into the PE locker room, get their clothes, walk over to the swim/athletic locker rooms or nurse’s office some distance away, change, go back to the PE locker room to stow their clothing, and then go to class.

251. With 5 minute passing periods between classes, there is not enough time to use the swim/athletic locker rooms or nurse’s office and get to class on time.

252. In response to the request for a private restroom facility, the Fremd Principal told Parent Plaintiffs that if their daughters walk into a restroom where a
male student is present, their daughter’s option is to leave and use a different restroom in the school.

253. This suggested solution is not acceptable for several reasons.

254. First, Girl Plaintiffs have 5 minutes between classes to: gather their things from the class they are leaving; walk to their locker to put things away and get their things for their next class; take care of extra things that may need to do, such as using the restroom; and walk to the next class, unload their things, and be ready for class to start.

255. Depending on the classes a student has, this can mean that they must walk all the way across the school to go from one class to another.

256. Restrooms are a distance apart and there are no restrooms in some areas of the school, such as the music wing and applied technology wing.

257. Therefore, there is not enough time for a Girl Plaintiff who is uncomfortable sharing a restroom with a biological male to leave the restroom she already walked into, walk to another restroom a distance away, attend to her personal needs, and then get to class on time.

258. This is even more unworkable if there are lines in the girls’ restrooms, as there almost always are, or if there is a need to use the restroom immediately.

259. Secondly, the District’s suggested solution does nothing to alleviate the stress and anxiety of having a male student walk in while a Girl Plaintiff is already using the restroom.

260. Such a situation is exactly what Parent Plaintiffs object to.
261. It is also what makes the restroom environment so hostile to the Girl Plaintiffs, since each time they use the restroom they must do so knowing that a biological male can walk in on them.

262. The Locker Room Agreement and Restroom Policy interfere with the Parent Plaintiffs’ preferred moral and/or religious teaching of their children concerning modesty and nudity.

263. The Locker Room Agreement and Restroom Policy interfere with the Parent Plaintiffs’ right to control whether their children will be exposed to the opposite sex in intimate, vulnerable settings like restrooms, locker rooms, and showers.

264. The Locker Room Agreement and Restroom Policy interfere with the Parent Plaintiffs’ right to control whether their children will be exposed to the partially or fully unclothed body of opposite sex persons.

265. The Locker Room Agreement and Restroom Policy interfere with Parent Plaintiffs’ right to control whether their children’s partially or fully unclothed body is exposed to the opposite sex.

266. Because of the Locker Room Agreement and Restroom Policy, at least one Parent Plaintiff has decided to send his daughter to private school, instead of a District 211 school, when she starts high school next fall.

267. Some of the student and parent members of Students and Parents for Privacy are devout Christians whose faith requires that they preserve their modesty and not use the restroom, shower, or undress, in the presence of the opposite sex.
268. These students and parents also believe that they should not be in the presence of a member of the opposite sex while that person is using the restroom, showering, or undressing.

269. The Restroom Policy and Locker Room Agreement are particularly likely to cause emotional and psychological trauma to girls who have been sexually assaulted, for whom the presence of a biological male in their private facilities can be especially unnerving, or even terrifying.

270. The Centers for Disease Control (the “CDC”) has observed that almost 12% of high school girls reported that they had already experienced the horror of rape. Center for Disease Control, Sexual Violence: Facts at a Glance (2012), available at http://www.cdc.gov/violenceprevention/pdf/sv-datasheet-a.pdf.

271. This means that nearly 1 out of every 8 high school girls is likely to have suffered sexual assault.

272. That statistic compounds the problem with the Restroom Policy and the Locker Room Agreement.

273. Whereas these policies cause stress, fright, embarrassment, humiliation, and anxiety for the Student Plaintiffs, they are likely traumatizing to other students who have been sexually assaulted.

ALLEGATIONS OF LAW

274. All of the student members of Students and Parents for Privacy suffer the loss of their constitutionally-guaranteed right to bodily privacy, as well as their right under Title IX to an education that is free from a hostile environment based
on sex, because of the Defendants’ actions, including the Locker Room Agreement and/or Restroom Policy.

275. Additionally, all of the student members of Students and Parents for Privacy suffer embarrassment, humiliation, anxiety, intimidation, fear, apprehension, stress, degradation, and loss of dignity as a result of the Defendants’ actions, including the Locker Room Agreement and/or Restroom Policy.

276. Defendants’ actions and the Locker Room Agreement and Restroom Policy negatively impact Student Plaintiffs’ ability to receive an education.

277. The Locker Room Agreement and Restroom Policy create a hostile environment where Student Plaintiffs experience sexual harassment and loss of dignity at the hands of their school every day.

278. The Federal Defendants have grossly exceeded their statutory authority, acted arbitrarily and capriciously, and violated Plaintiffs’ constitutional rights by adopting a legislative rule redefining “sex” under Title IX to include gender identity and enforcing that rule in a manner that requires District 211 to allow students to use the locker rooms and restrooms of the opposite sex.

279. The Federal Defendants have acted without observing the proper administrative procedure for adopting and enforcing such a new legislative rule, which includes notice and comment under the APA and presidential approval under Title IX.

280. It is a violation of the right to bodily privacy to force students to have their partially or fully unclothed bodies viewed by students of the opposite sex.
281. The right to bodily privacy also bars the government from forcing students into situations where they risk exposure of their unclothed body to the opposite sex.

282. Minors have a fundamental right to be free from compelled intimate exposure of their bodies to members of the opposite sex, which is violated when the Defendants force them to use the restrooms and locker rooms with students of the opposite sex.

283. The Defendants are violating the parental right to control the upbringing and education of one’s child by exposing Parent Plaintiffs’ children to the opposite sex in intimate, vulnerable settings like restrooms, locker rooms, and showers, especially where their children, the opposite-sex children, or both, may be in a state of undress or even naked.

284. Providing single-sex restrooms, locker rooms, and shower facilities does not violate Title IX, so long as the facilities provided for one sex are comparable to the facilities provided to the other sex.


286. Plaintiffs are suffering and continue to suffer irreparable harm.

287. Plaintiffs have no adequate remedy at law.
FIRST CAUSE OF ACTION AGAINST FEDERAL DEFENDANTS:
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

288. Plaintiffs reallege all matters set forth in paragraphs 1 through 287 and incorporate them herein.

289. The Federal Defendants promulgated, and are enforcing, a new legislative rule that redefines the term “sex” in Title IX and its accompanying regulations to mean, or at least include, “gender identity.”

290. The DOE has enforced this new redefinition of “sex” as a legislative rule against District 211.

291. The DOE’s new legislative rule contradicts the text, structure, legislative history, and historical judicial interpretation of Title IX, all of which confirm that “sex” means male and female in the binary and biological sense.

292. According to the DOE’s new legislative rule, Title IX requires schools to permit students to use restrooms, locker rooms, and showers based on their gender identity, rather than their biological sex.

293. The DOE has communicated this new legislative rule to school districts nationwide and stated that their failure to comply with it will result in investigation and enforcement action up to and including withdrawal of millions of dollars in federal funding.

294. The DOE’s promulgation and enforcement of this new legislative rule are reviewable actions under the Administrative Procedure Act (“APA”).

295. These DOE actions are reviewable pursuant to 20 U.S.C § 1683.
296. The DOE’s actions are also final and there is no other adequate remedy because the Locker Room Agreement binds District 211 such that Plaintiffs cannot get relief unless the Agreement is set aside and the Federal Defendants are enjoined from continuing to communicate and enforce the new rule changing the meaning of “sex.”

297. Plaintiffs have suffered a legal wrong as a direct result of the DOE’s actions, because Plaintiffs’ constitutional and statutory rights were and continue to be violated by the Locker Room Agreement, which is the direct result of the DOE’s enforcement of its new rule.

298. Under the APA, a reviewing Court must “hold unlawful and set aside agency action” in four instances that apply to this case:

- One: if the agency action is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C);
- Two: if the agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A);
- Three: if the agency action is “contrary to constitutional right, power, privilege, or immunity.” 5 U.S.C. § 706(2)(B); and
- Four: if the agency action is “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

299. DOE’s action here violates all four of these standards and so should be held unlawful and set aside.
300. Plaintiffs ask this Court (1) to set aside all three guidance documents, 
(see supra at ¶ 63), to the extent that they incorporate gender identity within the meaning of “sex” for purposes of Title IX, as well as the Locker Room Agreement, and (2) to enjoin the DOE and DOJ from further enforcing Title IX in a manner that requires District 211 to give any students the right of entry to, and use of, the private facilities (locker rooms and restrooms) designated for students of the opposite sex.

**The DOE’s Action Is Unlawful Under the APA Because It Is In Excess of Statutory Jurisdiction, Authority, or Limitations**

301. The DOE’s actions in promulgating and enforcing its new rule are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” because they redefine the unambiguous term “sex” and add gender identity to Title IX without the authorization of Congress.

302. Congress has not delegated to the DOE the authority to define, or redefine, unambiguous terms in Title IX.

303. Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination...” 20 U.S.C. § 1681(a) (emphasis added).

304. The term “sex” as used in Title IX means male and female, under the traditional binary conception of sex consistent with one’s birth or biological sex.

305. This definition is not ambiguous.

306. Title IX makes no reference to “gender identity” in the language of the statute.
307. The enacting regulations, which interpret Title IX, likewise make no reference to “gender identity.”

308. Title IX’s implementing regulations are not ambiguous in their instruction that a school district may separate restrooms, locker rooms, and shower facilities on the basis of biological sex.

309. Title IX permits schools receiving federal funds to “maintain[] separate living facilities for the different sexes.” 20 U.S.C. § 1686.

310. The regulations implementing Title IX state that schools receiving federal funding “may provide separate toilet, locker room, and shower facilities on the basis of sex, [as long as] such facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex.” 34 C.F.R. § 106.33.

311. Title IX does not require that District 211 or any other school open its girls' restrooms, locker rooms and shower rooms to biological males who identify as female. Nor does it require that they open their boys’ facilities to biological females who identify as male.

312. The DOE’s unilateral decree that “sex” in Title IX means, or includes, “gender identity,” which requires schools to allow males who identify as female to use the girls’ facilities, and vice versa, requires District 211 to give Student A the right of entry and use of opposite sex locker and shower rooms, and requires District 211 to give all students right of entry and use of the restrooms that correspond to their gender identity, irrespective of their biological sex.
313. This new rule is not supported by Title IX’s text, implementing regulations, or legislative history.

314. The new rule is contradicted by the fact that every court to consider the question for the past four decades, prior to the DOE’s April 2015 Guidance Document equating sex discrimination with gender identity discrimination, had concluded that Title IX did not require cross-sex restrooms or locker rooms, even when students who identify as the opposite sex are involved.

315. The new rule is contradicted by the fact that Congress has repeatedly rejected attempts to amend Title IX, or create new law, that would be consistent with the DOE’s rule and application.

316. The new rule is contradicted by the fact that Congress has considered proposed legislation that would add Title IX style protections for gender identity discrimination, but has declined to enact it.

317. Therefore, the DOE’s rule was promulgated and enforced “in excess of statutory jurisdiction, authority or limitations, or short of statutory right[,]” See 5 U.S.C. § 706(2)(C). This Court should hold that it is unlawful and set it aside.

318. Additionally, even if the DOE’s rule was interpretive, it would still be in excess of statutory authority and due to be declared unlawful and set aside.

*The DOE’s Action Is Unlawful Under the APA Because It Is Arbitrary, Capricious, An Abuse of Discretion, or Not In Accordance With Law*

319. The DOE’s actions in promulgating and enforcing its new rule are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” See 5 U.S.C. § 706(2)(A).
320. Congress requires that whenever an agency takes action it do so after engaging in a process by which it “examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” Motor Veh. Mfrs. Ass’n v. State Farm Ins., 463 U.S. 29, 43 (1983) (quotation omitted).

321. An agency action is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or product of agency expertise.” State Farm, 463 U.S. at 43.

322. The DOE gave no explanation whatsoever for its redefinition of “sex” in Title IX, whereby the DOE unilaterally decreed that the term, “sex,” in Title IX means, or includes, gender identity; requires District 211 to give Student A right of entry and use of opposite sex locker and shower rooms; and requires District 211 to give all students access to the facilities that correspond to their gender identity, if the students desire to use them.

323. Nor did the DOE give any explanation of the relevant factors that were the basis of its actions.

324. The DOE failed to consider important aspects of the problems caused by mixing biological boys and girls in intimate settings, including the language and structure of Title IX and its regulations; the congressional, and judicial histories of
Title IX and its regulations; the practical and constitutional harms created by its unlawful application of Title IX; and, the violation of Title IX caused by this unlawful application.

325. The DOE’s action was also made without a rational explanation, inexplicably departed from established policies, or rested on other considerations that Congress could not have intended to make relevant.

326. DOE offered no explanation for its rule redefining “sex;” the rule departed from the established Title IX policy that allowed schools to maintain private facilities separated by biological sex; and, it rested on considerations related to “gender identity,” despite the fact that the legislative history indicates Congress did not intend “sex” to mean anything other than biological sex.

327. The DOE’s action was also made even though it is contrary to law or regulation.

328. The DOE’s rule purporting to redefine Title IX violates Title IX as it applies to the very group Title IX was created to protect, girls, by creating a hostile environment for the Girl Plaintiffs.

329. The DOE’s promulgation and enforcement of its rule is thus arbitrary, capricious, an abuse of discretion, and not in accordance with law. This Court should therefore hold that it is unlawful and set it aside.

330. Additionally, even if the DOE’s rule was interpretive, it would still be arbitrary, capricious, an abuse of discretion, and not in accordance with law, and so is due to be declared unlawful and set aside.
The DOE’s Action Is Unlawful Under the APA Because It Is Contrary to Constitutional Right, Power, Privilege, or Immunity

331. The DOE’s actions are “contrary to constitutional right, power, privilege, or immunity.” See 5 U.S.C. § 706(2)(B).

332. The DOE’s legislative rule is an unlawful application of Title IX contrary to the Constitution because it violates the privacy rights of Student Plaintiffs, their parents’ fundamental liberty interest in controlling their children’s upbringing and education, and the rights of some Student Plaintiffs and their parents to freely live out their religious beliefs. See Second, Third, Fifth, Sixth, and Seventh Causes of Action.

333. Also, the DOE’s legislative rule is in violation of the Spending Clause of the United States Constitution, under which Title IX was enacted.

334. When Congress uses its Spending Clause power, it generates legislation much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.

335. Congress must clearly and unambiguously state the conditions to which the States are agreeing in exchange for federal funds, so that the States can knowingly decide whether to accept the funding.

336. The crucial inquiry is whether Congress spoke so clearly that it can be fairly said that the State could make an informed choice.

337. Requiring schools to allow biological males access to facilities designated for girls cannot pass this test, no matter how the males identify.
338. As already explained, the plain language of the text, along with the legislative history, clearly indicates that Congress intended that (1) “sex” means “biological sex;” (2) Title IX prevents discrimination based on biological sex; and (3) Title IX allows sex-separated restrooms and locker rooms.

339. Further, the implementing regulations specifically allow schools to maintain restrooms and locker rooms separated by biological sex.

340. Thus, for the over 40 years of Title IX’s existence, it has been universally understood by schools that receive federal education funding that Title IX’s definition of “sex” does not include gender identity.

341. It has likewise been universally understood by schools that received federal education funding that maintaining separate restrooms, locker rooms, and other private facilities on the basis of biological sex is consistent with Title IX.

342. No school could have possibly made an informed choice, because no school could have known that the funds it agreed to accept were conditioned on allowing cross-sex private facilities, or otherwise recognizing gender identity as within the meaning of the term “sex.”

343. For these reasons, this Court should hold the DOE’s actions unlawful, set aside its guidance documents and the Locker Room Agreement, and enjoin it, along with the DOJ, from further communicating the new rule that “sex” in Title IX includes “gender identity” to District 211.
Additionally, even if the DOE's rule was interpretive, it would still be contrary to constitutional right, power, privilege, or immunity, and so is due to be declared unlawful and set aside.

**The DOE’s Action Is Unlawful Under the APA Because It Is Without Observance of Procedure Required By Law**

345. The DOE’s actions were done “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

346. As explained above, the DOE has promulgated a new rule, unilaterally declaring that Title IX’s term, “sex,” means, or includes, “gender identity,” and so Title IX prohibits discrimination based on gender identity.

347. The DOE’s new rule also requires schools, including District 211, to allow biological males entry and usage of restrooms and locker rooms designated for girls, and vice versa.

348. Further, the Federal Defendants have given this rule the full force of law, investigating and enforcing it against District 211 to require the Locker Room Agreement.

349. The rule imposes rights and obligations, and through administrative enforcement actions, binds school districts.

350. The rule also applies generally to all school districts.

351. Under the Administrative Procedure Act, any “rules which do not merely interpret existing law or announce tentative policy positions but which establish new policy positions that the agency treats as binding must comply with
the APA’s notice-and-comment requirements, regardless of how they initially are labeled." 72 Fed. Reg. 3433.

352. The Supreme Court has additionally ruled that all legislative rules, which are those having the force and effect of law and are accorded weight in agency adjudicatory processes, must go through the notice-and-comment requirements. *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015).

353. “Notice-and-comment rulemaking” requires that the DOE (1) issue a general notice to the public of the proposed rule-making, typically by publishing notice in the Federal Register; (2) give interested parties an opportunity to submit written data, views, or arguments on the proposed rule, and consider and respond to significant comments received; and (3) include in the promulgation of the final rule a concise general statement of the rule’s basis and purpose.

354. Notice-and-comment rulemaking also requires that the DOE consider all the relevant comments offered during the public comment period before finally deciding whether to adopt the proposed rule.

355. Additionally, under Title IX, final rules, regulations, and orders of general applicability issued by the DOE must be approved by the president of the United States.

356. The DOE promulgated and enforced its new rule redefining “sex” in Title IX to include gender identity without notice and comment as required by law, 5 U.S.C. § 553. It promulgated this new legislative rule without signature by the president as required by Title IX. 20 U.S.C. § 1682.
357. Simply stated, the DOE did not follow the required procedure when it adopted its new rule defining “sex” in Title IX to mean, or include, gender identity. This Court should therefore hold that it is unlawful and set it aside.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

SECOND CAUSE OF ACTION AGAINST DISTRICT 211
AND THE FEDERAL DEFENDANTS:
VIOLATION OF THE FUNDAMENTAL RIGHT TO PRIVACY

358. Plaintiffs reallege all matters set forth in paragraphs 1 through 357 and incorporate them herein.

359. “Fundamental rights” are grounded in the Fourteenth Amendment’s Due Process Clause.

360. They are rights that are deeply rooted in this Nation’s history and tradition and are implicit in the concept of ordered liberty.

361. Numerous courts, including the Seventh Circuit, have recognized a fundamental right to bodily privacy.

362. This right includes a right to privacy in one’s fully or partially unclothed body.

363. It also includes the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex.

364. The Student Plaintiffs, like everyone else, enjoy the fundamental right to bodily privacy.
365. The right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex, while part of the right to bodily privacy, is also separately and deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty.

366. Throughout its history, American law and society has had a national commitment to protecting citizens, and especially children, from suffering the risk of exposing their bodies, or their intimate activities, to the opposite sex.

367. From colonial times, the law allowed civil actions against “Peeping Toms.”

368. As American law developed after the Founding, it criminalized surreptitiously viewing others while they reasonably expect privacy.

369. This protection is heightened for children.

370. While pornography involving only adults is legal and cannot be constitutionally banned, federal law makes it a crime to possess, distribute, or even view images of naked children.

371. Nearly every state has a law criminalizing “sexting,” which is when someone (often a minor) sends a naked picture of herself via email, text messaging, or other electronic means.

373. In the late 1800s, as women began entering the workforce, the law developed to protect privacy by mandating that workplace restrooms and changing rooms be separated by sex.

374. Massachusetts adopted the first such law in 1887.

375. By 1920, 43 of the (then) 48 states had similar laws protecting privacy by mandating sex-separated facilities in the workplace.

376. Because of our national commitment to protect our citizens, and especially children, from the risk of being exposed to the anatomy of the opposite sex, as well as the risk of being seen by the opposite sex while attending to private, intimate needs, sex-separated restrooms and locker rooms are ubiquitous in public places.

377. Using public restrooms and locker rooms separated by sex are an American social and modesty norm.

378. Historically, purposefully entering a restroom or locker room designated for the opposite biological sex has been considered wrongful, and even criminal, behavior.

379. Sex-separated restrooms and locker rooms are also ubiquitous in public schools.

380. Historically, there has been no mixing of the biological sexes in school restrooms or locker rooms.
381. A girls’ locker room or restroom has always been a place that by
definition is to be used exclusively by girls and where biological males are not
allowed.

382. Freedom from the risk of compelled intimate exposure to the opposite
sex, especially for minors, is deeply rooted in this Nation’s history and tradition.

383. It is also implicit in the concept of ordered liberty.

384. The ability to be clothed in the presence of the opposite biological sex,
along with the freedom to use the restroom and locker room away from the presence
of the opposite biological sex, is fundamental to most people’s sense of self respect
and personal dignity.

385. If the government were granted the far-reaching and extreme power to
compel its citizens to disrobe or risk being unclothed in the presence of the opposite
sex, then little personal liberty involving our bodies would be left.

386. Because freedom from the risk of compelled exposure to the opposite
biological sex, especially for minors, is deeply rooted in this Nation’s history and
tradition and implicit in the concept of ordered liberty, it is a fundamental right.

387. Specifically: minors have a fundamental right to be free from State-
compelled risk of exposure of their bodies, or their intimate activities, such as occur
within restrooms and locker rooms, to the opposite biological sex.

388. The government may not infringe fundamental rights, unless the
infringement satisfies strict scrutiny review, which requires that the government
demonstrate that the law or regulation furthers a compelling interest in the least restrictive means available.

389. The Locker Room Agreement allows Student A, a biological male, the right of entry to, and use of, the girls’ locker rooms any time he wants.

390. The Restroom Policy allows biologically male students who identify as female access and use of the girls’ restrooms.

391. The Restroom Policy also allows biological female students who identify as male access and use of the boys’ restrooms.

392. The Locker Room Agreement and the Restroom Policy both require the Student Plaintiffs to risk being intimately exposed to those of the opposite biological sex.

393. The Locker Room Agreement and the Restroom Policy both infringe the Student Plaintiffs’ fundamental right to privacy in their unclothed bodies, as well as their fundamental right to be free from government-compelled risk of intimate exposure to the opposite sex, without any compelling justification.

394. Defendants have no compelling interest to justify forcing school children to share restrooms and locker rooms with opposite sex classmates.

395. Also, Defendants have not used the least restrictive means of serving any interest they may have.

396. Accordingly, the Locker Room Agreement and Restroom Policy both fail the required strict scrutiny review and are unconstitutional as applied to any minor, including the Student Plaintiffs.
WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

**THIRD CAUSE OF ACTION AGAINST DISTRICT 211 AND THE FEDERAL DEFENDANTS: VIOLATION OF PARENTS’ FUNDAMENTAL RIGHT TO DIRECT THE EDUCATION AND UPBRINGING OF THEIR CHILDREN**

397. Plaintiffs reallege all matters set forth in paragraphs 1 through 396 and incorporate them herein.

398. The right of parents to make decisions concerning the care, custody, and control of their children is a fundamental right protected by the Fourteenth Amendment’s Due Process Clause.

399. Included within that parental fundamental right is the power to direct the education and upbringing of one’s children.

400. It gives parents the right, as well as the duty, to instill moral standards and values in their children.

401. Parents’ right and duty to instill moral standards and values in their children, and to direct their education and upbringing, encompasses the right to determine whether, and when, their minor children endure the risk of being exposed to members of the opposite sex in intimate, vulnerable settings like restrooms, locker rooms, and showers.

402. Parents also have a fundamental right to determine whether their children will have to risk being exposed to opposite sex nudity at school and a fundamental right to determine whether their children, while at school, will have to
risk exposing their own undressed or partially unclothed bodies to members of the opposite sex.

403. It is not for the Defendants to say whether, and when, minor children will risk being exposed to the opposite sex in such settings: it is each parents’ right to decide for his or her own child.

404. Nor is it for the Defendants to say that minor children must risk being exposed to opposite-sex nudity, when those children’s parents object.

405. Nor is it for the Defendants to say that minor children must risk exposing their own bodies to members of the opposite sex, when those children’s parents object.

406. All of the Parent Plaintiffs object to the Locker Room Agreement and the Restroom Policy.

407. All of the Parent Plaintiffs agree that they do not want their minor children to endure the risk of being exposed to the opposite sex in intimate, vulnerable settings like restrooms, locker rooms, and showers, nor do they want their minor children to attend to their personal, private bodily needs in the presence of members of the opposite sex.

408. All of the Parent Plaintiffs desire to raise their children with a respect for traditional modesty, which requires that one not undress or use the restroom in the presence of the opposite sex.
409. All of the Parent Plaintiffs desire to prevent their children from enduring the risk of being observed while undressing by members of the opposite sex.

410. All of the Parent Plaintiffs also desire to prevent their children from enduring the risk of being exposed to the unclothed body of members of the opposite sex.

411. Some of the Parent Plaintiffs object to the Locker Room Agreement and Restroom policy for religious reasons because of their sincerely held religious beliefs about modesty and other religious doctrines.

412. The Locker Room Agreement and Restroom Policy, instituted and enforced by the Defendants, make it impossible for the Parent Plaintiffs to direct the upbringing and education of their children.

413. Accordingly, the Locker Room Agreement and Restroom Policy infringe the Parent Plaintiffs’ fundamental right to direct the education and upbringing of their children.

414. Defendants may not infringe fundamental rights, including parents’ fundamental right to direct the education and upbringing of their children, unless the infringement satisfies strict scrutiny review, which requires that Defendants demonstrate that the law or regulation furthers a compelling interest in the least restrictive manner available.

415. Defendants have no compelling interest to justify forcing school children to share restrooms and locker rooms with opposite sex classmates.
416. Also, Defendants have not used the least restrictive means of serving any interest they may have.

417. Accordingly, the Locker Room Agreement and Restroom Policy both fail the required strict scrutiny review and are unconstitutional infringements on parents’ fundamental right to direct the education and upbringing of their children.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

FOURTH CAUSE OF ACTION AGAINST DISTRICT 211: VIOLATION OF TITLE IX

418. Plaintiffs reallege all matters set forth in paragraphs 1 through 417 and incorporate them herein.

419. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a).

420. Courts have given Title IX broad effect in order to combat sex discrimination in the educational setting.

421. Title IX is a broadly written general prohibition on discrimination based on sex, and so it does not explicitly list every discriminatory act that it prohibits.

422. There is an implied right of action under Title IX.

423. There is no requirement that a claimant exhaust administrative remedies before bringing a Title IX cause of action.
424. Allowing people to use restrooms or locker rooms that are designated for the opposite biological sex violates privacy and creates a sexually harassing hostile environment.

425. Exposure to opposite-sex nudity creates a sexually harassing hostile environment.

426. The Locker Room Agreement and Restroom Policy allow some students to use locker rooms and restrooms that are designated for the opposite biological sex.

427. The Locker Room Agreement and Restroom Policy needlessly subject the Student Plaintiffs to the risk that their partially or fully unclothed bodies will be exposed to the opposite sex and that they will be exposed to opposite-sex nudity.

428. As a result, the Student Plaintiffs experience embarrassment, humiliation, anxiety, intimidation, fear, apprehension, stress, degradation, and loss of dignity.

429. Some of the Student Plaintiffs are avoiding the restroom as a result of the embarrassment, humiliation, anxiety, intimidation, fear, apprehension, stress, degradation, and loss of dignity they experience because of the Restroom Policy.

430. Some of the Student Plaintiffs are not able to concentrate as well in school as they did before because of these policies.

431. All of the Student Plaintiffs find that school has become intimidating and stressful as a result of the Locker Room Agreement and/or the Restroom Policy,
and the Girl Plaintiffs find that the locker rooms have become intimidating and stressful as a result of the Locker Room Agreement.

432. The Locker Room Agreement and Restroom Policy violate Title IX because they produce unwelcome sexual harassment and create a hostile environment on the basis of sex.

433. There are five elements necessary to make out a Title IX claim: (1) plaintiff belongs to a protected group; (2) plaintiff was subjected to harassment; (3) the harassment was based on sex; (4) the harassment was so pervasive or severe that it altered the conditions of plaintiff’s education; and (5) knowledge by school officials.

434. The Student Plaintiffs satisfy all five elements.

435. First, the Student Plaintiffs belong to a protected group because they are female and male students at an educational institution that receives federal funds.

436. Second, the Student Plaintiffs are subjected to harassment because the Locker Room Agreement and Restroom Policy allow biological males to use girls’ locker rooms and restrooms, and also allow biological females to use the boys’ restrooms, which creates a sexually harassing hostile environment.

437. Third, this harassment is based on sex.

438. There are real and significant differences between the biological sexes.

439. These differences include, among other things, differences in anatomy and physiology.
440. These differences do not disappear when biological males identify as female, and vice versa.

441. The biological and anatomical differences between the sexes is the reason that Title IX and its implementing regulations allow for separate living facilities, restrooms, locker rooms, and changing areas for each biological sex.

442. The allowance for separate facilities is based on Title IX and its implementing regulations’ recognition that each biological sex has unique needs and vulnerabilities when using these facilities.

443. Title IX and its implementing regulations allow for separate living facilities, restrooms, locker rooms, and changing areas for each biological sex based on the recognition that permitting a biological male to enter and use such facilities designated for females would be sexually harassing to the females.

444. The Locker Room Agreement and Restroom Policy, which open the girls' restrooms and locker rooms to biological males, is harassment based on the girls’ sex.

445. Title IX and its implementing regulations allow for separate living facilities, restrooms, locker rooms, and changing areas for each biological sex based on the recognition that permitting a biological female to enter and use such facilities designated for males would be sexually harassing to the males.

446. The Restroom Policy, which opens the boys’ restrooms to biological females, is harassment based on the boys’ sex.
Moreover, both male and female Student Plaintiffs experience humiliation, anxiety, intimidation, fear, apprehension, stress, degradation, and loss of dignity as a result of the Locker Room Agreement and/or Restroom Policy permitting the opposite sex to be in locker rooms and restrooms designated for their biological sex.

It is the significant and real differences between the biological sexes that creates the hostile environment, which is harassment.

Fourth, the harassment is sufficiently severe or pervasive.

To satisfy this fourth element, the harassment need only be severe or pervasive.

The harassment created by the Locker Room Agreement and Restroom Policy is both.

The harassment is ongoing and continuous, occurring every time the female Student Plaintiffs use the locker room, and every time any of the Student Plaintiffs use the restroom.

This satisfies the pervasiveness prong.

Letting biological males use the girls’ restrooms and locker rooms, and allowing biological females to use the boys’ restrooms, places the bodily privacy of both sexes at risk, and so is sufficiently egregious to satisfy the severity prong.

The environment is one that a reasonable person would find hostile or abusive, and one that the Student Plaintiffs in fact perceive to be so.
456. The sexually harassing hostile environment is threatening and humiliating, and altered the conditions of the Student Plaintiffs’ educational opportunities, benefits, programs, and/or activities.

457. Fifth, school officials are aware of the hostile environment.

458. In fact, District 211’s official policies—the Locker Room Agreement and Restroom Policy—are the direct cause of this hostile environment.

459. Some of the Student Plaintiffs, and some of the Parent Plaintiffs, have alerted District 211 officials about the hostile environment.

460. Those officials have authority to stop the hostile environment.

461. These officials include Fremd High School’s principal, as well as the District superintendent.

462. Despite their knowledge that their policies are creating a hostile environment based on sex, the Defendants have not remedied the situation.

463. Instead, these officials have advised that, if the students perceive the environment to be hostile, the students should remove themselves from it by accepting an “accommodation” or using a different restroom.

464. Schools cannot escape liability for Title IX violations by requiring the victim of harassment to remove herself from the hostile environment or otherwise suggesting that she is responsible for the harassment she endures.

465. Additionally, the accommodations themselves violate Title IX.
466. Some of the Girl Plaintiffs have been told that instead of using the locker room to change for PE class, they may change their clothing in a nurse’s office located on the other side of the school.

467. This facility for changing is inferior to the locker room facilities provided for boy students.

468. This violates 34 C.F.R. § 106.33, which provides that schools receiving federal funding “may provide separate toilet, locker room, and shower facilities on the basis of sex, [as long as] such facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex.”

469. Additionally, some of the Student Plaintiffs have been told that, if they are uncomfortable using a restroom because a member of the opposite sex is present, they may find another restroom.

470. Because there are only five minutes between classes, any student leaving one restroom to hunt for another is almost certain to be tardy.

471. The students will also miss instructional time.

472. The Locker Room Agreement and Restroom Policy violate Title IX by creating a hostile environment on the basis of sex.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.
FIFTH CAUSE OF ACTION AGAINST DISTRICT 211:
VIOLATION OF THE
ILLINOIS RELIGIOUS FREEDOM RESTORATION ACT

473. Plaintiffs reallege all matters set forth in paragraphs 1 through 472 and incorporate them herein.

474. The Illinois Religious Freedom Restoration Act (“RFRA”) provides in pertinent part:

Government may not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.

775 ILCS 35/15.

475. Many of the Student Plaintiffs have a religious requirement that they practice modesty. These students have the sincere religious belief that they must not undress, or use the restroom, in the presence of the opposite biological sex, and also that they must not be in the presence of the opposite biological sex while the opposite biological sex is undressing or using the restroom.

476. Many of the Parent Plaintiffs have the sincere religious belief that they must teach their children to practice modesty. Their religious faith also requires them to protect the modesty of their children. These parents have the sincere religious belief that their children must not undress, or use the restroom, in the presence of a member of the opposite biological sex, and also that they must not be in the presence of the opposite biological sex while the opposite biological sex is undressing or using the restroom.
477. The Restroom Policy requires the Student Plaintiffs to use the restroom while knowing that a member of the opposite biological sex could enter the restroom while they are using it.

478. The Locker Room Agreement requires the Girl Plaintiffs to use the locker rooms and shower rooms, knowing that a biological male either is present with them, or could enter while they are using these private facilities.

479. The Restroom Policy and Locker Room Agreement prevent the Student Plaintiffs from practicing the modesty that their faith requires of them.

480. The Restroom Policy and Locker Room Agreement prevent the Parent Plaintiffs from teaching their children traditional modesty, and insisting that their children practice modesty, as their faith requires of the Parent Plaintiffs.

481. Complying with the requirements of the Restroom Policy and Locker Room Agreement thus places a substantial burden on the Plaintiffs’ exercise of religion.

482. It is a substantial burden to require Plaintiffs’ to choose between the benefit of a free public education and violating their religious beliefs.

483. The state has no “compelling interest” that would justify burdening the Plaintiffs’ exercise of religion in this manner.

484. Additionally, the state has not used the “least restrictive means” to achieve its purported interest in burdening the Plaintiffs’ exercise of religion in this manner.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.


486. Plaintiffs reallege all matters set forth in paragraphs 1 through 485 and incorporate them herein.

487. Many of the Student Plaintiffs have a religious requirement that they practice modesty. These students have the sincere religious belief that they must not undress, or use the restroom, in the presence of the opposite biological sex, and also that they must not be in the presence of the opposite biological sex while the opposite biological sex is undressing or using the restroom.

488. Many of the Parent Plaintiffs have the sincere religious belief that they must teach their children to practice modesty. Their religious faith also requires them to protect the modesty of their children. These parents have the sincere religious belief that their children must not undress, or use the restroom, in the presence of a member of the opposite biological sex, and also that they must not be in the presence of the opposite biological sex while the opposite biological sex is undressing or using the restroom.

489. The Locker Room Agreement—which was mandated by the federal Defendants—requires the Girl Plaintiffs to use the locker rooms and shower rooms,
knowing that a biological male either is present with them, or could enter while they are using these private facilities.

490. The Locker Room Agreement prevents the Student Plaintiffs from practicing the modesty that their faith requires of them.

491. The Locker Room Agreement prevents the Parent Plaintiffs from teaching their children traditional modesty, and insisting that their children practice modesty, as their faith requires of the Parent Plaintiffs.

492. Complying with the requirements of the Locker Room Agreement thus places a substantial burden on the Plaintiffs’ exercise of religion.

493. It is a substantial burden to require Plaintiffs’ to choose between the benefit of a free public education and violating their religious beliefs.

494. The federal Defendants have no “compelling interest” that would justify burdening the Plaintiffs’ exercise of religion in this manner.

495. Additionally, the federal Defendants have not used the “least restrictive means” to achieve their purported interest in burdening the Plaintiffs’ exercise of religion in this manner.

496. The Locker Room Agreement accordingly violates the Plaintiffs’ rights protected by the Religious Freedom Restoration Act.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.
SEVENTH CAUSE OF ACTION AGAINST DISTRICT 211
AND THE FEDERAL DEFENDANTS:
VIOLATION OF THE FIRST AMENDMENT’S GUARANTEE OF
FREE EXERCISE OF RELIGION

497. Plaintiffs reallege all matters set forth in paragraphs 1 through 496 and incorporate them herein.

498. The First Amendment provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

499. The Restroom Policy and Locker Room Agreement burden the free exercise rights of some of the Plaintiffs. See supra, Fifth and Sixth Causes of Action.

500. Laws that burden free exercise, but are not neutral or generally applicable, are subject to strict scrutiny.

501. The Restroom Policy is not generally applicable because it does not allow all students to use the opposite-sex restrooms, but only students who perceive themselves as a different gender than their biological sex.

502. Similarly, the Locker Room Agreement is not generally applicable.

503. The Locker Room Agreement applies only to one student, Student A.

504. The Locker Room Agreement does not apply to all students, allowing them to access whatever locker and shower rooms they want.

505. The Locker Room Agreement does not even apply to all students who perceive their gender identity to be different than their biological sex.
506. Because the Restroom Policy and Locker Room Agreement are not generally applicable, they are subject to strict scrutiny, which they fail. See supra, Fifth and Sixth Causes of Action.

507. Additionally, the Restroom Policy and Locker Room Agreement are subject to strict scrutiny because, in addition to burdening free exercise rights, the policies also burden other constitutional rights.

508. Both the Locker Room Agreement and the Restroom Policy violate the Student Plaintiffs’ fundamental right to be free from compelled risk of exposure of their bodies to the opposite biological sex. See supra, Second Cause of Action.

509. Additionally, both the Locker Room Agreement and the Restroom Policy violate the Student Plaintiffs’ fundamental right to privacy in their unclothed bodies. See id.

510. Additionally, both the Locker Room Agreement and the Restroom Policy violate the Parent Plaintiffs’ fundamental right to direct the education and upbringing of their children. See supra, Third Cause of Action.

511. Accordingly, both the Restroom Policy and Locker Room Agreement are subject to strict scrutiny, which they fail. See supra, Fifth and Sixth Causes of Action.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for judgment as follows and request the following relief:

A. That this Court enter a preliminary and permanent injunction restraining all Defendants, their officers, agents, employees, and all other persons acting in concert with them, from enforcing the Locker Room Agreement, and District 211, their officers, agents, employees, and all other persons acting in concert with them, from enforcing the Restroom Policy, and ordering them to permit only biological females to enter and use District 211’s girls’ locker rooms and restrooms and only biological boys to enter and use District 211’s boys’ restrooms;

B. That this Court hold unlawful and set aside the federal Defendants’ new rule that redefines the word “sex” in Title IX to mean, or include, gender identity, which it announced in at least the following documents—U.S. Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, 5 (Apr. 2014); U.S. Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities, 25 (Dec. 2014); U.S. Department of Education, Office for Civil Rights, Title IX Resource Guide, 1, 15, 16, 19, 21-22 (Apr. 2015);

C. That this Court enter a preliminary and permanent injunction restraining the federal Defendants, their officers, agents, employees, and all other persons acting in concert with them, from taking any action based on DOE’s new
rule that redefines the word “sex” in Title IX, including implementing the revocation of funding as indicated in the Letter of Findings sent to District 211 and from communicating to District 211 through these documents or in any other manner that the term “sex” means, or includes, gender identity or that Title IX bars gender identity discrimination or mandates that regulated entities allow students to use restrooms, locker rooms, and showers based on their gender identity;

D. That this Court enter a declaratory judgment declaring that the Locker Room Agreement and Restroom Policy impermissibly burden the Student Plaintiffs’ constitutional right to privacy; impermissibly burden the Student Plaintiffs’ constitutional right to be free from State-compelled risk of intimate exposure of themselves and their intimate activities to members of the opposite sex; impermissibly burden the Parent Plaintiffs’ constitutional right to direct the upbringing and education of their children; violate Title IX; violate the rights of some of the Student Plaintiffs and Parent Plaintiffs under the Illinois Religious Freedom Restoration Act; violate the rights of some of the Student Plaintiffs and Parent Plaintiffs under the federal Religious Freedom Restoration Act; and violate the constitutional guarantee to free exercise of religion for some of the Student Plaintiffs and Parent Plaintiffs under the Free Exercise Clause.

E. That this Court award nominal damages in the amount of one (1) dollar, and compensatory damages, for the violation of Plaintiffs’ constitutional and statutory rights, except those claimed under the Administrative Procedure Act;
F. That this Court retain jurisdiction of this matter for the purpose of enforcing any Orders;

G. That this Court award Plaintiffs costs and expenses of this action, including a reasonable attorneys’ fees award, in accordance with 775 ILCS 35/20, 28 U.S.C. § 2412, and 42 U.S.C § 1988;

H. That this Court issue the requested injunctive relief without a condition of bond or other security being required of Plaintiffs; and

I. That this Court grant such other and further relief as the Court deems equitable and just in the circumstances.

Respectfully submitted this 4th day of May, 2016.

By: /s/ Jocelyn Floyd

THOMAS L. BREJCHA, IL 0288446
PETER BREEN, IL 6271981
JOCELYN FLOYD, IL 6303312
THOMAS MORE SOCIETY
19 S. La Salle Street, Suite 603
Chicago, IL 60603
(312) 782-1680
(312) 782 -1887 Fax
tbrejcha@thomasmoresociety.org
pbreen@thomasmoresociety.org
jfloyd@thomasmoresociety.org

JEREMY D. TEDESCO, AZ 023497*
JOSEPH E. LA RUE, AZ 031348*
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 Fax
jtedesco@adflegal.org
jlarue@adflegal.org
J. MATTHEW SHARP, GA 607842*
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road NE
Suite D-1100
Lawrenceville, Georgia 30043
(770) 339-0774
(770) 339-6744 Fax
msharp@adflegal.org

Attorneys for Plaintiffs

*Pro Hac Vice Applications Forthcoming

THIS DOCUMENT HAS BEEN ELECTRONICALLY FILED
DECLARATION UNDER PENALTY OF PERJURY

I, V.W., a citizen of the United States and a resident of the State of Illinois, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 29th day of April, 2016, at Palatine, Illinois.

V. W., President
STUDENTS AND PARENTS FOR PRIVACY
DECLARATION UNDER PENALTY OF PERJURY

I, N.A., a citizen of the United States and a resident of the State of Illinois, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 30 day of April, 2016, at PALATINE, Illinois.

N.A., individually and on behalf of C.A.
DECLARATION UNDER PENALTY OF PERJURY

We, S.M. and R.M., citizens of the United States and residents of the State of Illinois, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of our knowledge.

Executed this 29th day of April, 2016, at Rolling Meadows, Illinois.

S.M., individually and on behalf of A.M.

R.M., individually and on behalf of A.M.
DECLARATION UNDER PENALTY OF PERJURY

I, R.G., a citizen of the United States and a resident of the State of Illinois, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 21 day of April, 2016, at [ADDRESS], Illinois.

R.G., individually and on behalf of N.G.
DECLARATION UNDER PENALTY OF PERJURY

We, T.V. and A.V., citizens of the United States and residents of the State of Illinois, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of our knowledge.

Executed this 27 day of April, 2016, at Bolingbrook, Illinois.

T.V.

T.V., individually and on behalf of A.V.

A.V.

A.V., individually and on behalf of A.V.
DECLARATION UNDER PENALTY OF PERJURY

We, D.W. and V.W., citizens of the United States and residents of the State of Illinois, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of our knowledge.

Executed this 29th day of April, 2016, at Palatine, Illinois.

V. W., individually and on behalf of B.W.

D. W., individually and on behalf of B.W.
Board of Education of the Highland Local School District,

Plaintiff,

vs.

United States Department of Education; John B. King, Jr., in his official capacity as United States Secretary of Education; United States Department of Justice; Loretta E. Lynch, in her official capacity as United States Attorney General; and Vanita Gupta, in her official capacity as Principal Deputy Assistant Attorney General,

Defendants.

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Defendants United States Department of Education, United States Secretary of Education John B. King, Jr., United States Department of Justice, United States Attorney General Loretta E. Lynch, and Principal Deputy Assistant Attorney General Vanita Gupta have attempted to rewrite Title IX of the Education Amendments of 1972. That statute prohibits schools that receive federal funding from discriminating “on the basis of sex.” Now that Congress has refused multiple times to add “gender identity” to Title IX, Defendants have decided to take matters into their own hands and accomplish that goal by executive pronouncement, creating a new rule that implausibly declares that the term “sex” in Title IX and its regulations includes “gender identity.” Defendants’ obvious end-run
around Congress violates the Administrative Procedure Act (APA), the Spending Clause in Article 1, Section 8 of the United States Constitution, the federalism guarantees of the United States Constitution, the separation-of-powers guarantees of the United States Constitution, and the Regulatory Flexibility Act (RFA).

2. Defendants have made it abundantly clear that their new rule requires all schools that receive federal funding to allow students who profess a gender identity that conflicts with their biological sex to access overnight accommodations, locker rooms, and restrooms designated for the opposite sex. In other words, schools must permit students who are biologically male but profess a female identity to share sleeping quarters, shower facilities, and restrooms with female students. By creating and enforcing this rule, Defendants have shown no regard for the dignity and privacy rights of students who do not want to share these intimate facilities with students of the opposite sex. Nor have they shown regard for the schools that care about the interests and concerns of those students. In fact, Defendants and their agents are openly and aggressively threatening to revoke those schools’ federal funding simply because they are trying to balance the rights and interests of all students.

3. Plaintiff Board of Education of the Highland Local School District (Highland) now finds itself embroiled in Defendants’ nationwide push to enforce their new Title IX rule. A student at one of Highland’s schools professes a gender identity (female) that conflicts with that student’s biological sex (male). Highland has generally acceded to the requests of that student’s legal custodian to respect that student’s gender-identity choice, but because of the dignity interests and privacy rights of other students, Highland has not
allowed that student to access intimate facilities like overnight accommodations, locker rooms, and restrooms designated for girls. Instead, Highland has ensured that the student has access to alternate private facilities, and in doing so, has protected the dignity and privacy rights of all students. Highland, in short, has admirably navigated a difficult and sensitive situation.

4. Unfortunately, however, Defendants and their agents demand that Highland change its district policies to allow the student (and others who profess a gender identity that conflicts with their biological sex) to access overnight accommodations, locker rooms, and restrooms designated for the opposite sex, and Highland’s federal funding is in jeopardy if it does not submit to Defendants’ rewriting of Title IX. As a result, Highland faces an impossible choice: capitulate to Defendants’ demands and sacrifice the dignity and privacy rights of its students; or protect those rights and watch Defendants strip away more than a million dollars each year in federal funding devoted to special-education programs, lunches for underprivileged children, and educational advancement. The Court should resolve this dilemma, declare that Defendants’ new Title IX rule is an unlawful executive-branch attempt to rewrite federal law, enjoin Defendants from enforcing that rule, and protect Highland from having to cut programs that serve underprivileged children and students struggling to learn.

JURISDICTION AND VENUE

5. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 because this action arises under federal law. It involves (1) Defendants’ unlawful attempt to revise the term “sex” in Title IX and its regulations and (2) the violation of Highland’s rights under
various provisions of federal law and the United States Constitution. Additionally, this Court has jurisdiction under 28 U.S.C. § 1361 to compel an officer of the United States or any federal agency to perform his or her duty.

6. This Court has jurisdiction to review Defendants’ unlawful actions and enter appropriate relief under the APA, 5 U.S.C. §§ 702-706.

7. This Court has jurisdiction to enter declaratory and other appropriate relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and Federal Rule of Civil Procedure 57.


9. This Court has jurisdiction to order corrective action under the Regulatory Flexibility Act (RFA), 5 U.S.C. § 611.

10. This Court has jurisdiction to award costs and attorneys’ fees under the Equal Access to Justice Act, 28 U.S.C. § 2412.

11. Venue is proper in this Court under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claims in this action occurred in this judicial district, because Highland is located and receives federal funding in this district, and because Defendants have residency in this district.

PARTIES

12. Plaintiff Board of Education of the Highland Local School District (Highland) is organized under the laws of the State of Ohio and administers public educational institutions in Morrow County, Ohio. Highland is comprised of public educational
institutions that provide education to both male students and female students from pre-
kindergarten through 12th grade. Highland receives education funding from the federal
government that is subject to Title IX.

13. Defendant United States Department of Education (DOE) is an executive
agency of the United States government and is responsible for the administration and
enforcement of Title IX, 20 U.S.C. §§ 1681-1688, and the promulgation of Title IX’s
implementing regulations, 34 C.F.R. Part 106.

14. Defendant John B. King, Jr., is the United States Secretary of Education. In
this capacity, he is responsible for the operation and management of the DOE. King is sued
in his official capacity.

15. Defendant United States Department of Justice (DOJ) is an executive agency
of the United States government and is responsible for the enforcement of Title IX, 20
Executive Order 12250, the DOJ has authority to bring actions to enforce Title IX.

16. Defendant Loretta E. Lynch is the United States Attorney General. In this
capacity, she is responsible for the operation and management of the DOJ. Lynch is sued in
her official capacity.

17. Defendant Vanita Gupta is Principal Deputy Assistant Attorney General at
the DOJ and acting head of the Civil Rights Division of the DOJ. She is assigned the
responsibility to bring enforcement actions under Title IX. 28 C.F.R. § 42.412. Gupta is sued
in her official capacity.
FACTUAL ALLEGATIONS

A. Title IX and Its Meaning

18. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). Title IX thus prohibits discrimination “on the basis of sex.”

19. The regulations implementing Title IX provide, in relevant part, that “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular . . . or other education program or activity operated by a recipient which receives Federal financial assistance.” 34 C.F.R. § 106.31(a).

20. The term “sex” as used in Title IX and its regulations refers to biological sex—that is, a person’s status as male or female as determined by biology.

21. Nothing in Title IX’s text, structure, legislative history, or regulations prohibits discrimination on the basis of “gender identity.”

22. On multiple occasions, members of Congress have introduced legislation to prohibit discrimination on the basis of gender identity in education. See, e.g., H.R. 1652 (2013), 113th Cong. (2013); S.439, 114th Cong. (2015). Those legislative efforts have failed every time that they have been introduced.

23. Congress has chosen to prohibit discrimination on the basis of gender identity in other areas of federal law. For example, Congress has enacted the Violence Against
Women Act (VAWA), which prohibits recipients of certain federal grants from discriminating on the basis of “sex” and “gender identity.” 42 U.S.C. § 13925(b)(13)(A).

24. Congress intended that Title IX would not force schools to violate students’ dignity interests, privacy rights, and safety concerns. Congress guaranteed that schools could prevent students of one biological sex from sharing overnight facilities reserved for students of the other biological sex.

25. Title IX states that “nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.” 20 U.S.C. § 1686.

26. This concern for privacy reaches back to Title IX’s inception. When Senator Bayh first introduced Title IX, Senator Dominick asked about the scope of the law with respect to this very issue:

Mr. DOMINICK. The provisions on page 1, under section 601, refer to the fact that no one shall be denied the benefits of any program or activity conducted, et cetera. The words “any program or activity,” in what way is the Senator thinking here? Is he thinking in terms of dormitory facilities, is he thinking in terms of athletic facilities or equipment, or in what terms are we dealing here? Or are we dealing with just educational requirements? I think it is important, for example, because we have institutions of learning which, because of circumstances such as I have pointed out, may feel they do not have dormitory facilities which are adequate, or they may feel, as some institutions are already saying, that you cannot segregate dormitories anyway. But suppose they want to segregate the dormitories; can they do it?


27. In response, Senator Bayh explained that Title IX was in no way designed to eradicate or even modify the common practice of designating that males and females use private facilities based on their biological sex:
Mr. BAYH. The rulemaking powers referred to earlier, I think, give the Secretary discretion to take care of this particular policy problem. **I do not read this as requiring integration of dormitories between the sexes,** nor do I feel it mandates the desegregation of football fields. What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. **We are not requiring** that intercollegiate football be desegregated, nor that the men’s locker room be desegregated.

*Id.* (emphasis added).

28. The following year, when Title IX was passed, Senator Bayh reiterated that the legislation was not meant to compel men and women to share facilities under circumstances that would sacrifice their privacy rights:

> [E]ach Federal agency which extends Federal financial assistance is empowered to issue implementing rules and regulations effective after approval of the President. **These regulations would allow enforcing agencies to permit differential treatment by sex** only—very unusual cases where such treatment is absolutely necessary to the success of the program—such as in classes for pregnant girls or emotionally disturbed students, in sports facilities or other **instances where personal privacy must be preserved.**

118 Cong. Rec. 5807 (1972) (emphasis added).

29. Members of the House expressed similar sentiments. Representative Thompson, who was concerned about men and women using the same facilities, offered an amendment to clarify that Title IX did not mandate that men and women must share the same private facilities:

> I have been disturbed however, about the statements that if there is to be no discrimination based on sex then there can be no separate living facilities for the different sexes. I have talked with the gentlewoman from Oregon (Mrs. Green) and discussed with the gentlewoman an amendment which she says she would accept. **The amendment simply would state that nothing contained herein shall preclude any educational institution from maintaining separate living facilities because of sex.** So, with that
understanding I feel that the amendment [exempting undergraduate programs from Title IX] now under consideration should be opposed and I will offer the “living quarters” amendment at the proper time.


30. Title IX’s regulations similarly confirm that schools “may provide separate toilet, locker room, and shower facilities on the basis of sex.” 34 C.F.R. § 106.33.

31. The only condition placed on this regulatory authorization of sex-specific locker rooms, shower facilities, and restrooms is that the “facilities provided for students of one sex shall be comparable to [the] facilities provided for students of the other sex.” Id.

32. Allowing schools to separate biological boys and biological girls in intimate environments like overnight accommodations, locker rooms, shower facilities, and restrooms is the very reason that Congress allowed for separate living facilities and that Title IX regulations permit sex-specific locker rooms, shower facilities, and restrooms.

33. Contemporaneous with Title IX’s enactment, legal scholars and other federal agencies confirmed the propriety of separate overnight accommodations, locker rooms, shower facilities, and restrooms. For instance, in a 1975 Washington Post editorial, then Columbia Law School Professor Ruth Bader Ginsburg wrote that “[s]eparate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy.” Ruth Bader Ginsburg, The Fear of the Equal Rights Amendment, Washington Post, Apr. 7, 1975, at A21 (emphasis added). Moreover, the United States Commission on Civil Rights, in a 1977 report, concluded that “the personal privacy principle permits maintenance of separate sleeping and bathroom facilities” for biological

B. Defendants’ Creation of a New Title IX Rule and their Efforts to Enforce it Nationally

34. Defendants, acting without constitutional or statutory authority, have created a new legislative rule declaring that the term “sex” in Title IX and its regulations includes “gender identity.”

35. Defendants announced this rule redefining the term “sex” in Title IX and its regulations to include “gender identity” in several documents published over the last few years, including the following: U.S. Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, at 5 (Apr. 29, 2014); U.S. Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities, at 25 (Dec. 1, 2014); U.S. Department of Education, Office for Civil Rights, Title IX Resource Guide, at 1 (Apr. 2015) (explaining that “Title IX protects students . . . from all forms of sex discrimination, including discrimination based on gender identity”).

36. When Defendants began announcing this rule, every court in the country that had considered whether the term “sex” in Title IX and its regulations included “gender identity” concluded that it did not.

37. On May 13, 2016, the DOJ and DOE provided their most recent and most definitive iteration of their new legislative rule in a “Dear Colleague Letter” sent to every public school district in the country. See Dear Colleague Letter from U.S. Dep’t of Justice Civil Rights Division and U.S. Dep’t of Educ. Office for Civil Rights (May 13, 2016).
38. In that Letter, the DOJ and DOE declared in no uncertain terms that Title IX’s prohibition on discrimination based on sex “encompasses discrimination based on a student’s gender identity,” id. at 1, and that “a student’s gender identity [is] the student’s sex for purposes of Title IX and its implementing regulations,” id. at 2.

39. The 2016 Dear Colleague Letter purports to definitively outline schools’ “Title IX obligations” and explain how the DOJ and DOE will evaluate whether schools “are complying with their legal obligations.” Id. at 1 (emphasis added). For example, the Letter categorically states that when a student or a student’s guardian informs a school that the student “assert[s] a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student’s gender identity.” Id. at 2 (emphasis added).

40. The 2016 Dear Colleague Letter purports to unequivocally declare rights for students who profess a gender identity that conflicts with their biological sex.

41. The 2016 Dear Colleague Letter definitively addresses issues, and in effect attempts to announce new law, far beyond anything addressed in Title IX or its regulations. For instance, after defining “gender identity” as a person’s “internal sense of gender,” id. at 1, the Letter declares that “there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity,” id. at 2.

42. The 2016 Dear Colleague Letter speaks to student use of sex-specific facilities like locker rooms and restrooms, unequivocally stating that schools “must allow . . . students access to such facilities consistent with their gender identity.” Id. at 3 (emphasis added).
43. The 2016 Dear Colleague Letter unambiguously forbids certain means of accommodating students who profess a gender identity that conflicts with their biological sex. The Letter states that “the desire to accommodate others’ discomfort” with sharing a locker room or restroom with a person of the opposite biological sex “cannot justify a policy that singles out and disadvantages” students who profess a gender identity that conflicts with their biological sex. *Id.* at 2. The Letter thus declares that “[a] school *may not require* transgender students . . . to use individual-user facilities when other students are not required to do so.” *Id.* at 3 (emphasis added).

44. The 2016 Dear Colleague Letter makes it clear that similar principles apply to student access to overnight accommodations that are part of school trips or events. Although “Title IX allows a school to provide separate housing on the basis of sex,” the Letter states, schools must allow “students to access housing consistent with their gender identity.” *Id.* at 4.

45. The 2016 Dear Colleague Letter directly ties continued federal funding to compliance with its directives, stating that “[a]s a condition of receiving Federal funds, a school agrees that it . . . must not treat a transgender student differently from the way it treats other students of the same gender identity.” *Id.* at 2.

46. No legal authority that is binding on Highland supports Defendants’ pronouncement that Title IX prohibits discrimination on the basis of gender identity.

47. Defendants are treating their declaration that Title IX prohibits discrimination on the basis of gender identity as a legislative rule that they consider binding on all schools subject to Title IX.
48. According to the DOE’s website, Defendants have been and will continue enforcing their legislative rule that redefines the term “sex” in Title IX and its regulations to include “gender identity.” See U.S. Dep’t of Educ, Office for Civil Rights, Resources for Transgender and Gender-Nonconforming Students, http://www2.ed.gov/about/offices/list/ocr/lgbt.html (linking to, among other things, (1) Letter from Timothy C.J. Blanchard, U.S. Dep’t of Educ. Office for Civil Rights, to Stephen M. Tomlinson, Superintendent of Broadalbin-Perth Central School District (NY) (Dec. 22, 2015) (explaining that the DOE’s investigation and enforcement of Title IX compelled a school board to permit students “to access the bathrooms and the locker rooms consistent with [their] gender identity”); (2) Letter from Adele Rapport, U.S. Dep’t of Educ. Office for Civil Rights, to Dr. Daniel E. Cates, Superintendent of Township High School District 211 (IL) (Nov. 2, 2015) (similar); and (3) Letter from Anurima Bhargava, U.S. Dep’t of Justice Civil Rights Division, to Dr. Joel Shawn, Superintendent of Arcadia Unified School District (CA) (July 24, 2013) (similar)).

49. Earlier this year, North Carolina enacted the Public Facilities Privacy and Security Act (the Privacy Act), which provides that boards of education and other governmental entities (including the University of North Carolina (UNC)) must require that every government-owned multiple-occupancy locker room, changing facility, and restroom be designated for and used by only people of the same biological sex.

50. On May 4, 2016, the DOJ sent letters to North Carolina Governor Patrick McCrory and UNC leaders (among others) regarding the Privacy Act. See Letter from Vanita Gupta to Governor Patrick McCrory (May 4, 2016); Letter from Vanita Gupta to Margaret
Spellings, President of the University of North Carolina, et al. (May 4, 2016) (Spellings Letter).

51. The letter to the UNC leaders reiterated Defendants’ position that “Title XI’s prohibition on sex discrimination extends to discrimination based on gender identity,” Spellings Letter at 2, and that “barring a student from the restrooms that correspond to his or her gender identity . . . constitutes unlawful sex discrimination in violation of Title IX,” id. at 3.

52. The letter to the UNC leaders also stated that the DOJ “has determined that UNC is in violation of . . . Title IX,” id. at 2, simply by enforcing the Privacy Act’s requirement that “every multiple-occupancy bathroom and changing facility . . . be designated for and used only by persons based on their biological sex,” id. at 1.

53. The letter to the UNC leaders threatened that unless the DOJ received assurances of compliance, it would “take enforcement action.” Id. at 2.

54. Just five days later, on May 9, 2016, the DOJ made good on its threat by filing suit in the United States District Court for the Middle District of North Carolina against the State of North Carolina, Governor Patrick McCrory, UNC, and the Board of Governors of UNC (among others).

55. The DOJ’s complaint against the State of North Carolina alleges that the Privacy Act violates Title IX by requiring governmental agencies, including UNC, to direct that “multiple occupancy bathrooms or changing facilities . . . be designated for and only used by individuals based on their biological sex.” Complaint ¶¶ 12, 55, United States v. North
Carolina, Case No. 1:16-cv-425 (M.D.N.C. May 10, 2016). The DOJ alleges that this constitutes “discrimination on the basis of sex in violation of Title IX.” *Id.* at ¶ 55.

C. Highland Faces the Issues Raised by Defendants’ New Title IX Rule

56. Highland serves approximately 850 elementary-school students (pre-kindergarten through 5th grade), 450 middle-school students (6th grade through 8th grade), and 600 high-school students (9th grade through 12th grade).

57. Highland operates one large campus on which separate buildings for its Elementary School, Middle School, and High School are located.

58. Highland serves a low-income community. The median income of families whose children attend Highland’s schools was $33,686 in tax year 2013.

59. Highland currently has a student who professes a gender identity that conflicts with that student’s biological sex. That student—referred to herein as Student A—is a biological male who professes a female identity.

60. Student A’s legal custodian enrolled Student A in Highland Elementary School when Student A was entering kindergarten, during the 2011-2012 school year.

61. When Student A enrolled in Highland Elementary School, Student A was listed on all paperwork as a male.

62. When Student A began attending Highland Elementary School, Student A presented as a male.

63. When Student A began attending Highland Elementary School, Student A used a name that is typically understood to be male.
64. When Student A began attending Highland Elementary School, all Student A’s classmates understood Student A to be male.

65. When Student A began attending Highland Elementary School, Student A was identified by Student A’s legal custodian, Highland’s staff, and other students as a male.

66. In or around August 2012, after Student A finished kindergarten, but before Student A entered the 1st grade, Student A’s legal custodian informed Highland that Student A would like to be addressed as a female.

67. After receiving this request, Highland agreed to address Student A as a female.

68. Highland and its representatives have at all times wanted to do what is best for Student A, but in doing so, they are also committed to protecting the dignity, privacy, safety, well-being, and rights of other students.

69. Student A’s legal custodian has acknowledged in communications with school representatives that doing what is best for Student A is Highland’s goal.

70. Highland has acceded, and will continue to accede, to the requests of Student A’s legal custodian to respect Student A’s gender-identity choice by not interfering with Student A’s current gender expression. But Highland will not accede to requests that adversely impact the dignity, privacy, safety, well-being, or rights of other students.

71. Student A began the 1st grade (during the 2012-2013 school year) presenting as a female and has continued to present as a female at school since that time.

72. Student A’s legal custodian first requested that Highland allow Student A to use the girls’ restroom when Student A was in the 2nd grade (during the 2013-2014 school year).
73. Highland declined to allow Student A to use the girls’ restroom.

74. It is Highland’s policy that students using sex-specific locker rooms and restrooms, or overnight accommodations during school trips or events, must use the facilities that correspond to their biological sex.

75. Highland realizes that altering its policy to address Student A’s request will have ramifications throughout all its schools.

76. Changing Highland’s policies to address Student A’s request will not simply affect restroom access at the Elementary School, but will also require Highland to allow students to access locker rooms consistent with their professed gender identity (rather than their biological sex) at all the schools in the district.

77. Changing Highland’s policies to address Student A’s request will also require Highland to allow students to select overnight accommodations during school trips or events consistent with their professed gender identity (rather than their biological sex).

78. Highland has concluded that allowing students who profess a gender identity that conflicts with their biological sex to access overnight accommodations, locker rooms, or restrooms designated for the opposite sex will violate the dignity interests and privacy rights of other students using those shared facilities.

79. All individuals, including students, have a constitutional right to bodily privacy protected by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution that forbids the government from placing them in situations where they will expose their unclothed or partially clothed bodies to people of the opposite sex.
80. Highland wants to avoid the liability under 42 U.S.C. §§ 1983 and 1988 that will result if it adopts policies that violate the constitutional rights of its students. See Complaint ¶¶ 358-396, Students and Parents for Privacy v. U.S. Dep’t of Educ., Case No. 1:16-cv-04945 (N.D. Ill. May 4, 2016) (alleging that a school district violated its students’ constitutional rights to bodily privacy by allowing a biological male who professes a female identity to access the girls’ locker room and restroom).

81. These privacy concerns arise in the use of overnight accommodations because during some school trips and events students of the same sex share rooms in overnight accommodations.

82. These privacy concerns also arise in the use of locker rooms. Highland Middle School has one locker room for male students and one locker room for female students, and Highland High School has two locker rooms for male students and two locker rooms for female students. The layout of all these locker rooms is very open. And the showers in the boys’ and girls’ locker rooms at the High School are group showers that do not have individual stalls.

83. These privacy concerns also arise in the use of restrooms because the stalls in the student restrooms at all of Highland’s schools are open at the top and bottom. In particular, the stalls in the girls’ student restrooms at Highland Elementary School are open at the top and bottom by approximately two feet at the bottom and two feet at the top.

84. Highland has also concluded that allowing students who profess a gender identity that conflicts with their biological sex to access overnight accommodations, locker
rooms, or restrooms for the opposite sex will violate the Title IX rights of other students using those shared facilities.

85. Title IX prohibits schools from creating a hostile environment based on sex.

86. Granting students access to sex-specific overnight accommodations, locker rooms, and restrooms based on gender identity requires girls to share these intimate facilities with biological males (and vice versa). By doing this, a school creates a hostile environment based on sex. See Complaint ¶¶ 418-472, Students and Parents for Privacy v. U.S. Dep’t of Educ., Case No. 1:16-cv-04945 (N.D. Ill. May 4, 2016) (alleging that a school district created a hostile environment based on sex in violation of Title IX by allowing a biological male who professes a female identity to access the girls’ locker room and restroom).

87. Highland wants to avoid the liability that will result if it adopts policies that violate the Title IX rights of its students.

88. Highland is also concerned that allowing students who profess a gender identity that conflicts with their biological sex to access overnight accommodations, locker rooms, or restrooms for the opposite sex will be unworkable and will create safety issues and lewdness concerns in the educational setting.

89. For example, a male student who wants to access a room full of partially clothed or unclothed girls (whether to pursue sexual advances toward them, undress in front of them, or view them in a state of partial or complete undress) can simply profess a female identity and the school would be required to allow him to access the girls’ locker room.

90. Indeed, Defendants’ 2016 Dear Colleague Letter acknowledges that students who profess a gender identity that conflicts with their biological sex need not produce a
medical diagnosis or other verification in order for their schools to treat them consistent with their professed gender identity.

91. Highland does not want to create such an unworkable policy that will undermine its ability to secure the safety and peace of mind of all its students.

92. Highland wants to avoid the liability that will result if it adopts policies that risk jeopardizing the safety and security of its students.

93. For the foregoing reasons, Highland declined to change its policies to allow Student A to use the girls’ restroom.

94. Highland nevertheless has allowed Student A to use any of the three single-use staff restrooms at the Elementary School or any of the two restrooms in the main office at the Elementary School.

95. Most recently, during Student A’s fourth-grade year (the 2015-2016 school year), Student A was part of a class that met close to one of the single-use staff restrooms, and Highland encouraged everyone in Student A’s class to use the nearby single-use staff restroom.

96. Highland plans to make similar arrangements for Student A’s restroom use for the 2016-2017 school year, which will include encouraging and permitting Student A’s classmates to use nearby single-use restrooms, while also continuing to allow Student A to use any of the five single-use restrooms located throughout the Elementary School building.

D. Federal Efforts to Enforce Defendants’ New Title IX Rule against Highland

97. On December 23, 2013, Student A’s legal custodian filed a complaint against Highland with the DOE’s Office for Civil Rights (OCR).
98. That complaint alleged that Highland engaged in sex-based discrimination against Student A, specifically claiming that Highland prohibited Student A “from using the girls’ student restroom” and required instead that Student A “use a restroom in the School’s office/sick room.”

99. On April 21, 2014, Highland agreed to participate in OCR’s Early Complaint Resolution (ECR) process. Despite this, the parties were unable to reach a resolution through that process, and OCR resumed its investigation of the complaint in June 2014.

100. On August 29, 2014, OCR amended the complaint, claiming that Highland staff and students referred to Student A “as a boy” and failed “to use female pronouns” when referring to Student A.

101. Whenever Student A or Student A’s legal custodian have raised concerns about comments from Highland staff or students to Student A, Highland officials have promptly addressed and resolved all those situations.

102. As part of their investigation, OCR representatives interviewed at least eight Highland employees and demanded that Highland produce (among other things) Student A’s class schedule, Student A’s school records, Highland officials’ communications with Student A’s legal custodian, complaints that Highland officials received from Student A or Student A’s legal custodian, and Highland officials’ responses to those complaints.

103. Since concluding their investigation, OCR representatives have been very complimentary of the way that Highland has handled the complaints from Student A or Student A’s legal custodian alleging that Highland staff and students referred to Student A “as a boy” or failed “to use female pronouns” when referring to Student A.
104. After concluding their investigation, on March 30, 2016, OCR representatives sent a proposed Resolution Agreement to Highland.

105. In the OCR representative’s email sending Highland the proposed Resolution Agreement, OCR stated its position that “Title IX’s prohibition on sex discrimination encompasses discrimination . . . based on gender identity.” Email from Ted Wammes, U.S. Dep’t of Educ., Office for Civil Rights, to Andrew J. Burton (Mar. 30, 2016).

106. The proposed Resolution Agreement indicates that OCR requires Highland to take all the steps outlined in the Agreement “[i]n order to resolve the issues raised in [Student A’s] complaint” and ensure Highland’s “compliance with the requirements of Title IX.” Resolution Agreement at 1.

107. Under the proposed Resolution Agreement, OCR demands that Highland “engage a third-party consultant . . . with expertise in child and adolescent gender identity . . . to support and assist [Highland].” Id. at 2.

108. Under the proposed Resolution Agreement, OCR demands that Highland take the following steps with regard to Student A:

a. “provide the Student access to sex-specific facilities at the District consistent with the Student’s gender identity; however, the Student may request access to private facilities based on privacy, safety, or other concerns;

b. provide the Student access to sex-specific facilities at all District-sponsored activities, including overnight events and extracurricular activities on and off campus, consistent with the Student’s gender identity; however, the
Student may request access to private facilities based on privacy, safety, or other concerns;

c. treat the Student consistent with the Student’s gender identity and the same as other students of the same gender in all respects in the education programs and activities offered by the District;

d. review all District records and systems and ensure that the Student’s preferred name and gender identity are reflected in the records and systems from August 2012 through the duration of the Student’s attendance at the District’s schools. Where the District states it is not permitted to change the Student’s name and/or gender, the District will promptly provide an explanation of the record and the reason the Student’s name and gender have not been changed; and

e. ensure that any District records containing the Student’s assigned sex at birth, if any, are treated as confidential, personally identifiable information; are maintained separately from the Student’s records; and are not disclosed to any District employees, students, or others without the express written consent of the Student’s parents or, after the Student turns 18 or is emancipated, the Student.”

Id. at 2-3.

109. The proposed Resolution Agreement defines “sex-specific facilities” to mean “facilities and accommodations used by students at school or during school-sponsored
activities and trips, and include, but are not limited to, restrooms, locker rooms, and overnight facilities.”

110. Under the proposed Resolution Agreement, OCR demands that Highland make the following policy changes (among others) throughout the district: (1) revise “all its policies, guidelines, procedures, regulations, and related documents and materials . . . related to sex discrimination . . . to . . . specifically include gender-based discrimination as a form of discrimination based on sex” and “state that gender-based discrimination includes discrimination based on a student’s gender identity, gender expression, gender transition, transgender status, or gender nonconformity.” Id. at 4-5.

111. OCR also requires Highland to “submit to OCR for review and approval all of its revised policies, procedures, regulations, and related documents and materials.” Id. at 5.

112. Under the proposed Resolution Agreement, OCR demands that Highland annually “conduct mandatory training on issues related to gender nonconformance . . . for all District administrators,” annually “provide training to all faculty and staff who interact with students at any grade level regarding the District’s obligations to prevent and address gender-based discrimination,” and provide “instruction to all students on gender-based discrimination and . . . examples of prohibited conduct . . . , including the types of conduct prohibited with respect to sex-specific facilities.” Id. at 6-7.

113. Under the proposed Resolution Agreement, OCR demands that Highland submit “a copy of the training materials and attendance rosters” and “documentation of the implementation of the age-appropriate instruction the District implements for students.” Id. at 7.
114. If Highland were to accept the proposed Resolution Agreement, OCR has made it clear that its officials retain the right to “visit the District, interview staff and students, and request . . . additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of the Agreement and is in compliance with . . . Title IX.” *Id.* at 8.

115. If Highland were to accept the proposed Resolution Agreement, OCR has made it clear that it “may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of th[e] Agreement.” *Id.*

116. OCR told Highland that it would have 90 days, or until June 28, 2016, to accept the proposed Resolution Agreement.

117. During discussions between one of OCR’s representatives and Highland’s representatives, the OCR representative stated that OCR will reject any counter-proposal by Highland that does not agree to let students use the overnight accommodations, locker rooms, and restrooms that correspond to their gender identity.

118. Highland decided that it will not accept OCR’s proposed Resolution Agreement—particularly the demands concerning student use of overnight accommodations, locker rooms, and restrooms—for all the reasons that it originally declined the request of Student A’s legal custodian to allow Student A to use the girls’ restroom.

119. In addition, Highland has concluded that OCR’s proposed Resolution Agreement would require Highland to violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This is because the Agreement requires Highland to respect and accommodate Student A’s privacy and safety interests in accessing
overnight accommodations, locker rooms, and restrooms, see Resolution Agreement at 2-3 (explaining that Student A “may request access to private [overnight, locker-room, or restroom] facilities based on privacy, safety, or other concerns”), but Defendants’ new rule forbids Highland from respecting and accommodating the privacy rights and safety interests of the approximately 1,900 other students who attend Highland’s schools, see 2016 Dear Colleague Letter at 2-3 (stating that schools “may not require” students who profess a gender identity that conflicts with their biological sex to “use individual-user facilities” in order “to accommodate other’s discomfort” with sharing overnight accommodations, locker rooms, or restrooms with people of the opposite sex).

120. Highland has determined that it will not hire a gender-identity consultant or implement special gender-identity training for its administrators, faculty, staff, and students because it endeavors to treat all students fairly and respectfully and does not want to create the impression that some students are treated more favorably than others.

121. Highland has determined that if it were to implement the costly measures discussed in the prior paragraph, it would be forced to divert its limited resources away from other educational programs that it currently provides to its students.

122. Highland has decided not to submit to ongoing OCR review of its records and actions because doing that would continue to divert its resources away from educating its students and will thus continue to hamper its students’ educational experience.

123. On May 13, 2016, the day that Defendants issued their 2016 Dear Colleague Letter, an OCR representative emailed Highland’s legal counsel a copy of a press release announcing the Letter, stating that the DOE and the DOJ had issued “guidance that
summarizes a school’s Title IX’s obligations regarding transgender students.” Email from Ted Wammes, U.S. Dep’t of Educ., Office for Civil Rights, to Andrew J. Burton (May 13, 2016).

124. Upon receipt, Highland’s legal counsel forwarded that email to Highland’s Superintendent and School Board members.

125. In that email, OCR’s representative wrote that OCR may “end the negotiations period at any time prior to the expiration of the 90-calendar day period when it is clear that agreement will not be reached (e.g., the recipient has refused to discuss any resolution; the recipient has indicated a refusal to agree to a key resolution term; the recipient has not responded to a proposed resolution agreement and at least 30 calendar days have passed).” Id.

126. In that email, OCR’s representative also wrote that if a resolution is not reached by June 28, 2016, OCR would proceed to the next steps outlined in Section 303(b) of OCR’s Case Processing Manual, which would soon result in OCR issuing a “Letter of Impending Enforcement Action” to Highland.

127. An enforcement action against Highland imperils its federal funding. See 20 U.S.C. § 1682 (“Compliance with any requirement adopted pursuant to this section [Title IX] may be effected . . . by the termination of or refusal to grant or to continue [Federal financial] assistance . . . to any recipient . . . .”).

128. For the 2015-2016 school year, Highland received funding from the federal government in the amount of $1,123,390. Highland’s total funding for that school year was $15,400,000.
129. For the 2015-2016 school year, Highland received the following federal funding: (1) $307,710 for special education; (2) $415,240 for school-wide Title I programming for educational advancement; (3) $50,440 for improving teacher quality; and (4) $350,000 for free and reduced-cost lunches.

130. Defendants’ threatened revocation of these funds will compel Highland to eliminate special-education classes and programs, end many of its educational-advancement programs and resources, increase class sizes (which will decrease the individualized time and attention that staff members are able to give each student), and cut the number of free and reduced-cost lunches available to students.

131. Defendants are prepared to impose these hardships on Highland’s students—hardships that will be disproportionately experienced by socioeconomically disadvantaged children and students struggling to learn—simply because Highland seeks to protect those students’ dignity interests, privacy rights, and safety concerns through a policy that requires all students to access overnight accommodations, locker rooms, and restrooms consistent with their biological sex.

**CLAIM ONE**

**Defendants’ Actions Violate the Administrative Procedure Act (APA)**

132. Highland realleges all matters set forth in Paragraphs 1 through 131 and incorporates them herein.

133. The DOE and DOJ are federal agencies subject to of the APA. 5 U.S.C. § 701(b); 5 U.S.C. § 551(1).

134. Defendants have promulgated, and are enforcing nationwide, a new legislative rule that redefines the term “sex” in Title IX and its regulations to include “gender identity”
and that requires schools, in order to comply with Title IX, to permit students to access sex-specific overnight accommodations, locker rooms, and restrooms based on their professed gender identity.

135. Defendants’ legislative rule contradicts the text, structure, legislative history, and historical judicial interpretation of Title IX, all of which confirm that “sex” means biological sex—that is, a person’s status as male or female as determined by biology.

136. Defendants’ legislative rule is a “rule” under the APA. 5 U.S.C. § 551(4).

137. Defendants have communicated their legislative rule to school districts nationwide, including Highland.

138. Defendants have stated that failing to comply with their legislative rule will result in investigations and enforcement actions that could revoke millions of dollars in federal funding.

139. Defendants are currently enforcing their legislative rule against Highland.

140. Highland has suffered a legal wrong and been adversely affected and aggrieved as a direct result of Defendants’ actions in promulgating and enforcing their legislative rule.

141. As explained below under Claims 2, 3, and 4, Defendants’ actions violate Highland’s constitutional rights under the Spending Clause in Article 1, Section 8 of the United States Constitution, the federalism guarantees of the United States Constitution, and the separation-of-powers guarantees of the United States Constitution.

142. Defendants seek to imminently compel Highland to undertake costly and time-consuming steps—such as hiring a gender-identity consultant, adopting unwarranted district-wide policy changes, and providing unnecessary district-wide training to
administrators, teachers, and students—all of which Defendants and their agents claim are necessary to bring Highland into compliance with Title IX.

143. Undertaking these costly and time-consuming steps will force Highland to divert its limited resources away from the educational programs that it currently provides to its students.

144. Defendants seek to imminently compel Highland to expose itself to liability by enacting changes to its policies regulating student access to overnight accommodations, locker rooms, and restrooms that will result in Highland violating the constitutional right to bodily privacy of its students, violating the Title IX rights of its students by (among other things) creating hostile environments based on sex, violating the constitutional equal-protection rights of its students by accommodating the privacy and safety concerns of Student A while ignoring the privacy and safety concerns of other students, jeopardizing the safety of its students, and creating lewdness concerns in its facilities.

145. Defendants threaten an imminent enforcement action against Highland through which Defendants and their agents have the authority to revoke all of Highland’s federal funding, which currently amounts to more than a million dollars each year.

146. That revocation of federal funding will harm Highland and its students by compelling Highland to eliminate special-education classes and programs, end many of its educational-advancement programs and resources, increase class sizes (which will decrease the individualized time and attention that staff members are able to give each student), and cut the number of free and reduced-cost lunches available to students.
147. These hardships on Highland’s students will be disproportionately experienced by underprivileged children and students struggling to learn.

148. Defendants have forced Highland to endure an illegitimate and invasive investigation and threaten to force Highland to submit to ongoing investigation and monitoring by Defendants and their agents.

149. Defendants’ legislative rule constitutes “final agency action” reviewable by this Court under 5 U.S.C. § 704.

150. Defendants’ legislative rule is definitive in its declaration of what Defendants think that the law requires; it is not in the least bit tentative in announcing Defendants’ legal policy.

151. Defendants’ legislative rule purports to determine the rights of students, including but not limited to the rights of Student A, and the obligations of schools that receive federal funding, including but not limited to the obligations of Highland.

152. Legal consequences are already flowing from Defendants’ legislative rule. Defendants have aggressively enforced it, and are aggressively enforcing it, throughout the nation, against not only Highland but also the State of North Carolina and schools in North Carolina, New York, Illinois, and California (among other places).

153. Under the APA, a reviewing Court must “hold unlawful and set aside agency action” in four instances that apply to this case: (1) if the agency action is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” 5 U.S.C. § 706(2)(C); (2) if the agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A); (3) if the agency action is
“contrary to constitutional right, power, privilege, or immunity,” 5 U.S.C. § 706(2)(B); and (4) if the agency action is “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D).

154. Defendants’ actions in promulgating and enforcing their legislative rule violate all four of these standards and should be set aside.

A. Defendants’ Actions Exceed Statutory Jurisdiction, Authority, and Limitations

155. Defendants’ actions in promulgating and enforcing their legislative rule are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” 5 U.S.C. § 706(2)(C), because they redefine the unambiguous term “sex” in Title IX to include “gender identity” without the authorization of Congress.

156. Congress has not delegated to Defendants the authority to define, or redefine, unambiguous terms in Title IX.

157. The term “sex” as used in Title IX means biological sex—that is, a person’s status as male or female as determined by biology.

158. The term “sex” as used in Title IX is not ambiguous.

159. Title IX makes no reference to “gender identity” in the language of the statute, and Title IX’s regulations likewise make no reference to “gender identity.”

160. Title IX is not ambiguous when it states that schools receiving federal funds may “maintain[] separate living facilities for the different sexes.” 20 U.S.C. § 1686.

161. Title IX’s regulation is not ambiguous when it states that schools receiving federal funds may separate locker rooms, shower facilities, and restrooms “on the basis of sex.” 34 C.F.R. § 106.33.
162. Title IX does not require that Highland or any other school district open its girls’ overnight accommodations, locker rooms, or restrooms to biological males who profess a female identity.

163. Nor does Title IX require that schools open their boys’ facilities to biological females who profess a male identity.

164. Defendants have thus promulgated and begun enforcing their legislative rule in excess of statutory jurisdiction, authority, and limitations.

165. Defendants promulgated and are enforcing their rule in excess of statutory jurisdiction regardless of whether the rule is considered legislative or interpretive.

B. Defendants’ Actions Are Arbitrary and Capricious, An Abuse of Discretion, and Not In Accordance With Law

166. Defendants’ actions in promulgating and enforcing their legislative rule are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).


168. An agency action is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Id.
169. Defendants have relied on the concept of “gender identity” in promulgating and enforcing their new legislative rule.

170. But gender identity is absent from the legislative history of Title IX and thus is a factor that Congress did not intend Defendants to consider.

171. Defendants failed to consider important aspects of the problems created by allowing students who profess a gender identity that conflicts with their biological sex to access overnight accommodations, locker rooms, and restrooms designated for the opposite sex.

172. Defendants ignored the language and structure of Title IX and its regulations, the congressional history and judicial interpretations of Title IX and its regulations, the practical and constitutional harms that their unlawful actions create, and the hostile environments based on sex in violation of Title IX (and the other violations of Title IX) that result from their unlawful actions.

173. Defendants’ actions in redefining the term “sex” in Title IX and its regulations to include “gender identity” were not accompanied by rational explanation.

174. Defendants’ actions inexplicably departed from established Title IX policy that unambiguously allowed schools to maintain overnight accommodations, locker rooms, and restrooms separated by biological sex.

175. Defendants’ actions are contrary to law.

176. Defendants’ actions in redefining the term “sex” in Title IX and its regulations to include “gender identity” are so implausible that they could not be ascribed to a difference in view or the product of agency expertise.
177. Defendants’ actions expose schools, including Highland, to liability by requiring them to enact policies that will violate the dignity interests and privacy rights of their students, violate the Title IX rights of their students by creating hostile environments based on sex, and create safety issues and lewdness concerns on school premises.

178. Defendants’ actions in promulgating and enforcing their legislative rule are thus arbitrary and capricious, an abuse of discretion, and not in accordance with law.

179. Defendants’ actions in promulgating and enforcing their rule are arbitrary and capricious, an abuse of discretion, and not in accordance with law regardless of whether the rule is considered legislative or interpretive.

C. Defendants’ Actions Are Contrary to Constitutional Right, Power, Privilege, and Immunity

180. Defendants’ actions in promulgating and enforcing their legislative rule are “contrary to constitutional right, power, privilege, or immunity.” 5 U.S.C. § 706(2)(B).

181. Defendants’ actions in requiring schools to allow students who profess a gender identity that conflicts with their biological sex to access overnight accommodations, locker rooms, and restrooms designated for the opposite sex will violate the constitutional rights to bodily privacy of other students using those shared facilities.

182. All individuals, including students, have a constitutional right to bodily privacy protected by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution that forbids the government from placing them in situations where they will expose their unclothed or partially clothed bodies to people of the opposite sex.

183. As explained below under Claim 2, Defendants’ actions in redefining the term “sex” in Title IX and its regulations to include “gender identity,” and in mandating that
schools permit students to access overnight accommodations, locker rooms, and restrooms consistent with their professed gender identity, violate the Spending Clause in Article 1, Section 8 of the United States Constitution.

184. As explained below under Claim 3, Defendants’ actions in redefining the term “sex” in Title IX and its regulations to include “gender identity,” and in mandating that schools permit students to access overnight accommodations, locker rooms, and restrooms consistent with their professed gender identity, violate the federalism guarantees of the United States Constitution, which include but are not limited to the Tenth Amendment.

185. As explained below under Claim 4, Defendants’ actions in redefining the term “sex” in Title IX and its regulations to include “gender identity,” and in mandating that schools permit students to access overnight accommodations, locker rooms, and restrooms consistent with their professed gender identity, violate the separation-of-powers guarantees of the United States Constitution.

186. Defendants’ actions in promulgating and enforcing their legislative rule are thus contrary to constitutional right, power, privilege, and immunity.

187. Defendants’ actions in promulgating and enforcing their rule are contrary to constitutional right, power, privilege, and immunity regardless of whether the rule is considered legislative or interpretive.

D. Defendants’ Actions Did Not Observe Procedure Required By Law

188. Defendants’ actions were done “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).
189. Defendants have promulgated a legislative rule that redefines the term “sex” in Title IX and its regulations to include “gender identity” and that requires schools, in order to comply with Title IX, to permit students to access overnight accommodations, locker rooms, and restrooms based on their professed gender identity.

190. This rule requires school districts, including Highland, to allow students who profess a gender identity that conflicts with their biological sex to access overnight accommodations, locker rooms, and restrooms designated for the opposite sex.

191. This rule applies to all school districts that receive federal funding.

192. This rule adds substantive content to the rights and obligations established under Title IX.

193. This rule announces new policy that in effect creates new law, rights, and obligations under Title IX’s statutory language.

194. This rule announces new policy that in effect creates new law, rights, and obligations under Title IX’s regulations, including but not limited to 34 C.F.R. § 106.33.

195. This rule does not explicate, and in fact is inconsistent with, Congress’s desires and purposes for Title IX.

196. This rule is an extra-statutory imposition of rights and obligations under Title IX.

197. Defendants are enforcing this rule nationwide and using it as a predicate for numerous investigations and threats against school districts, including Highland.

198. Defendants and their agents are treating this rule as if it has the full force of law in their enforcement efforts against Highland, and they have indicated that this rule
binds Highland and that a failure to comply with it will result in an enforcement action against Highland that threatens to revoke all of its federal funding.

199. This rule, given its nature and operation, qualifies as a legislative rule.

200. Legislative rules must comply with the APA’s notice-and-comment requirements. See Perez v. Mortg. Bankers Ass’n, 135 S. Ct. 1199, 1204 (2015) (concluding that all legislative rules must satisfy the notice-and-comment requirements).

201. Notice-and-comment requirements mandate that an agency (1) provide notice to the public of the proposed rulemaking, typically by publishing notice in the Federal Register, (2) give interested parties an opportunity to submit written data, views, or arguments on the proposed rule, and consider and respond to significant comments received, and (3) include in the promulgation of the final rule a concise general statement of the rule’s basis and purpose. Notice-and-comment requirements also mandate that an agency consider all the relevant comments offered during the public-comment period before finally deciding whether to adopt a proposed rule.

202. Defendants promulgated and began enforcing their legislative rule without satisfying these notice-and-comment requirements.

203. Under Title IX, final rules, regulations, and orders of general applicability issued by the DOE must be signed by the President of the United States. 20 U.S.C. § 1682.

204. Defendants promulgated and began enforcing their legislative rule without the signature of the President.

205. Defendants thus did not follow the requisite procedures when they adopted their legislative rule.
CLAIM TWO
Defendants’ Actions Violate the Spending Clause in Article 1, Section 8 of the United States Constitution

206. Highland realleges all matters set forth in Paragraphs 1 through 205 and incorporates them herein.

207. Defendants’ actions in redefining the term “sex” in Title IX and its regulations to include “gender identity,” and in mandating that schools permit students to access overnight accommodations, locker rooms, and restrooms consistent with their professed gender identity, violate the Spending Clause in Article 1, Section 8 of the United States Constitution.

208. Congress enacted Title IX using its Spending Clause power.

209. Defendants’ actions violate the Spending Clause in two ways. First, Defendants attempt to impose new conditions on federal funding that conflict with the clear and unambiguous conditions that Congress imposed when it enacted Title IX. Second, Defendants’ actions unconstitutionally coerce and commandeer Highland and every other school district in the United States to implement Defendants’ gender-identity policies.

A. Defendants Attempt to Impose New Conditions on Federal Funding that Conflict with the Clear and Unambiguous Conditions that Congress Imposed When It Enacted Title IX

210. When Congress uses its Spending Clause power, the resulting legislation operates much like a contract: in return for federal funds, the states, their political subdivisions, and related governmental entities agree to comply with federally imposed conditions.
211. Congress must clearly and unambiguously state the conditions for receipt of federal funds so that the states, their political subdivisions, and related governmental entities can knowingly decide whether to accept that funding.

212. Until Defendants’ recent efforts to change the unambiguous meaning of Title IX, it was understood that the term “sex” in Title IX and its regulations did not include “gender identity.”

213. Until Defendants’ recent efforts to change the unambiguous meaning of Title IX, it was understood that schools receiving federal funding did not violate Title IX by requiring students to access overnight accommodations, locker rooms, and restrooms consistent with their biological sex.

214. No school district could have reasonably anticipated that Defendants would impermissibly attempt to alter Title IX and its regulations to change the term “sex” to include “gender identity” and to mandate that schools permit biological males to access overnight accommodations, locker rooms, and restrooms designated for females (and vice versa).

215. Defendants’ actions thus violate the Spending Clause.

B. Defendants’ Actions Unconstitutionally Coerce and Commandeer Highland to Implement Defendants’ Gender-Identity Policies

216. The federal government cannot place unreasonable conditions on federal funding or otherwise offer financial inducements that effectively coerce and commandeer the states, their political subdivisions, or related governmental entities to implement the policies of the federal government.
217. Through their efforts to enforce their new gender-identity policies against Highland, Defendants threaten to revoke all (not merely part) of the educational funding that the federal government provides to Highland.

218. The amount of federal funding that Defendants threaten to revoke is a substantial percentage of Highland’s overall funding.

219. The federal funding that Defendants threaten to revoke is designated for special-education programs, educational advancement, improving teacher quality (including class-size reduction), and providing free and reduced-cost lunches.

220. Being stripped of those funds will compel Highland to eliminate special-education classes and programs, end many of its educational-advancement programs and resources, increase class sizes (which will decrease the individualized time and attention that staff members are able to give each student), and cut the number of free and reduced-cost lunches available to students.

221. Being stripped of those funds will impose hardships on Highland’s students that will be disproportionately experienced by socioeconomically disadvantaged children and students struggling to learn.

222. Threatening to revoke Highland’s federal funding is so coercive that it passes the point at which pressure turns into compulsion.

223. Defendants’ actions thus violate the Spending Clause.
CLAIM THREE
Defendants’ Actions Violate the Federalism Guarantees of the United States Constitution

224. Highland realleges all matters set forth in Paragraphs 1 through 223 and incorporates them herein.

225. Several provisions of the United States Constitution make clear that the states remain independent sovereigns in the federal system, that they joined the union with their sovereignty—including their traditional police power—intact, and that the federal government is one of limited powers.

226. Those provisions include but are not limited to Section 2 of the Thirteenth Amendment, Section 5 of the Fourteenth Amendment, Section 2 of the Fifteenth Amendment, and Article I, Section 8—all of which delineate specific and limited subjects on which Congress may legislate—and the Tenth Amendment, which provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

227. No provision of the United States Constitution authorizes any arm of the federal government to require state-operated schools to permit students access to sex-specific overnight accommodations, locker rooms, or bathrooms consistent with their professed gender identity. This is particularly true considering that “education” is an area “where States historically have been sovereign.” United States v. Lopez, 514 U.S. 549, 564 (1995).

228. Because the federal government lacks the constitutional authority to interfere with Highland’s policies concerning student access to sex-specific overnight
accommodations, locker rooms, and bathrooms, Defendants’ actions usurp Highland’s sovereign authority to regulate access to those intimate facilities.

229. Defendants’ actions thus violate the federalism guarantees of the United States Constitution.

230. The Constitution’s federalism guarantees also constrain the federal government’s ability to place conditions on the receipt of federal funds through legislation under the Spending Clause in Article I, Section 8. So for all the reasons explained under Claim 2, Defendants’ actions also violate the federalism guarantees of the United States Constitution.

CLAIM FOUR

Defendants’ Actions Violate the Separation-of-Powers Guarantees in the United States Constitution

231. Highland realleges all matters set forth in Paragraphs 1 through 230 and incorporates them herein.

232. Multiple provisions of the United States Constitution make clear that if the federal government is to impose new legal requirements on the states or their political subdivisions, those requirements must be imposed by or at the behest of Congress, and not by the executive branch acting on its own.

233. Those provisions include but are not limited to the Vesting Clause of Article I, Section 1, the Bicameralism and Presentment Clauses of Article I, Section 7, the Take Care Clause of Article II, Section 3, and Section 5 of the Fourteenth Amendment.
234. Defendants’ new Title IX directives go so far beyond any reasonable reading of that statute and its regulations that it is tantamount to exercising the lawmaking powers reserved exclusively to Congress.

235. Defendants’ efforts to impose its new Title IX directives on Highland are a usurpation of Congress’s exclusive authority under Article I of the Constitution, which provides that “[a]ll legislative Powers herein granted shall be vested in . . . Congress.”

236. Defendants’ new Title IX directives thus violate the separation-of-powers guarantees in the United States Constitution.

CLAIM FIVE

Defendants’ Actions Violate the Regulatory Flexibility Act (RFA)

237. Highland realleges all matters set forth in Paragraphs 1 through 236 and incorporates them herein.

238. The RFA requires federal agencies to prepare and make available for public comment an initial and final regulatory flexibility analysis before issuing a new rule. 5 U.S.C. § 603(a).

239. Defendants have promulgated a new rule that redefines the term “sex” in Title IX and its regulations to include “gender identity” and that requires schools, in order to comply with Title IX, to permit students to access overnight accommodations, locker rooms, and restrooms based on their professed gender identity.

240. Defendants failed to prepare and make available for public comment an initial and final regulatory flexibility analysis before issuing their new Title IX rule.
241. An agency can avoid performing a flexibility analysis if its top official certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. § 605(b).

242. The certification must include a statement providing the factual basis for the agency’s determination that the rule will not significantly impact small entities. Id.

243. Defendants did not make such a certification.

244. Defendants’ new Title IX rule would impose disproportionate and unnecessary burdens on small and economically disadvantaged school districts, including Highland.

245. Defendants and their agents demand, among other things, that Highland (1) adopt district-wide changes to its policies forbidding sex discrimination; (2) adopt district-wide changes to its policies regarding student use of sex-specific overnight accommodations, locker rooms, and restrooms; (3) hire a gender-identity consultant; and (4) implement gender-identity training for its administrators, faculty, staff, and students.

246. Implementing these demands would impose burdens on Highland that are disproportionate and unnecessary.

247. Defendants’ actions in promulgating and enforcing their new Title IX rule thus violate the RFA.

PRAYER FOR RELIEF

WHEREFORE, Highland respectfully requests that this Court enter judgment:

A. Declaring unlawful and setting aside Defendants’ rule announcing that the term “sex” in Title IX and its regulations includes “gender identity” and that Title IX
requires schools to allow students to access overnight accommodations, locker rooms, and restrooms consistent with their professed gender identity;

B. Declaring that the policies that Highland administers and enforces with respect to student use of overnight accommodations, locker rooms, and restrooms do not violate Title IX;

C. Declaring that Defendants’ efforts to create their rule and enforce it against Highland violate the Administrative Procedure Act, the Spending Clause in Article 1, Section 8 of the United States Constitution, the federalism guarantees in the United States Constitution, the separation-of-power guarantees in the United States Constitution, and the Regulatory Flexibility Act;

D. Preliminarily and permanently enjoining Defendants, their officers, agents, employees, and all other persons acting in concert with them from enforcing their rule that the term “sex” in Title IX and its regulations includes “gender identity” and that Title IX requires schools to allow students to access overnight accommodations, locker rooms, and restrooms consistent with their professed gender identity;

E. Preliminarily and permanently enjoining Defendants, their officers, agents, employees, and all other persons acting in concert with them from enforcing Title IX to require Highland to allow any of its students to access overnight accommodations, locker rooms, and restrooms consistent with their gender identity;

F. Preliminarily and permanently enjoining Defendants, their officers, agents, employees, and all other persons acting in concert with them from taking any adverse action against Highland for its policy that students must use overnight accommodations, locker
rooms, and restrooms consistent with their biological sex, including but not limited to enjoining Defendants, their officers, agents, employees, and all other persons acting in concert with them from taking steps to revoke Highland’s federal funding.

G. Awarding Highland costs and attorneys’ fees; and

H. Granting such other and further relief as the Court deems just and proper.

Dated: June 10, 2016

Respectfully submitted,

/s/ James A. Campbell

James A. Campbell, OH Bar No. 0081501

Trial Attorney
Kenneth J. Connelly, AZ Bar No. 025420*
Jeana Hallock, AZ Bar No. 032678*
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020 Phone
(480) 444-0028 Fax
jcampbell@ADFlegal.org
kconnelly@ADFlegal.org
jhallock@ADFlegal.org

J. Matthew Sharp, GA Bar No. 607842*
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road NE
Suite D-1100
Lawrenceville, Georgia 30043
(770) 339-0774
(770) 339-6744 Fax
msharp@ADFlegal.org

Andrew J. Burton, OH Bar No. 0083178
RENWICK, WELSH & BURTON LLC
9 North Mulberry Street
Mansfield, Ohio 44902
(419) 522-2889
(419) 525-4666 Fax
andrew@rwblawoffice.com

Counsel for Plaintiff

*Pro Hac Vice Applications Forthcoming
VERIFICATION OF COMPLAINT

I, William Dodds, Superintendent of Highland Local School District and authorized representative of the Board of Education of the Highland Local School District, a citizen of the United States and a resident of the State of Ohio, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the allegations in the foregoing Complaint are true and correct to the best of my knowledge.

Executed this the 9th day of June, 2016, in Morrow County, Ohio.

William Dodds
Superintendent of Highland Local School District and Authorized Representative of the Board of Education of the Highland Local School District
UNIVERSAL STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

VERIFIED
COMPLAINT-IN-INTERVENTION

BOARD OF EDUCATION OF THE
HIGHLAND LOCAL SCHOOL DISTRICT,
Plaintiff,

vs.

UNITED STATES DEPARTMENT OF
EDUCATION; JOHN B. KING, JR., in his
official capacity as United States Secretary of
Education; UNITED STATES DEPARTMENT
OF JUSTICE; LORETTA E. LYNCH, in her
official capacity as United States Attorney
General; and VANITA GUPTA, in her official
capacity as Principal Deputy Assistant Attorney
General,

Defendants.

----------------------------------------------
JANE DOE, a minor, by and through her legal
guardians JOYCE and JOHN DOE,

Intervenor Third-Party Plaintiff,

vs.

BOARD OF EDUCATION OF THE
HIGHLAND LOCAL SCHOOL DISTRICT;
HIGHLAND LOCAL SCHOOL DISTRICT;
WILLIAM DODDS, Superintendent of Highland
Local School District; and SHAWN
WINKELFOOS, Principal of Highland
Elementary School,

Third-Party Defendants.

----------------------------------------------

16 Civ. 524 (ALM/KAJ)
JANE DOE, by and through her legal guardians, JOYCE and JOHN DOE, and her undersigned counsel, for her third-party complaint-in-intervention against the Board of Education of the Highland Local School District and the Highland Local School District (together, “Highland”) and the other Third-Party Defendants, avers as follows:

INTRODUCTION

1. Jane Doe is an eleven-year-old transgender girl who attends Highland Elementary School in the Highland Local School District. For the past three years, Highland has refused to treat Jane the same as other girls, causing her to be ostracized and leading to frequent bullying and humiliation by teachers, staff, and students. Following an investigation, the U.S. Department of Education recently concluded that Highland is violating Title IX. But instead of trying to remedy that situation, Highland filed this lawsuit – purportedly concerned about protecting the “dignity and privacy” of other students – seeking court orders to try to ensure that the mistreatment of Jane and the violation of her rights, dignity, and privacy will continue unabated.

2. From a very young age, Jane began asserting her identity as female. Joyce and John Doe initially believed that this was a “phase,” but Jane’s statements and actions only became more consistent, persistent, and insistent. Those statements were accompanied by an increasing level of psychological distress at being treated like a boy. Uncertain about how to alleviate that distress, Joyce and John sought out the advice of professionals.

3. Prior to Jane’s first-grade year, with the guidance of medical and mental health professionals, Joyce and John helped Jane begin living as the girl she has always been. As part of that process, Joyce met with Third-Party Defendant Shawn Winkelfoos, the principal at Highland Elementary School, and Highland administrators to ensure that Jane would be affirmed and respected as a girl and treated the same as other girls throughout the school environment when she returned to first grade. Although Highland alleges that it has “admirably navigated a difficult
and sensitive situation,” in fact it has refused to acknowledge Jane’s identity as a girl and has repeatedly singled her out for adverse treatment and exposed her to stigma and harassment.

4. Unlike the other girls in her school, Highland refuses to allow Jane to use the girls’ restrooms. Instead, she must use specially designated restrooms that are inconvenient, place additional restrictions on her ability to use the restroom, and isolate and stigmatize her. In addition to placing Jane in a discriminatory situation that encourages other students to stigmatize and harass her, Highland refuses to investigate or effectively respond to the harassment, name-calling, and bullying Jane routinely faces and which Jane’s legal guardians have brought to the school’s attention on numerous occasions. The school refuses to correct teachers and staff who, years after being informed that Jane is transgender, insist on continuing to refer to her by male pronouns. Beyond failing to address the hostile school environment Jane must endure every day, the school has actively contributed to that environment. For example, the school’s one attempt at encouraging “sensitivity” involved a male teacher dressing up as a woman during a school assembly, generating raucous laughter and humiliating Jane in front of the entire school community.

5. In short, Highland’s treatment of Jane has been anything but “sensitive” or “admirable.” Instead, Highland has staunchly refused to respect or acknowledge Jane’s female gender, subjecting her to untold pain and anxiety, without any sound reason for doing so. Neither in its lawsuit, nor in its communications with Jane’s family, has the school ever articulated a basis for denying Jane’s use of the girls’ bathrooms, other than suggesting a vague, unsupported notion that such a policy reflects the balancing of privacy interests of all students, despite the policy’s ongoing violation of Jane’s privacy and the absence of any way in which treating a transgender girl the same as other girls would adversely affect anyone’s privacy. Nor has the
school stated why it permits the existence of a hostile school environment in which Jane is continually subjected to harassment due to her transgender status by both school personnel and students.

6. Behind the legal wrangling between the school district and the U.S. Department of Education is a child who is suffering. Last summer, as the school year approached, Jane (then only ten years old) began experiencing severe psychological distress and made serious attempts to end her own life. Jane, through her legal guardians, seeks to intervene in this action to assert her rights and seek appropriate remedies for the deprivation of those rights.

PARTIES

7. Jane Doe is an eleven-year-old resident of Morrow County and a citizen of the State of Ohio. She has been a student at Highland Elementary School in the Highland Local School District since August 2011.

8. John and Joyce Doe are Jane’s legal guardians and sue as her next friends.

9. Third-Party Defendant Highland Local School District (the “School District” or the “District”) is an education corporation and association in Morrow County, Ohio, existing pursuant to Section 3311 of the Revised Code of the State of Ohio. The School District is a “person” within the meaning of 42 U.S.C. § 1983. Upon information and belief, the School District and each of its component schools are recipients of federal financial assistance. The District operates one elementary school, Highland Elementary School, one middle school, and one high school.

10. Plaintiff/Third-Party Defendant Highland Local School District Board of Education (the “School Board,” and collectively with the District, “Highland”) is the governing body for the School District. The School Board is a “body politic and corporate” under Ohio law that is amenable to suit for the policies of the School District. Ohio Rev. Code § 3313.17. School
Board members are officers of the State of Ohio. Highland Local School District Bylaws & Policies § 118.

11. Third-Party Defendant William Dodds, sued in both his official and individual capacities, is and was at all relevant times the Superintendent of the School District. Upon information and belief, Superintendent Dodds has final policymaking authority for the School District and the School Board in circumstances not provided for in the School District Bylaws and Policies. This authority includes redressing complaints of discrimination and ensuring compliance with state and federal laws.

12. Third-Party Defendant Shawn Winkelfoos, sued in both his official and individual capacities, is and was at all relevant times the Principal of Highland Elementary School. Upon information and belief, Principal Winkelfoos has final policymaking authority for the School District and School Board with respect to the day-to-day enforcement of equal opportunity and anti-discrimination policies at Highland Elementary. This authority includes the responsibility to redress complaints of discrimination and to forward complaints to appropriately designated individuals in the School District.

JURISDICTION AND VENUE


14. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because the School District is located within the Southern District of Ohio and the claims alleged in this complaint arose from events that occurred within this district.

5
FACTUAL ALLEGATIONS

Gender Identity Development and Gender Dysphoria

15. Gender identity is a person’s inner sense of belonging to a particular gender, such as male or female. It is a deeply felt and core component of human identity. Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 2013) (hereinafter “DSM-5”). Everyone has a gender identity, and for most people, their gender identity is consistent with the gender they were assigned at birth. Transgender people have a gender identity, or affirmed gender, that is different from the gender they were assigned or assumed to be at birth.

16. At birth, infants are classified as male or female based on a cursory observation of their external genitalia. This classification becomes the person’s birth-assigned gender, but may not be the same as the person’s actual gender. Children typically become aware of their gender identity between the ages of two and four years old. DSM-5 at 455. Around this age, transgender children often begin to express their cross-gender identification to their family members and caregivers through statements and actions. The medical diagnosis of gender dysphoria refers to the severe and unremitting emotional pain resulting from this incongruity. People diagnosed with gender dysphoria have an intense and persistent discomfort with the primary and secondary sex characteristics of their assigned gender. Gender dysphoria is a serious medical condition codified in the DSM-5 and the World Health Organization’s International Classification of Diseases.

17. The way in which a child with gender dysphoria expresses himself or herself differs greatly from children engaging in age-appropriate imaginative play; children expressing a gender identity that is different than their assigned gender exhibit a strong cross-gender identification that is insistent, persistent, and consistent. Although uncommon, a gender identity that is inconsistent with one’s gender assigned at birth is a normal variation of human diversity.
18. Gender dysphoria was previously referred to as gender identity disorder. The American Psychiatric Association changed the name and diagnostic criteria for this condition to reflect that gender dysphoria “is more descriptive than the previous DSM-IV term gender identity disorder and focuses on dysphoria as the clinical problem, not identity per se.” DSM-5 at 451.

19. When provided with the love, support, and affirmation that all children need, transgender children thrive and grow into healthy adults who have the same capacity for happiness, achievement, and contributing to society as others. For these youth, that means supporting their need to live in a manner consistent with their actual gender, the gender they know themselves to be, as opposed to their assigned gender, which includes using sex-separated facilities that match their gender identity and consistently being referred to by their correct name and pronouns.

20. When parents and caregivers discourage or do not allow a transgender child to express cross-gender identification, or do not validate or accept the child’s gender identity, the child experiences psychological distress. Rejection or disapproval by the child’s parents, family, and caregivers leads to serious mental health consequences for the child, marked by serious negative health consequences such as low self-esteem, anxiety, depression, self-harming behaviors, and suicidal ideation.

21. These harmful symptoms interfere with the child’s healthy development across all domains. As a result, a transgender child whose gender identity is not affirmed will likely have difficulty developing and maintaining healthy interpersonal relationships with family as well as peers. Similarly, once that child enters school, the lack of familial support can have a detrimental effect on the child’s ability to focus in class and learn.
22. Given the amount of time that students spend in school, the school environment has a tremendous effect on a transgender student’s well-being.

23. The longer these symptoms are allowed to persist without addressing the underlying gender dysphoria, the more significant and long-lasting the negative consequences can become. For example, a recent survey of transgender people revealed *forty-two percent* of transgender women had previously attempted suicide, a rate that is approximately twenty-five times the national average. Ann P. Haas, *et al.*, The Williams Institute, *Suicide Attempts among Transgender and Gender Non-Conforming Adults* 2 (2014); Jaime M. Grant, *et al.*, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 82 (2011); see also Arnold H. Grossman, *et al.*, *Transgender Youth and Life-Threatening Behaviors*, 37 Suicide & Life-Threatening Behavior 527, 533-37 (2007). That survey also found that transgender adults who experienced discrimination in schools were more likely to have attempted suicide. Haas, *supra*, at 11. The National Transgender Discrimination Survey found that over one quarter of respondents used drugs and alcohol to cope with the mistreatment they experienced based on their gender identity. Grant, *supra*, at 81; see also Caitlyn Ryan, *Supportive Families, Healthy Children: Helping Families with Lesbian, Gay, Bisexual & Transgender Children* 5-7 (2009).

24. Part of supporting a transgender child is ensuring that the child has access to treatment for their gender dysphoria. The goal of treatment is to enable a transgender person to live authentically, based on their core gender identity, and typically involves bringing the person’s body and social presentation into alignment with the person’s gender. Treatment does not make a transgender person more of a man or more of a woman; rather, the person’s core gender identity already exists. Treatment creates more alignment between the person’s identity and the person’s appearance, attenuating the dysphoria and symptoms.
25. Health care providers recognize that when a child has strong and persistent cross-gender identification, which is typically associated with gender dysphoria, “social transition” improves that child’s mental health and reduces the risk that the child will engage in self-harming behaviors. Kristina Olson, et al., Mental Health of Transgender Children who are Supported in Their Identities, 137 Pediatrics 1 (2016). Social transition involves changes that bring the child’s outer appearance and lived experience into alignment with the child’s core gender. That includes wearing clothes, using a name and pronouns, and interacting with peers and the social environment in a manner that matches the child’s core gender. For most children, living and interacting with others consistently with their lived experience of who they are provides tremendous and immediate relief, because prior to puberty, there are few, if any, observable differences between boys and girls apart from the social and cultural conventions such as dress or hairstyle which, while distinct, children can adopt regardless of their birth-assigned gender.

Jane’s Gender Identity and Transition

26. Jane is an eleven-year-old transgender girl with disabilities, about to begin fifth grade at Highland Elementary.

27. Despite being assigned male at birth, from at least age four, Jane has asserted her female gender – that is, an innate sense of being female. Even as a young child, Jane would draw portraits of herself as a girl, try on and take Joyce’s make up, and wrap blankets and table cloths around herself to create dresses. This eventually grew into insisting on wearing girls’ clothing and shopping for girls’ toys.

28. Nevertheless, because her parents did not yet understand her transgender identity, Jane spent the majority of each day dressed in boys’ clothing with a boys’ haircut, an outward
appearance which was at odds with her core gender. This internal conflict caused Jane to experience great distress, which was compounded by the fact that she was not allowed to be herself. Jane’s psychological distress manifested itself in tantrums where she would bite, kick, and hit when she was not being affirmed as female.

29. At first, her family thought Jane’s identification as female and behavior were merely the passing play of childhood, but after repeated and persistent expressions, Joyce and John sought out the advice of medical and mental health professionals, including Jane’s regular pediatrician, a therapist, a psychiatrist, and doctors at the transgender youth clinic at Nationwide Children’s Hospital in Columbus, Ohio. Based on their examinations and treatment of Jane, these medical professionals determined that social transition was medically necessary to treat Jane’s gender dysphoria. Consequently, Joyce and John ensured that Jane had appropriate clothing, obtained a court-ordered name change, treated her as their daughter in all respects, and advocated that others in the community do the same. This medically supervised transition occurred during the summer between kindergarten and first grade.

30. The impact of the transition on Jane’s emotional and mental state was dramatic. Supported by her parents and free from the incongruity of being treated by others as male and able to dress and live consistent with her core female gender, Jane finally felt at ease with herself. She became joyful, more carefree, and her anger subsided.

31. Unfortunately, her social transition into the new school year for first grade was far from smooth. In the summer of 2012, prior to the start of first grade, Joyce informed Principal Winkelfoos about Jane’s transition and requested that Jane be treated consistent with her female gender for all educational purposes. In response, Principal Winkelfoos requested a meeting with Joyce. At the meeting, Joyce provided Principal Winkelfoos with a letter from Jane’s
pediatrician’s office outlining the doctor’s diagnosis of gender dysphoria and requesting that the school affirm and respect Jane’s female gender. Joyce requested that Jane be addressed and referred to by her chosen name and by female pronouns. Joyce also requested that the school permit Jane to use the girls’ bathrooms and generally treat her the same as other girls attending the school.

32. Principal Winkelfoos stated that the school, and its personnel, would begin to address and refer to Jane by her preferred name and with female pronouns. However, Principal Winkelfoos told Joyce that Jane would not be permitted to use the girls’ bathrooms, a position reflecting Highland’s policy, which, upon information and belief, held that students are assigned sex-segregated bathrooms based on the gender identified on their birth certificates. Instead, Jane would be required to use the office bathroom, a bathroom used generally by school personnel and other adults, and very few students.

33. This discriminatory policy has remained in effect through first, second, third, and fourth grades. As a result of this policy, Jane is singled out due to her status as a transgender girl, continually “outed” and stigmatized as transgender, and made a target for bullying and harassment. Moreover, despite assurances that Highland personnel would refer to Jane by her chosen, and now legal, name and female pronouns, Highland implicitly sanctioned the routine use of Jane’s male birth name and male pronouns by Highland personnel and students in addressing and referring to her. Highland has taken no steps to require use of Jane’s female name and pronouns and routinely permitted personnel and students to do just the opposite, despite repeated requests that they stop doing so by Jane’s parents.

1 Ohio law does not permit one to change the gender on one’s birth certificate. See Ohio Rev. Code § 3705.22.
34. As a result of Highland’s refusal to treat Jane as a girl and to treat her the same as other girls at her school, Jane suffers from extreme anxiety and depression, and the joy Jane exhibited after her transition has slowly been sapped away. She suffers from a host of physical conditions that stem, in significant part, from the emotional toll of Highland’s policies. Although only eleven years old, Jane has engaged in numerous acts of self-harm and has attempted suicide multiple times, including just days before the start of fourth grade.

**Denial of Access to Girls’ Bathrooms**

35. Although, upon information and belief, Highland attempted to sidestep the bathroom issue for Jane in first grade by assigning her class to a room with a single-user restroom contained in the classroom, this measure fell far short of protecting her or treating her equally to other students. When outside the classroom, Jane still had to use the office restroom while her peers were all able to use the restroom that was consistent with their gender identity. That differential treatment did not go unnoticed by Jane or her peers. In fact, on at least one occasion, Jane attempted to use the girls’ restroom but was prevented from doing so by school personnel. As the year progressed, Joyce and John began to notice the signs that this arrangement was taking a toll on Jane’s mental health.

36. Unable to simply watch Jane’s mental health deteriorate, Joyce renewed her request that Jane be permitted to use bathrooms consistent with her female gender in second grade. Recognizing that Jane is likely the first transgender student to have transitioned while at Highland Elementary, Joyce offered Highland personnel many resources to assist them in learning about the needs of transgender youth in schools including books, such as *The Transgender Child*, and articles, and even connected Principal Winkelfoos with TransYouth Family Allies, an organization that would have provided free or low-cost training to the school
on this issue. All of those offers were declined and, time and again, Highland denied Joyce’s request that Jane be permitted to use the girls’ bathrooms consistent with her female gender.

37. Throughout second grade, Jane was required to use a separate faculty office bathroom that no other students used. Due to the students’ age, the teacher took the entire class for scheduled restroom breaks. To prepare for the restroom break, students would separate into two lines: one for boys and one for girls. While all of the other students waited their turn to use the restroom, Jane would walk, dejected, to the restroom by the school office. As she walked by her peers, some would ask Jane why she used a different bathroom, while others heckled her about her using the restroom by the office and called her a boy. Those comments caused significant internal distress, which often found its release at home in the form of negative and unhealthy behaviors. School personnel failed to effectively intervene to protect Jane from this harassment.

38. Then, after nearly an entire school year of being excluded from the bathroom routine and having her peers watch her go to a separate bathroom, the buildup of psychological distress became too great for Jane to handle. On May 2, 2014, Jane was hospitalized for suicidal ideation and depressed mood.

39. In September 2014, as Jane was preparing for yet another year of being segregated from her female peers, Joyce requested that Superintendent Dodds ask the Board of Education to permit Jane to use the girls’ bathrooms. Superintendent Dodds eventually informed Joyce that the Board had refused. Superintendent Dodds did not invite Joyce, John, or Jane to the meeting or, upon information and belief, provide the Board with any educational material about transgender students.
40. For third grade, Jane was required to use a bathroom in the teachers’ lounge, because her third-grade classroom was a significant distance from the unisex bathroom Jane was previously assigned. This required Jane to enter the teachers’ lounge during the day, even though no other students were permitted to enter. Jane reported that teachers would glare at her and make her feel uncomfortable. She began to express to Joyce that the school was being mean to her, and to express how alone and segregated she felt.

41. Over the summer between third and fourth grades, Jane felt intense anxiety about returning to school. She expressed anger several times concerning the school’s refusal to permit her to use the girls’ bathrooms. Those emotions continued to build up throughout the summer vacation. Once again, Jane’s coping skills were overloaded and Jane decided to end her life, which she attempted to do in the days leading up to her fourth-grade year.

42. This past year, Jane’s fourth-grade year, was even more humiliating and demeaning than prior years. Highland required Jane to use a bathroom in the staff room in the fourth-grade hallway. However, the bathroom remained locked, and, in order for Jane to access the bathroom, a staff member had to walk Jane to the bathroom, unlock the bathroom, wait outside the door for Jane to finish, and escort her back to class. By contrast, other students in Jane’s fourth-grade class were allowed to ask permission to leave to use the restroom, and could then go to and from the restroom on their own. Only Jane had to be escorted to a separate restroom by a Highland staff member.

43. Jane began refusing to use the bathroom at school during the day because she could not use the girls’ bathrooms and she did not want the other children seeing her use the staff or office bathrooms. Jane limited her fluid intake during the day in order to limit her need to use the bathroom at school.
44. Jane would also return home from school agitated and combative much more regularly than she had in previous years.

45. In May 2016, after the U.S. Department of Education and Department of Justice released its guidance on Title IX’s applicability to transgender students, Jane remarked to her teacher escort that President “Obama said I could use the girls’ restroom,” and asked when she would be allowed to do so. The teacher responded by accusing Jane of “lying” and threatened to discipline her.

46. Despite Highland’s policy and practice of refusing Jane use of the girls’ bathrooms, Jane has, on several occasions due to exigent circumstances, used girls’ bathrooms. On none of these occasions has Jane’s use of a girls’ bathroom caused any harm or resulted in any incident:

a. In April and May 2014, Jane participated in an afterschool running club. Her coach allowed her to use a girls’ bathroom at the school, without incident.

b. In October 2014, Jane began participating in a program called God’s Kids afterschool. During this program, the school locks the office and teacher’s lounge, and Jane is unable to use the unisex bathrooms. Jane has been permitted to use the girls’ bathrooms at the school during this program, without incident.

c. In April 2015, Jane went on a school field trip to the local zoo. Superintendent Dodds and Principal Winkelfoos deferred to Joyce’s decision to let Jane use the girls’ bathroom at the zoo. Jane used the girls’ bathroom, without incident.

d. Jane has used the girls’ bathrooms, without incident, during after-school choir practice at the school.

e. Jane used a girls’ bathroom in Highland High School during a Highland Elementary summer volleyball camp, without incident.

47. Indeed, it is Jane’s forced use of specially designated bathrooms that draws greater attention from the Highland Elementary student body because Jane is otherwise
perceived by her peers as a girl; however, being forced to use a separate bathroom constantly “outs” her as different and causes other students to question her gender and to harass her for being transgender.

48. Despite the serious social, emotional, and academic harms caused by denying Jane use of the girls’ bathroom, Highland clings to that discriminatory policy based on nothing more than an unsupported notion that Jane’s female classmates would somehow be put at risk by Jane’s presence.

Harassment and Bullying by Teachers, Staff, and Students

49. The foundation for the hostile school environment was laid even before Jane’s transition. In kindergarten, Joyce informed Principal Winkelfoos that Jane wanted to wear dresses to school. Principal Winkelfoos responded that he would not allow such behavior, without any further justification.

50. Since Joyce first informed the school about Jane’s transition in 2012, Joyce has repeatedly offered Highland officials information regarding the importance of affirming a transgender child’s chosen name and pronouns, with the goal of making the school environment safe and welcoming for Jane and her peers. Each time Joyce’s offer was rebuffed and Highland instead ignored, permitted, and even condoned acts of harassment and bullying by teachers, staff and students.

51. In fact, within a few months of Jane’s transition, the school hosted an assembly during which one of the male teachers dressed up like a woman, to pervasive laughter from the school audience. The event made a mockery of Jane’s transition and caused Jane significant emotional distress. In the days following that event, Jane reported numerous somatic complaints
(i.e., headaches, stomach aches, general not feeling well) to Joyce and John in an attempt to avoid school.

52. Despite assurances from Principal Winkelfoos that the school, and its personnel, would address and refer to Jane by her chosen name and female pronouns, Jane’s male birth name and male pronouns have been repeatedly used in addressing or referring to her, both verbally and in writing (i.e., school-generated records, schoolwork).

53. On numerous occasions, teachers would not permit Jane to use her chosen name on assignments, even though other students were permitted to use nicknames on schoolwork.

54. This practice of deliberately refusing to acknowledge Jane’s female gender and insistence upon treating her as a boy was not limited to schoolwork. For example, in January 2013, during Jane’s first-grade year, a physical therapist contracted by Highland told Jane that it was her Christian duty to tell Jane that what Jane was doing was wrong, that God made Jane a boy, and that Jane would always be a boy.

55. After repeated attempts to address this problem at the school level, in August 2014, just as Jane started third grade, Joyce complained to Superintendent Dodds that at least four staff members continued to use the wrong pronouns and refer to Jane by her birth sex. Highland failed to effectively respond to that complaint. Now, for example, nearly three years after Jane legally changed her name, Jane’s computer lab teacher still insists on using Jane’s birth name and refers to her exclusively with male pronouns, and is not the only teacher to do so.

56. Taking cues from teachers and other school personnel, many students consistently refer to Jane by her birth name and are not corrected by school staff or informed that continuing to refer to Jane in that manner is unacceptable and could result in discipline.
57. In addition to creating a hostile school environment for Jane, Highland’s continued refusal to acknowledge her female gender and to treat her the same as other girls results in a continual violation of her privacy. Highland’s conduct continually discloses the fact that Jane is transgender, which is private medical information, without consent from Jane or Joyce and John. While the circumstances of Jane’s transition mean that certain students and staff know that she is transgender, that does not diminish her right to and reasonable expectation of privacy regarding that information with respect to those students and staff who do not know Jane is transgender.

58. Disregarding Jane’s interest in keeping the fact that she is transgender private, each time Jane moves up to a new grade, the school informs Jane’s new teacher that she is transgender. The result is that Jane’s gender immediately becomes an item of discussion for people strange and unfamiliar to her, without any legitimate reason for the disclosure, let alone consent from Jane, Joyce, or John. Joyce has expressly asked Highland to stop this practice, but upon information and belief, it continues.

59. In addition to being frequently referred to by the wrong name and pronoun, Jane suffered many other forms of harassment and abuse at school. In February 2014, a student yelled across the lunchroom, “you ARE a boy!” at Jane, loud enough for all the other students to hear. Just in case anyone missed the message, the student then proceeded to walk around the lunchroom repeating that information to each table. Jane asked the assistant principal for help. The assistant principal simply told Jane to be strong and ignore it.

60. In September 2014, Joyce filed a complaint with Superintendent Dodds against Principal Winkelfoos, describing his harmful attitude and actions towards Jane. Superintendent Dodds replied – following, upon information and belief, a cursory “investigation” which
involved only a “conversation” with Principal Winkelfoos and a review of documents – that Joyce’s complaint was without merit and that Principal Winkelfoos would never allow a hostile environment to take place.

61. In Jane’s third-grade year alone, she was called a “faggot” and “gay” on a regular basis, mocked because she is a girl who was assigned male at birth, and was frequently told by students that she was a boy and referred to by her former, male name. One student in particular would often comment that Jane looked like a boy with her glasses. As a result of those comments, Jane intentionally broke several pairs of glasses over the past two school years.

62. That mistreatment by her peers continued through Jane’s fourth-grade year as well, starting while she waited for the bus and persisting throughout the school day.

63. Highland teachers and staff similarly continued to refer to Jane by her former, male name and use male pronouns.

64. Jane’s attendance suffered as a result of the mistreatment to which she was subjected, as she missed days due to the need to attend counseling sessions to help her cope with the emotional and psychological impact of her situation at school.

65. The stigmatizing impact of the harassment and bullying targeted at Jane and of the requirement that she use separate bathrooms treats her differently than other girls and severely undermines her social transition process. Jane therefore suffers severe and persistent emotional and social harms. This harm is compounded by Jane’s youth and her fragile health.

**Jane’s Name and Gender on School and District Records**

66. Since Jane’s transition, Joyce has requested that the school and district records reflect Jane’s chosen name and correct gender marker. The purpose for this request was four-fold: (1) the records would be more accurate; (2) increasing the likelihood, if not ensuring, that
school personnel, especially those unfamiliar with Jane, would refer to her using the correct name and pronouns; (3) safeguarding Jane’s privacy by not automatically disclosing that she is transgender to all the school personnel with whom she interacts; and (4) based on all of the above, reducing the likelihood that Jane would be bullied, harassed, and mistreated.

67. As with Joyce’s other requests, Highland denied those requests and persisted in using Jane’s birth name and assigned gender on all school records. Upon information and belief, Highland requires a student to obtain a court-ordered name change before that name can be used on any school records, and maintains a policy of using the gender listed on a student’s birth certificate for the gender marker in the student information system.

68. For example, at Jane’s March 2013 Individualized Educational Plan (“IEP”) meeting, the first IEP meeting held after Jane’s transition, Joyce requested that the IEP reflect Jane’s chosen name and correct gender. Representatives from the Ohio Department of Education, who were present at the meeting, said the change was acceptable. Highland’s director of special education immediately changed Jane’s gender on her IEP. However, several months later, Principal Winkelfoos informed Joyce that the information would have to be changed back to be consistent with Jane’s birth certificate.

69. Then, after November 2013, when Jane obtained her court-ordered name change, several documents continued to use her birth name and the male gender marker, including her IEPs, the school e-mail system, and the “scoreboard” link for the typing club. Some of those errors were not corrected until years after Jane’s court-ordered name change. Upon information and belief, some Highland records continue to incorrectly state Jane’s gender is male.

70. Upon information and belief, Highland uses Powerschool for its student information system. The Powerschool platform permits system administrators to customize the
database, allowing school districts to track additional student data that is not standard. Upon information and belief, other school districts have used that functionality to maintain transgender students’ correct name and pronoun as well as the name and pronoun that appears on the student’s birth certificate, allowing those districts to generate school records with the correct information while maintaining a student data set that will sync with the student database maintained by the state education agency.

71. Highland’s refusal to correct the student information system has directly and indirectly disclosed Jane’s transgender status without express permission, and has perpetuated and condoned the continued inappropriate use of Jane’s birth name and male pronouns to address and refer to her. As a result, Jane has been exposed to continued harassment, causing and exacerbating her psychological distress regarding school, and impeding her ability to access and benefit from Highland’s educational program.

**OCR Complaint**

72. In December 2013, Joyce filed a complaint with the U.S. Department of Education’s Office for Civil Rights (“OCR”). The complaint alleged that Highland discriminated against Jane based on sex by requiring her to use a separate gender-neutral bathroom and denying her access to the same bathrooms used by other female students.

73. Joyce informed OCR that during first and second grades, Jane was subject to frequent and repetitive gender-based harassment by other students. As a result, in August 2014, OCR amended the complaint to include an additional allegation, that school staff members subjected Jane to harassment and that Highland failed to respond appropriately when staff members were made aware of frequent and repetitive incidents of harassment by other students.
74. Highland maintains bylaws and policies including a notice of nondiscrimination that prohibits discrimination on the basis of “[s]ex, including sexual orientation and gender identity.” This policy also states that OCR considers gender-based harassment to be a form of sex discrimination. The Superintendent is designated to handle or address any inquiry or complaint of discrimination, but OCR found that he was unaware of Highland’s specific policies referencing transgender students.

75. On March 29, 2016, OCR notified Highland that its investigation concluded that Highland’s actions failed to comply with Title IX regulations. Consistent with its operating procedures, OCR attempted to reach a mutually agreed-upon resolution, but negotiations broke down in June 2016.

76. Shortly thereafter, on June 26, 2016, OCR issued its letter of findings detailing the results of its investigations. On the issue of restroom access, OCR noted that Highland acknowledged it prohibits Jane from using the girls’ restrooms and instead requires her to use a single-user facility. A Highland administrator further confirmed that Jane could use the girls’ bathrooms only if her birth certificate indicated her gender identity. OCR concluded that by prohibiting Jane from using the girls’ restroom, Highland denied her equal access to and enjoyment of the facilities in the school in violation of Title IX.

77. In respect of the allegations regarding bullying and harassment, OCR’s investigation revealed that at least two teachers in the school acknowledged their continued refusal to use Jane’s name and female pronouns when referring to her. Moreover, the investigation found that, despite knowing about many incidents of bullying and harassment, Highland did not adequately investigate those incidents. For example, Highland failed to interview key witnesses in its investigations of bullying and harassment. The letter of findings
also noted that although Highland claimed to have responded appropriately to those incidents, it
failed to produce evidence to corroborate those claims. Consequently, OCR concluded that
Highland failed to investigate whether Jane experienced a hostile environment in violation of
Title IX.

CLAIMS FOR RELIEF

COUNT I

Fourteenth Amendment to the United States Constitution

(Brought Pursuant to 42 U.S.C. § 1983 Against the School Board,
the School District, William Dodds, and Shawn Winkelfoos)

78. Jane repeats and realleges each and every allegation above as if fully set forth
herein.

79. The Third-Party Defendant School District is a person for purposes of Section
1983.

80. The Third-Party Defendant School Board is a person for purposes of Section
1983.

81. Third-Party Defendants Superintendent Dodds and Principal Winkelfoos possess
final policymaking authority for the School District and Highland Elementary School,
respectively, with respect to at least some of the discriminatory actions described herein.

82. By excluding Jane – a transgender girl – from the same restrooms used by other
girls, the Third-Party Defendants, under color of state law, have treated and continue to treat Jane
differently from other students based on her gender and her perceived non-conformity with
gender stereotypes, including the expectation that a person’s gender must conform to the gender
assigned to the person at birth.

83. By failing to appropriately investigate and address reported incidents of bullying
and harassment Jane was subjected to by staff and students due to her perceived gender non-
conformity and transgender status, the Third-Party Defendants have treated and continue to treat Jane differently from similarly situated students based on her gender.

84. Despite repeated reports of the bullying and harassment and requests that Highland personnel address the misconduct, the Third-Party Defendants acted with deliberate indifference by failing to investigate and remedy those incidents of bullying and harassment because Jane is transgender. In so doing, the Third-Party Defendants have violated Jane’s clearly established constitutional right to equal protection of the laws and to be free from official gender-based discrimination.

85. Similarly, by refusing to correct Jane’s name and gender marker on student records and other school- and District-generated information (e.g. student e-mails, ID cards) to be consistent with Jane’s identity, some of which were not changed until years after she obtained a legal name change, the Third-Party Defendants have impermissibly discriminated against Jane on the basis of gender by singling her out for differential treatment.

86. The Third-Party Defendants’ discrimination against Jane based on her gender denies her the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

87. The Third-Party Defendants’ discrimination against Jane based on her gender is not substantially related to any important government interest.

88. The Third-Party Defendants’ discrimination against Jane based on her gender is not rationally related to any legitimate government interest.

89. The Third-Party Defendants’ discrimination against Jane based on her gender has injured Jane and has caused her severe psychological distress.
90. The Third-Party Defendants are liable for their violations of Jane’s Fourteenth Amendment rights under 42 U.S.C. § 1983, and Jane is entitled to declaratory, injunctive, and monetary relief.

COUNT II

Title IX of the Education Amendments of 1972

(Brought Pursuant to 42 U.S.C. § 1681, et seq., Against the School Board and the School District)

91. Jane repeats and realleges each and every allegation set forth above as if fully set forth herein.

92. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a).

93. Under Title IX, discrimination “on the basis of sex” encompasses discrimination based on a person’s gender identity, transgender status, or failure to conform to sex stereotypes.

94. Third-Party Defendant School District is an education program receiving federal financial assistance.

95. By requiring Jane – a transgender girl – to use a separate restroom, and by prohibiting her from using the same restrooms as other girls, the School Board and School District have, on a continuous and continuing basis, excluded Jane from participation in, denied her the benefits of, and subjected her to discrimination in educational programs and activities at Highland Elementary School “on the basis of sex.”
96. By refusing to enforce consequences and discipline against staff and students who harass and bully Jane because she is a transgender girl, the School Board and School District have made the school environment hostile and unwelcoming to Jane.

97. The School Board’s and School District’s actions and omissions amount to deliberate indifference, which permitted the bullying and harassment to become so severe and pervasive as to exclude Jane from participation in, deny her the benefits of, and subject her to discrimination in educational programs and activities at Highland Elementary School “on the basis of sex.”

98. By refusing to correct Jane’s name and gender marker on student records and other school- and District-generated information (e.g. student e-mails, ID cards), the School Board and School District have impermissibly discriminated against Jane on the basis of sex by singling her out for differential treatment and exposing her to stigma and harassment, including by effectively disclosing her transgender status to others on a continual basis.

99. The School District’s and Highland Elementary’s violations of Title IX were the actual, direct and proximate cause of injuries suffered by Jane as alleged herein.

100. Jane is entitled to declaratory, injunctive, and monetary relief.

COUNT III

Right to Privacy Under the United States Constitution

(Brought Pursuant to 42 U.S.C. § 1983 Against the School Board, the School District, William Dodds, and Shawn Winkelfoos)

101. Jane repeats and realleges each and every allegation set forth above as if fully set forth herein.

102. Jane’s fundamental right to privacy extends to preventing the disclosure of, and in deciding under what circumstances to disclose, highly sensitive, personal information related to
her being transgender, especially as the disclosure of such information would subject her to psychological harm and could additionally expose her to harassment and bodily harm.

103. By refusing to require that Jane be addressed and referred to by her chosen, and now legal, name and female pronouns, the Third-Party Defendants sanction, under color of state law, the disclosure of Jane’s transgender status. Each time a teacher stands before the class and refers to Jane by her birth name or by male pronouns, her transgender status is impermissibly disclosed to every student in that class. Each time a Highland administrator looks up Jane’s records and sees reference to her birth name or a male pronoun, Jane’s transgender status is impermissibly disclosed.

104. The Third-Party Defendants’ refusal to require that Jane be addressed and referred to by her legal name and female pronouns is not substantially related to any important government interest.

105. The Third-Party Defendants’ refusal to require that Jane be addressed and referred to by her legal name and female pronouns is not rationally related to any legitimate government interest.

106. The Third-Party Defendants’ refusal to require that Jane be addressed and referred to by her legal name and female pronouns denies her right to privacy, in violation of the United States Constitution.

107. The Third-Party Defendants’ actions were taken with deliberate indifference to Jane’s clearly established constitutional rights.

108. The Third-Party Defendants are liable for their violations of Jane’s right to privacy under 42 U.S.C. § 1983, and Jane is entitled to declaratory and injunctive relief.
REQUEST FOR RELIEF

For the foregoing reasons, JANE DOE respectfully requests that the Court grant to her the following relief:

A. A declaration that Third-Party Defendants violated Jane’s rights under the United States Constitution and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq.;

B. An injunction requiring Highland to treat Jane as a girl for all purposes, including, but not limited to:
   i. Use of the girls’ restrooms and other sex-separated activities, programs and facilities;
   ii. Addressing and referring to Jane by her legal name and female pronouns;
   iii. Correcting Jane’s name and gender marker in the student information system;
   iv. Retaining a consultant to develop and provide training for all district personnel (i.e., board, district and school administrators, teachers, and staff), students, and community members on issues affecting transgender youth and the importance of affirming transgender students in school;
   v. Retaining a consultant to develop protocols for receiving and investigating complaints of gender-based harassment, and to provide training to district and school staff on implementing those protocols; and
   vi. Retaining a consultant to develop protocols for affirming and supporting transgender students, including ensuring use of the proper facilities, correcting school records, and privacy, and to provide training to district and school staff on implementing those protocols.

C. Damages in an amount determined by the Court;

D. Jane’s reasonable costs and attorneys’ fees pursuant to 42 U.S.C. § 1988 and;

E. Such other relief as the Court deems just and proper.
Respectfully submitted,

Dated: July 21, 2016

By:  _/ John Harrison__________________

John Harrison (OH Bar No. 0065286)
Linda Gorczynski (OH Bar No. 0070607)
HICKMAN & LOWDER, L.P.A.
1300 East 9th Street, Suite 1020
Cleveland, OH 44199
(216) 861-0360 (tel.)
(216) 861-3113 (fax)
JHarrison@Hickman-Lowder.com
LGorczynski@Hickman-Lowder.com

Jyotin Hamid (pro hac vice pending)
Joseph Weissman (pro hac vice pending)
Derek Wikstrom (pro hac vice pending)
Jennifer Mintz (pro hac vice pending)
Matthew Hartz (pro hac vice pending)
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000 (tel.)
(212) 909-6836 (fax)
jhamid@debevoise.com
jweissman@debevoise.com
dwikstrom@debevoise.com
jfmintz@debevoise.com
mhartz@debevoise.com

Christopher Stoll (pro hac vice pending)
Asaf Orr (pro hac vice pending)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, California 94102
(415) 392-6257 (tel.)
(415) 392-8442 (fax)
cstoll@nclrights.org
aorr@nclrights.org

Attorneys for JANE DOE
Verification

I, Joyce Doe, the legal guardian of proposed intervenor Jane Doe, a citizen of the United States and a resident of the State of Ohio, hereby declare that I have reviewed the foregoing Complaint-In-Intervention, and that the factual statements set forth therein are true to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 20 day of July, 2016, in Morrow County, Ohio.

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

STATE OF TEXAS;
HARROLD INDEPENDENT
SCHOOL DISTRICT (TX);
STATE OF ALABAMA;
STATE OF WISCONSIN;
STATE OF WEST VIRGINIA;
STATE OF TENNESSEE;
ARIZONA DEPARTMENT
OF EDUCATION;
HEBER-OVERGAARD
UNIFIED SCHOOL DISTRICT (AZ);
PAUL LePAGE, Governor of the
State of Maine;
STATE OF OKLAHOMA;
STATE OF LOUISIANA;
STATE OF UTAH;
STATE OF GEORGIA;
STATE OF MISSISSIPPI,
by and through Governor Phil Bryant;
COMMONWEALTH OF KENTUCKY,
by and through
Governor Matthew G. Bevin,

Plaintiffs,

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT
OF EDUCATION; JOHN B. KING,
Jr., in his Official Capacity as United
States Secretary of Education; UNITED
STATES DEPARTMENT OF JUSTICE;
LORETTA E. LYNCH, in her Official
Capacity as Attorney General of the
United States; VANITA GUPTA, in her
Official Capacity as Principal Deputy
Assistant Attorney General;
UNITED STATES EQUAL
EMPLOYMENT OPPORTUNITY

CIVIL ACTION NO. 7:16-cv-00054-O
COMMISSION; JENNY R. YANG, in her Official Capacity as Chair of the United States Equal Employment Opportunity Commission; UNITED STATES DEPARTMENT OF LABOR; THOMAS E. PEREZ, in his Official Capacity as United States Secretary of Labor; DAVID MICHAELS, in his Official Capacity as the Assistant Secretary of Labor for the Occupational Safety and Health Administration, Defendants.

PLAINTIFFS’ FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The State of Texas, the Harrold Independent School District (Texas), the State of Alabama, the State of Wisconsin, the State of West Virginia, the State of Tennessee, the Arizona Department of Education, the Heber-Overgaard Unified School District (Arizona), Paul LePage, Governor of the State of Maine, the State of Oklahoma, the State of Louisiana, the State of Utah, the State of Georgia, the State of Mississippi, by and through Governor Phil Bryant, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin (collectively, “Plaintiffs”) seek declaratory and other relief against the United States of America, the United States Department of Education, John B. King, Jr., in his Official Capacity as United States Secretary of Education, the United States Department of Justice, Loretta E. Lynch, in her Official Capacity as Attorney General of the United States, Vanita Gupta, in her Official Capacity as Principal Deputy Assistant Attorney General, the United States Equal Employment Opportunity Commission, Jenny R. Yang, in her Official
Capacity as Chair of the United States Equal Employment Opportunity Commission, the United States Department of Labor, Thomas E. Perez, in his Official Capacity as United States Secretary of Labor, and David Michaels, in his Official Capacity as the Assistant Secretary of Labor for the Occupational Safety and Health Administration.

Plaintiffs include a diverse coalition of States, top State officials, and local school districts, spanning from the Gulf Coast to the Great Lakes, and from the Grand Canyon to the Grand Isle, that believe that the solemn duty of the executive branch is to enforce the law of the land, and not rewrite it by administrative fiat.

Defendants have conspired to turn workplaces and educational settings across the country into laboratories for a massive social experiment, flouting the democratic process, and running roughshod over commonsense policies protecting children and basic privacy rights. Defendants’ rewriting of Title VII and Title IX is wholly incompatible with Congressional text. Defendants cannot foist these radical changes on the nation.

I. PARTIES

1. Plaintiff State of Texas is subject to Title VII as the employer of hundreds of thousands through its constituent agencies. The State of Texas also oversees and controls several agencies that receive federal funding subject to Title IX. For example, the School for the Blind and Visually Impaired (“SBVI”) and School for the Deaf (“SD”) are statutorily created, independent state agencies. Tex. Educ. Code § 30.001 et seq. Both are governed by nine-member boards, appointed by the governor and confirmed by the senate, and both have superintendents appointed by
the boards and “carry out the functions and purposes of [each] school according to any
general policy the board[s] prescribe[].” Id. §§ 30.023(e) (SBVI); 30.053(e) (SD).
Currently, SBVI has a total budget of $24,522,116, of which $4,789,974 is identified
as federal funds, and SD has a total budget of $28,699,653, of which $1,957,075 is
identified as federal funds. As another example, the Texas Juvenile Justice
Department (“TJJD”) is a state agency, subject to Title VII and Title IX, responsible
for overseeing youth correction facilities in the State of Texas. TJJD’s current budget
is $314,856,698, which includes $9,594,137 in federal funding.

2. Plaintiff Harrold Independent School District (“Harrold ISD”) is an
independent public school district based in Harrold, Wilbarger County, Texas.
Additional information about Harrold ISD can be found infra.

3. The Plaintiff States of Alabama, Wisconsin, West Virginia, Tennessee,
Oklahoma, Louisiana, Utah, and Georgia are similarly situated to the State of Texas
in that one or more of the following circumstances is present: (1) they are employers
covered by Title VII, (2) their agencies and departments are subject to Title IX, (3)
their agencies and departments receive other federal grant funding that requires, as
a condition of the grant, compliance with the Title IX provisions at issue in this
lawsuit, or (4) they are suing on behalf of public educational institutions,
departments, or agencies in their State that are subject to Title IX.

4. Plaintiff Arizona Department of Education is the state agency
responsible for “[t]he general conduct and supervision of the public school system” in
Arizona. ARIZ. CONST. art. XI, § 2; A.R.S. § 15-231.
5. Plaintiff Heber-Overgaard Unified School District is a public school district with its principal office located in Heber, Navajo County, Arizona.

6. Plaintiff Paul LePage is the Governor of Maine and Chief Executive of the Maine Constitution and the laws enacted by the Maine Legislature. ME. CONST. art. V, Pt. 1, § 1.

7. Governor Phil Bryant brings this suit on behalf of the State of Mississippi pursuant to Miss. Code Ann. § 7-1-33. Mississippi is similarly situated to the State of Texas and the Plaintiff States in that it (1) is a covered employer under Title VII, (2) its agencies and departments are subject to Title IX, (3) its agencies and departments receive other federal grant funding that requires, as a condition of the grant, compliance with the Title IX provisions at issue in this lawsuit, and (4) many public educational institutions, departments, and agencies in Mississippi are subject to Title IX.

8. Governor Matthew G. Bevin brings this suit on behalf of the Commonwealth of Kentucky pursuant to the Kentucky Constitution, which provides that the “supreme executive power” shall be vested in the Governor. KY. CONST. § 69. Kentucky is similarly situated to the State of Texas and the Plaintiff States in that it (1) is a covered employer under Title VII, (2) its agencies and departments are subject to Title IX, (3) its agencies and departments receive other federal grant funding that requires, as a condition of the grant, compliance with the Title IX provisions at issue in this lawsuit, and (4) many public educational institutions, departments, and agencies in Kentucky are subject to Title IX.
9. Defendant United States Department of Education ("DOE") is an executive agency of the United States and responsible for the administration and enforcement of Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 ("Title IX").

10. Defendant John B. King, Jr., is the United States Secretary of Education. In this capacity, he is responsible for the operation and management of the DOE. He is sued in his official capacity.


12. Defendant Loretta A. Lynch is the Attorney General of the United States and head of DOJ. She is sued in her official capacity.

13. Defendant Vanita Gupta is Principal Deputy Assistant Attorney General at DOJ and acting head of the Civil Rights Division of DOJ. She is assigned the responsibility to bring enforcement actions under Titles VII and IX. 28 C.F.R. § 42.412. She is sued in her official capacity.

14. Defendant Equal Employment Opportunity Commission ("EEOC") is a federal agency that administers, interprets, and enforces certain laws, including Title VII. EEOC is, among other things, responsible for investigating employment and hiring discrimination complaints.
15. Defendant Jenny R. Yang is Chair of the EEOC. In this capacity, she is responsible for the administration and implementation of policy within the EEOC, including the investigating of employment and hiring discrimination complaints. She is sued in her official capacity.

16. Defendant United States Department of Labor ("DOL") is the federal agency responsible for supervising the formulation, issuance, and enforcement of rules, regulations, policies, and forms by the Occupational Safety and Health Administration ("OSHA").

17. Defendant Thomas E. Perez is the United States Secretary of Labor. He is authorized to issue, amend, and rescind the rules, regulations, policies, and forms of OSHA. He is sued in his official capacity.

18. Defendant David Michaels is the Assistant Secretary of Labor for OSHA. In this capacity, he is responsible for assuring safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance. He is sued in his official capacity.

II. JURISDICTION AND VENUE

19. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this suit concerns the ultra vires revision of the term “sex” under multiple provisions of the United States Code. This Court also has jurisdiction to compel an officer of the United States or any federal agency to perform his or her duty pursuant to 28 U.S.C. § 1361.
20. Venue is proper in the Northern District of Texas pursuant to 28 U.S.C. § 1391 because the United States, several of its agencies, and several of its officers in their official capacity are Defendants; a substantial part of the events or omissions giving rise to Plaintiffs’ claims occurred in this District; and Plaintiff Harrold ISD (TX) is both an employer subject to Title VII, and a recipient of federal monies subject to Title IX restrictions in Harrold, Wilbarger County, Texas.


III. FACTUAL BACKGROUND

A. Congressional History.


23. Eight years later, Congress passed Title IX of the Education Amendments of 1972, proscribing invidious discrimination on the basis of “sex” in federally funded education programs and activities. 20 U.S.C. § 1681(a). Title IX permits institutions to differentiate intimate facilities by sex. 20 U.S.C. § 1686 (“Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different
Section 1686 was added to address concerns that Title IX would force a school to allow women in facilities designated for men only, and vice versa. When Senator Birch Bayh first introduced the legislation, Senator Dominick asked about the scope of the law:

Mr. DOMINICK. The provisions on page 1, under section 601, refer to the fact that no one shall be denied the benefits of any program or activity conducted, et cetera. The words “any program or activity,” in what way is the Senator thinking here? Is he thinking in terms of dormitory facilities, is he thinking in terms of athletic facilities or equipment, or in what terms are we dealing here? Or are we dealing with just educational requirements?

I think it is important, for example, because we have institutions of learning which, because of circumstances such as I have pointed out, may feel they do not have dormitory facilities which are adequate, or they may feel, as some institutions are already saying, that you cannot [sexually] segregate dormitories anyway. **But suppose they want to [sexually] segregate the dormitories; can they do it?**

Mr. BAYH. The rulemaking powers referred to earlier, I think, give the Secretary discretion to take care of this particular policy problem. **I do not read this as requiring integration of dormitories between the sexes**, nor do I feel it mandates the [sexual] desegregation of football fields.

What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, **nor that the men’s locker room be [sexually] desegregated.**


24. The following year, when Title IX was passed, Senator Bayh again reiterated that this was not meant to force men and women to share intimate facilities where their privacy rights would be compromised:

Under this amendment, each Federal agency which extends Federal financial assistance is empowered to issue implementing rules and
regulations effective after approval of the President. *These regulations would allow enforcing agencies to permit differential treatment by sex only*—very unusual cases where such treatment is absolutely necessary to the success of the program—such as in classes for pregnant girls or emotionally disturbed students, in sports facilities or other instances where personal privacy must be preserved.

118 Cong. Rec. 5807 (1972) (emphasis added).

25. Privacy was raised when Title IX was debated in the House. Representative Thompson, concerned about men and women using the same intimate facilities, offered an amendment:

> I have been disturbed however, about the statements that if there is to be no discrimination based on sex then there can be no separate living facilities for the different sexes. I have talked with the gentlewoman from Oregon (Mrs. Green) and discussed with the gentlewoman an amendment which she says she would accept. The amendment simply would state that nothing contained herein shall preclude any educational institution from maintaining separate living facilities because of sex. So, with that understanding I feel that the amendment [exempting undergraduate programs from Title IX] now under consideration should be opposed and I will offer the “living quarters” amendment at the proper time.

117 Cong. Rec. 39260 (1971) (emphasis added). This amendment was eventually introduced and passed. 117 Cong. Rec. 39263 (1971).

**B. Aftermath of Title IX.**

26. At the time that Title IX was enacted, there was broad support behind the policy of maintaining separate intimate facilities for female and male students. Scholars defended the practice. *See, e.g.*, Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 901 (1971) (discussing the “separation of the sexes in public rest rooms”). A 1971 article in the *Harvard Law Review* candidly
remarked: “[T]here has never been any indication that men have wished to avoid intimate contact with women on a daily basis.” Note, Sex Discrimination and Equal Protection: Do We Need A Constitutional Amendment?, 84 HARV. L. REV. 1499, 1514 (1971). And a 1972 article in the Texas Law Review characterized restrictions on accessing bathrooms and changing areas as a commonsense “response to our society’s concern for privacy and modesty.” Brian E. Berwick & Carol Oppenheimer, Marriage, Pregnancy, and the Right to Go to School, 50 TEX. L. REV. 1196, 1228 n.116 (1972).

27. Following the enactment of Title IX, there continued to be significant backing for the longstanding arrangement of maintaining sex-separated intimate facilities. The initial rules promulgated to implement Title IX permitted separate restrooms, locker rooms, and shower facilities on the basis of sex. 34 C.F.R. § 106.33. And legal scholars continued to defend sex-separated intimate facilities as necessary to preserve individual privacy rights. In a 1975 Washington Post editorial, then Columbia Law School Professor Ruth Bader Ginsburg wrote that “[s]eparate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy.” Ginsburg, The Fear of the Equal Rights Amendment, WASH. POST, Apr. 7, 1975, at A21 (emphasis added). And in a 1977 report, the United States Commission on Civil Rights concluded the “the personal privacy principle permits maintenance of separate sleeping and bathroom facilities” for women and men. United States Commission on Civil Rights, Sex Bias in the U.S. Code 216 (1977). Courts have recognized this privacy concern as well. In 1996, the United States Supreme Court determined that in admitting female students, a

28. Congress construes its prohibitions against invidious “sex” discrimination narrowly. In 1974, Representatives Bella Abzug and Edward Koch proposed to amend the Civil Rights Act to *add* the *new* category of “sexual orientation.” H.R. 14752, 93rd Cong. (1974). Congress considered other similar bills during the 1970s. *See* H.R. 166, 94th Cong. (1975); H.R. 2074, 96th Cong. (1979); S. 2081, 96th Cong. (1979). In 1994, lawmakers introduced the Employment Non-Discrimination Act (“ENDA”) which, like Rep. Abzug and Koch’s earlier effort, was premised on the understanding that Title VII’s protections against invidious “sex” discrimination related only to one’s biological sex as male or female. H.R. 4636, 103rd Cong. (1994). In 2007, 2009, and 2011, lawmakers proposed a broader version of ENDA to codify protections for “gender identity” in the employment context. H.R. 2015, 110th Cong. (2007); H.R. 2981, 111th Cong. (2009); S. 811, 112th Cong. (2011). In addition, in 2013 and 2015, proposals were made to *add* to Title IX the *new* category of “gender identity.” H.R. 1652, 113th Cong. (2013); S.439, 114th Cong. (2015). Notwithstanding the success or failure of the aforementioned Congressional proposals, they all affirmed Congress’s enduring understanding that “sex,” as a protected class, refers only to one’s biological sex, as male or female, and not the radical re-authoring of the term now being foisted upon Americans by the collective efforts of Defendants.

29. And when Congress actually did, in one instance, redefine the term “sex”
for the purposes of its prohibitions against invidious “sex” discrimination, the new
definition did not encompass “gender identity.” Rather, in 1978, Congress broadened
the statutory term “sex” to include discrimination “on the basis of pregnancy,
95-555, § (k), 92 Stat. 2076, 2076 (1978). In amending the law in this way, Congress
indicated that invidious “sex” discrimination occurs when females and males are not
afforded the same avenues for advancement, i.e., when pregnant women may be
legally fired or not hired. Thus, this amendment affirmed Congress’s long-held view
that “sex” refers to biological sex, and not to an individual’s self-perception of his or
her “gender identity.”

C. Secondary Sources.

30. According to standard legal treatises, “gender identity” is not within the
ambit of Title VII. See, e.g., Margaret C. Jasper, Employment Discrimination Law
Under Title VII 45 (2d ed. 2008) (stating that Title VII makes it unlawful “to
discriminate against any employee or applicant for employment because of his or her
sex”); Mack A. Player, Employment Discrimination Law 239 (1988) (providing that
the term “sex” for the purposes of Title VII generally refers to the division of
organisms into biological sexes); Charles A. Sullivan et al, Federal Statutory Law of
Employment Discrimination 161 (1980) (same). Indeed, “gender identity” was a
virtually unrecognized construct among legal academics when Title VII and Title IX
became law. It was not even mentioned in a law review article on the subject of Title
VII or Title IX until the 1980s.
“Gender identity” is a relatively recent addition to the social science lexicon. The 1992 National Health and Social Life Survey did not ask about men or women that identify as the opposite sex, nor did the first four waves of data collection of the National Longitudinal Study of Adolescent Health (begun in 1994 and last fielded in 2008). And the Centers for Disease Control and Prevention (“CDC”) has so far passed on doing so. Brian W. Ward et al, Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013, 77 NATIONAL HEALTH STATISTICS REPORTS 2 (2014). Among the general public, “gender identity” also became a familiar concept only of late. Law Professor Gail Heriot, a member of the United States Commission on Civil Rights, noted in her recent Congressional testimony that the 1991 Compact Oxford English Dictionary does not define “transgender.” The Federal Government on Autopilot: Delegation of Regulatory Authority to an Unaccountable Bureaucracy: Hearing Before the H. Comm. on the Judiciary, 114th Cong. 13 (2016) (statement of Gail Heriot, Member, U.S. Comm’n on Civil Rights). Likewise, newspapers such as the Washington Post and the New York Times did not use the term throughout the 1960s and 1970s. Id.

understood these terms to mean something different than “sex.”

34. In the 1950s, John Money, a psychologist at Johns Hopkins University, introduced “gender”—previously a grammatical term only—into scientific discourse. Joanne Meyerowitz, *A History of “Gender,”* 113 *The American Historical Review* 1346, 1353 (2008). Money believed that an individual’s “gender role” was not determined at birth but was acquired early in a child’s development much in the same fashion that a child learns a language. John Money et al, *Imprinting and the Establishment of Gender Role,* 77 *A.M.A. Archives of Neurology and Psychiatry* 333–36 (1957). Robert Stoller, the UCLA psychoanalyst who first used the term “gender identity,” was another early adopter of the terminology of “gender.” He wrote in 1968 that gender had “psychological or cultural rather than biological connotations.” Robert J. Stoller, *Sex and Gender: On the Development of Masculinity and Femininity* 9 (1968). To him, “sex was biological but gender was social.” Haig, *supra,* at 93.

35. In 1969, Virginia Prince, who is credited with coining the term “transgender,” echoed the view that “sex” and “gender” are distinct: “I, at least, know the difference between sex and gender and have simply elected to change the latter and not the former. . . . I should be termed ‘trasngenderal.’” *The Federal Government on Autopilot,* 114th Cong. 13 (Heriot statement) (quoting Virginia Prince, *Change of Sex or Gender,* 10 *Transvestia* 53, 60 (1969)). And in the 1970s, feminist scholars joined the chorus differentiating “biological sex” from “socially assigned gender.” Haig, *supra,* at 93 (quoting Ethel Tobach, 41 *Some Evolutionary Aspects of Human
The meaning of the term “sex” has remained unchanged since the enactment of Title VII and Title IX. Around the time that these laws passed, nearly every dictionary definition of “sex” referred to physiological distinctions between females and males, particularly with respect to their reproductive functions. See, e.g., AMERICAN HERITAGE DICTIONARY 1187 (1976) (“The property or quality by which organisms are classified according to their reproductive functions”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1971) (“the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . .”); 9 OXFORD ENGLISH DICTIONARY 578 (1961) (“The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these.”). Even today, “sex” continues to refer to biological differences between females and males. See, e.g., WEBSTER’S NEW WORLD COLLEGE DICTIONARY 1331 (5th ed. 2014) (“either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions”); Sari L. Reisner et al, “Counting” Transgender and Gender-Nonconforming Adults in Health Research, TRANSGENDER STUDIES QUARTERLY, Feb. 2015, at 37 (“Sex refers to biological differences among females and males, such as genetics, hormones, secondary sex characteristics, and anatomy.”).
37. The meaning of “gender” has also remained essentially the same since the term was introduced as a means of drawing a distinction between biological “sex” and social “gender.” See, e.g., Reisner et al, supra, at 37 (“Gender typically refers to cultural meanings ascribed to or associated with patterns of behavior, experience, and personality that are labeled as feminine or masculine.”). This usage of “gender” is also more commonplace now. For example, the 2010 New Oxford American Dictionary distinguishes between “sex,” defined in biological terms, and “gender,” defined in social and cultural terms. NEW OXFORD AMERICAN DICTIONARY 721–22, 1600 (3d ed. 2010).

D. Defendants’ Revisions of the Law.


39. While Congress has added “gender identity” next to “sex” in other areas of federal law, it has not changed the terms of Title VII and Title IX. These laws continue to prohibit unlawful discrimination on the basis of “sex.” Since 2010,
however, Defendants have pretended that these statutes were actually amended to cover the distinct concept of “gender identity.” For example:

- In a 2010 Dear Colleague Letter, the DOE’s Office for Civil Rights (OCR) asserted that “Title IX does protect all students, including . . . transgender (LGBT) students, from sex discrimination.” OCR, Dear Colleague Letter: Harassment and Bullying, at 8 (Oct. 26, 2010) (Exhibit A).

- In April 2014, OCR stated 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.” OCR, Questions and Answers on Title IX and Sexual Violence, at B-2 (Apr. 29, 2014) (Exhibit B).


- And in 2015, OSHA published a “guide” for employers regarding restroom access for employees who identify as the opposite sex. Press Release, OSHA, OSHA publishes guide to restroom access for transgender workers (June 1, 2015). OSHA’s guidance concluded that
“all employees should be permitted to use the facilities that correspond with their gender identity,” which is “internal” and could be “different from the sex they were assigned at birth.” OSHA, *A Guide to Restroom Access for Transgender Workers* (2015) (Exhibit D).

In 2016, Defendants’ disregard for federal law as written—and the ability to maintain sex-separated intimate facilities—reached its nadir in the wake of events in North Carolina.

**E. North Carolina.**

40. On February 22, 2016, the City Council of Charlotte, North Carolina, amended the city’s Non-Discrimination Ordinance (Exhibit E), requiring that every government and business bathroom and shower, however designated, be simultaneously open to both sexes. In other words, Charlotte outlawed the right to maintain separate sex intimate facilities throughout the city. The North Carolina General Assembly then passed the Public Facilities Privacy and Security Act (“the Act”) (Exhibit F), preempting the Charlotte ordinance and providing that public employees and public school students use bathrooms and showers correlating with their biological sex, defined as the sex noted on their birth certificate. The Act does not establish a policy for private businesses and permits accommodations based on special circumstances.

41. After signing the Act, on April 12, 2016, North Carolina Governor Patrick L. McCrory issued Executive Order No. 93 to Protect Privacy and Equality (“EO 93”) (Exhibit G). EO 93 expanded non-discrimination protections to state
employees on the basis of “gender identity,” while simultaneously affirming that cabinet agencies should require multiple occupancy intimate facilities, like bathrooms, to be designated for use only by persons based on their biological sex. EO 93 directed cabinet agencies to make reasonable accommodations when practicable.

42. Nevertheless, on May 3, 2016, the EEOC released a document titled “Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964” (“Fact Sheet”) (Exhibit H). The Fact Sheet states that Title VII’s prohibition of invidious discrimination on the basis of “sex” also now extends to “gender identity.” It further provides that employers that do not allow employees to use the bathroom and other intimate facilities of their choosing are liable for unlawful discrimination on the basis of “sex.”

43. Then, on May 4, 2016, DOJ sent Governor McCrory a letter (Exhibit I), declaring that the Act and EO 93 violate both Title VII and Title IX. DOJ threatened to “apply to [an] appropriate court for an order that will ensure compliance with” its ultra vires rewriting of the law.

44. On May 9, 2016, DOJ sued North Carolina, asserting that both the Act and EO 93 are impermissible under federal law.
F. The DOJ / DOE Joint Letter.

45. On May 13, 2016, DOJ and DOE issued a joint letter ("the Joint Letter") (Exhibit J), officially foisting its new version of federal law on the more than 100,000 elementary and secondary schools that receive federal funding.

46. The Joint Letter contends that Title IX’s prohibition of invidious “sex” discrimination also somehow encompasses discrimination based on “gender identity.” Further, it advises that schools taking a different view of Title IX face legal action and the loss of federal funds. The Joint Letter concerns “Title IX obligations regarding transgender students” and provides insight as to the manner in which DOJ and DOE will evaluate how schools “are complying with their legal obligations” (emphasis added). It refers to an accompanying document collecting examples from school policies and recommends that school officials comb through the document “for practical ways to meet Title IX’s requirements” (same). Indeed, the Joint Letter amounts to “significant guidance” (emphasis in original).

47. According to the Joint Letter, schools must treat a student’s “gender identity” as the student’s “sex” for purposes of Title IX compliance, with one notable exception. “Gender identity,” the Joint Letter explains, refers to a person’s “internal sense of gender,” without regard to one’s biological sex. One’s “gender identity” can be the same as a person’s biological sex, or different. The Joint Letter provides that no medical diagnosis or treatment requirement is a prerequisite to selecting one’s “gender identity,” nor is there any form of temporal requirement. In other words, a student can choose one “gender identity” on one particular day or hour, and then the
opposite one the next. And students of any age may establish a “gender identity” different from their biological sex simply by notifying the school administration—the involvement of a parent or guardian is not necessary.

48. In the case of athletics, however, the Joint Letter does not require schools to treat a student’s “gender identity” as the student’s “sex” for the purpose of Title IX compliance. Instead, the Joint Letter basically leaves intact Title IX regulations allowing schools to restrict athletic teams to members of one biological sex. The only change that the Joint Letter makes to athletic programs is that schools may not “rely on overly broad generalizations or stereotypes” about students. Otherwise, differentiating sports teams on the basis of “sex”—not “gender identity”—is consistent with the Joint Letter. The Joint Letter’s disparate treatment of bathrooms and showers, on the one hand, and athletic teams, on the other, demonstrates that DOJ/DOE is not simply demanding that schools abide by Title IX (as misinterpreted to somehow include “gender identity”). Rather, the Joint Letter tries to rewrite Title IX by executive fiat, mandating all bathrooms and showers to be simultaneously open to both sexes, while concurrently permitting different sex athletics subject to limited exceptions. The new policy has no basis in law.

49. Adapting to the new demands of DOJ and DOE requires significant changes in the operations of the nation’s school districts. Schools subject to Title IX must allow students to choose the restrooms, locker rooms, and other intimate facilities that match their chosen “gender identity” at any given time. Single-sex
classes, schools, and dormitories must also be open to students based on their chosen “gender identity.”

50. On May 17, 2016, the Attorneys General of Oklahoma, Texas, and West Virginia sent DOJ and DOE a letter (Exhibit K) requesting clarification on the effect of the Joint Letter on agencies within these States. DOJ and DOE did not respond.

G. Harrold Independent School District (TX).

51. On May 23, 2016, school board members of the Harrold ISD (“the Board”) convened a regular session. At the session, the Board adopted a policy (“the Policy”) (Exhibit L) consistent with its current practice. The Policy, which applies to students and employees of the Harrold ISD, limits multiple occupancy bathrooms and locker rooms to usage by persons based on their biological sex. The Policy also allows for accommodations.

52. After adopting the Policy, the Board requested representation (Exhibit M) from the Office of the Attorney General (“OAG”) of Texas, under Texas Education Code § 11.151(e), to determine whether the Policy is in conflict with federal law and, if so, whether the Policy is enforceable. The OAG agreed to represent the Board.

53. Harrold ISD is subject to Title VII and receives federal funding subject to Title IX. In 2015–16, Harrold ISD operated on a total annual budget exceeding $1.4 million, with the federal portion amounting to approximately $117,000.

54. Defendants have indicated they will enforce their revision of federal law against entities, such as Harrold ISD, that do not obey the new obligations unlawfully imposed on them. The Joint Letter of May 13, 2016, (Exhibit J) states that Title IX
and its implementing regulations apply to “educational programs and activities operated by recipients of Federal financial assistance” and that schools agree to same “as a condition of receiving federal assistance.” According to its website, DOE “vigorously enforces Title IX to ensure that institutions that receive federal financial assistance from [DOE] comply with the law.” DOE, http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html. And federal regulations provide for mandatory investigations into recipients of Title IX-linked funds who discriminate on the basis of “sex.” 34 C.F.R. §§ 100.7(a), 100.8, 106.71 (incorporating Title VI procedures).

55. Thus, the federal government possesses the ability to deny federal funds that comprise a substantial portion of Harrold ISD’s budget if Harrold ISD chooses to follow its Policy instead of the new rules, regulations, guidance and interpretations of Defendants. As a result, Harrold ISD must budget and reallocate resources now in order to prepare for the prospective loss of federal funding.

H. Arizona Plaintiffs.

56. Plaintiffs Arizona Department of Education, by and through Superintendent of Public Instruction Diane Douglas, and Heber-Overgaard Unified School District (collectively, the “Arizona Plaintiffs”) have requested that Arizona Attorney General Mark Brnovich represent them in the present litigation. Arizona Attorney General Mark Brnovich deems it necessary to represent the Arizona Plaintiffs. Arizona Department of Education Guideline and Procedure Doc. No. HR-20 (Exhibit N), which applies to all Arizona Plaintiffs, provides that “It is not . . .
discriminatory for a school to offer separate housing, toilet, athletic and other facilities on the basis of sex, so long as the facilities provided to each sex are comparable.” Exhibit N, at 2.

I. Federal Education Funding.

57. The loss of all federal funding for state and local education programs will have a major effect on State and local education budgets. The $69,867,660,640 in annual funding makes its way to all 50 states. DOE, *Funds for State Formula-Allocated and Selected Student Aid Programs, U.S. Dep’t of Educ. Funding*, at 120, available at http://www2.ed.gov/about/overview/budget/statetables/index.html (charts listing the amount of federal education funding by program nationally and by state). DOE estimates that the federal government will spend over $36 billion in State and local elementary and secondary education, and over $30 billion in State and local postsecondary education programs in 2016.

58. Not counting funds paid directly to state education agencies, or funds paid for non-elementary and secondary programs, the national amount of direct federal funding to public elementary and secondary schools alone exceeds $55,862,552,000 on average annually—which amounts to 9.3 percent of the average State’s total revenue for public elementary and secondary schools, or $1,128 per pupil. Texas’s public elementary and secondary schools, for example, receive an average of $5,872,123,000 in federal funds annually, or $1,156 per pupil, which amounts to about 11.7 percent of the State’s revenue for public elementary and secondary schools.
59. Alabama’s public elementary and secondary schools, for example, receive an average of $850,523,000 in federal funds annually, or $1,142 per pupil, which amounts to about 11.8 percent of the State’s revenue for public elementary and secondary schools. West Virginia’s public elementary and secondary schools, for example, receive an average of $380,192,000 in federal funds annually, or $1,343 per pupil, which amounts to about 10.7 percent of the State’s revenue for public elementary and secondary schools. Wisconsin’s public elementary and secondary schools, for example, receive an average of $850,329,000 in federal funds annually, or $975 per pupil, which amounts to about 7.9 percent of the State’s revenue for public elementary and secondary schools. The percentages in other States are comparable. Nat’l Ctr. For Educ. Statistics, U.S. Dep’t of Educ. & Institute of Educ. Sciences, Digest of Education Statistics, Tab. 235.20, available at https://nces.ed.gov/programs/digest/d15/tables/dt15_235.20.asp?current=yes.

IV. CLAIMS FOR RELIEF

COUNT ONE

Relief Under 5 U.S.C. § 706 (APA) that the new Rules, Regulations, Guidance and Interpretations at Issue Are Being Imposed Without Observance of Procedure Required by Law

60. The allegations in paragraphs 1 through 59 are reincorporated herein.

61. Defendants are “agencies” under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are “rules” under the APA, id. § 551(4), and constitute “[a]gency action made reviewable by
statute and final agency action for which there is no other adequate remedy in a
court.” Id. § 704.

62. The APA requires this Court to hold unlawful and set aside any agency
action taken “without observance of procedure required by law.” Id. § 706(2)(D).

63. With exceptions that are not applicable here, agency rules must go
through notice-and-comment rulemaking. Id. § 553.

64. Defendants failed to properly engage in notice-and-comment
rulemaking in promulgating the new rules, regulations, guidance and interpretations
described herein.

COUNT TWO

Relief Under 5 U.S.C. § 706 (APA) that the new Rules, Regulations,
Guidance and Interpretations at Issue Are Unlawful by Exceeding
Congressional Authorization

65. The allegations in paragraphs 1 through 64 are reincorporated herein.

66. Defendants are “agencies” under the APA, 5 U.S.C. § 551(1), and the
new rules, regulations, guidance and interpretations described herein are “rules”
under the APA, id. § 551(4), and constitute “[a]gency action made reviewable by
statute and final agency action for which there is no other adequate remedy in a
court.” Id. § 704.

67. The APA requires this Court to hold unlawful and set aside any agency
action that is “contrary to constitutional right, power, privilege, or immunity” or “in
excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”
Id. § 706(2)(B)–(C).
68. The new rules, regulations, guidance and interpretations described herein go so far beyond any reasonable reading of the relevant Congressional text such that the new rules, regulations, guidance and interpretations functionally exercise lawmakers reserved only to Congress. U.S. CONST. art. I, § 1 (“All legislative powers herein granted shall be vested in . . . Congress”) (emphasis added); The Federalist No. 48, at 256 (James Madison) (Carey and McClellan eds. 1990) (noting that “[t] is not unfrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere,” but that “the executive power [is] restrained within a narrower compass and . . . more simple in its nature”).

69. The new rules, regulations, guidance and interpretations described herein also violate separation of powers principles by purporting to expand federal court jurisdiction to cover whether persons of both sexes have a right to use previously separate sex intimate facilities, an issue on which Congress has not intended to legislate. Only Congress, not an agency, can expand federal court jurisdiction, U.S. CONST. art. III, § 1-2; Vaden v. Discover Bank, 556 U.S. 49, 59 n.9 (2009); see also Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (“[Federal courts] possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.”) (internal citations omitted); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922) (“[A] court created by the general government derives its jurisdiction wholly from the authority of Congress . . . provided it be not extended
beyond the boundaries fixed by the Constitution.”), and the Defendants’ attempts to
do so as described herein violates the constitutional separation of powers.

70. Because the new rules, regulations, guidance and interpretations are
not in accordance with the law articulated above, they are unlawful, violate 5 U.S.C.
§ 706, and should be set aside.

COUNT THREE

Relief Under 5 U.S.C. § 706 (APA) that the new Rules, Regulations,
Guidance and Interpretations at Issue Are Unlawful by Violating the
Tenth Amendment

71. The allegations in paragraphs 1 through 70 are reincorporated herein.

72. Defendants are “agencies” under the APA, 5 U.S.C. § 551(1), and the
new rules, regulations, guidance and interpretations described herein are “rules”
under the APA, id. § 551(4), and constitute “[a]gency action made reviewable by
statute and final agency action for which there is no other adequate remedy in a
court.” Id. § 704.

73. The APA requires this Court to hold unlawful and set aside any agency
action that is “contrary to constitutional right, power, privilege, or immunity” or “in
excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”
Id. § 706(2)(B)–(C).

74. The federal government is one of limited, enumerated powers; all
others—including a general police power—are reserved to the States. See United
States v. Morrison, 529 U.S. 598, 617–19 (2000). The States’ police power includes the
“protection of the safety of persons,” Queenside Hills Realty Co. v. Saxl, 328 U.S. 80,

75. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

76. The new rules, regulations, guidance and interpretations described herein violate the Tenth Amendment because they effectively commandeer the States’ historic and well-established regulation of civil privacy law. *New York v. United States*, 505 U.S. 144, 162 (1992) (“While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”).

77. The new rules, regulations, guidance and interpretations described herein unlawfully attempt to preempt State law regarding rights of privacy because historic powers reserved to the States, such as civil privacy protections, cannot be superseded by federal act, “unless that was the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Gregory v. Ashcroft*, 501 U.S. 452, 460–70 (1991). As explained herein, not only is there no evidence that Congress intended to regulate civil privacy circumstances within the States, but legislative history demonstrates that Congress expressed its clear intent to *not* encroach upon the traditional State
role in safeguarding privacy expectations in the workplace, public accommodations, and educational settings.

78. Because the new rules, regulations, guidance and interpretations are not in accordance with the law as articulated above, they are unlawful, violate 5 U.S.C. § 706, and should be set aside.

COUNT FOUR

Relief Under 5 U.S.C. § 706 (APA) that the new Rules, Regulations, Guidance and Interpretations at Issue Are Unlawful by Violating the Equal Protection of Law

79. The allegations in paragraphs 1 through 78 are reincorporated herein.

80. Defendants are “agencies” under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are “rules” under the APA, id. § 551(4), and constitute “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” Id. § 704.

81. The APA requires this Court to hold unlawful and set aside any agency action that is “contrary to constitutional right, power, privilege, or immunity” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” Id. § 706(2)(B)–(C).

82. The new rules, regulations, guidance and interpretations violate the constitutional right to the equal protection of law because they treat similarly situated individuals differently. For example, under Defendants’ new rules, a female who proclaims a male “gender identity” can use either the men’s or women’s restroom,
but a female who proclaims a female “gender identity” may use only the women’s restroom. Thus, not all men or women are treated the same.

83. Because the new rules, regulations, guidance and interpretations are not in accordance with the law articulated above, they are unlawful, violate 5 U.S.C. § 706, and should be set aside.

COUNT FIVE

Relief Under 28 U.S.C. §§ 2201-2202 (DJA) and 5 U.S.C. § 706 (APA) that the new Rules, Regulations, Guidance and Interpretations at Issue Unlawfully Attempt to Abrogate State Sovereign Immunity

84. The allegations in paragraphs 1 through 83 are reincorporated herein.

85. Defendants are “agencies” under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are “rules” under the APA, id. § 551(4), and constitute “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” Id. § 704.

86. The APA requires this Court to hold unlawful and set aside any agency action that is “contrary to constitutional right, power, privilege, or immunity” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” Id. § 706(2)(B)–(C).

87. The new rules, regulations, guidance and interpretations improperly abrogate the States’ sovereign immunity without supporting Congressional findings.

88. The Supreme Court acknowledges Congress’s abrogation of the States’ sovereign immunity in the employment context, but only on the basis of
Congressional findings and concerns about unequal treatment between men and women, and not an employee’s decision on whether they declare themselves male or female. See, e.g., Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 728 and n.2 (2003) (observing that the FMLA aims to promote the goal of equal employment opportunity for women and men).

89. In adopting their new rules, regulations, guidance and interpretations, the Defendants point to no Congressional findings about invidious discrimination based on “gender identity.” Indeed, the Defendants ignore the complete lack of any Congressional intent that the term “sex” include an individual’s right to choose his or her sex. The Defendants cannot expand abrogation of the State’s sovereign immunity by rewriting the meaning of “sex” employed by Congress.

COUNT SIX

Relief Under 5 U.S.C. § 706 (APA) that new Rules, Regulations, Guidance and Interpretations at Issue Are Arbitrary and Capricious in that they Interfere with Local Schools

90. The allegations in paragraphs 1 through 89 are reincorporated herein.

91. Defendants are “agencies” under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are “rules” under the APA, id. § 551(4), and constitute “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” Id. § 704.
92. The APA requires this Court to hold unlawful and set aside any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Id. § 706(2)(A).

93. Defendants’ actions—rewriting federal law to suit their own policy preferences—are arbitrary and capricious and not otherwise in accordance with the law. Defendants’ actions are arbitrary and capricious because they interfere with local schools by unilaterally changing the statutory term “sex”—long and widely accepted to be a biological category—to include “gender identity.” Title IX and Title VII do not refer to “gender identity.” Nor does 34 C.F.R. § 106.33, which expressly authorizes separate restrooms and locker rooms “on the basis of sex.” The federal laws at issue prohibit disparate treatment “on the basis of sex,” 20 U.S.C. § 1681(a); 34 C.F.R. § 106.33, a term long understood unambiguously to be a biological category based principally on male or female reproductive anatomy, and not one that includes self-proclaimed “gender identity.”

COUNT SEVEN

Relief Under 5 U.S.C. § 706 (APA) that new Rules, Regulations, Guidance and Interpretations at Issue Are Arbitrary and Capricious in that they Conflict with Federal Law

94. The allegations in paragraphs 1 through 93 are reincorporated herein.

95. Defendants are “agencies” under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are “rules” under the APA, id. § 551(4), and constitute “[a]gency action made reviewable by
statute and final agency action for which there is no other adequate remedy in a
court.” *Id.* § 704.

96. The APA requires this Court to hold unlawful and set aside any agency
action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in
accordance with law.” *Id.* § 706(2)(A).

97. Under PREA (Prison Rape Elimination Act), 42 U.S.C. § 15601 *et seq.*, those that identify as the opposite sex have the option to shower separately. 28 C.F.R. § 115.42(f). Coupling this element in PREA with the new rules, regulations, guidance and interpretations at issue (where everyone may identify as the opposite sex, if they choose to do so) means that every inmate can exercise a right to take a separate shower, which is an untenable position (and, thus, arbitrary and capricious), especially within a correctional circumstance.

**COUNT EIGHT**

Relief Under 28 U.S.C. §§ 2201-2202 (DJA) and 5 U.S.C. § 706 (APA) that the
new Rules, Regulations, Guidance and Interpretations at Issue Are
Unlawful and Violate Constitutional Standards of Clear Notice

98. The allegations in paragraphs 1 through 97 are reincorporated herein.

99. Defendants are “agencies” under the APA, 5 U.S.C. § 551(1), and the
new rules, regulations, guidance and interpretations described herein are “rules” under the APA, *id.* § 551(4), and constitute “[a]gency action made reviewable by
statute and final agency action for which there is no other adequate remedy in a
court.” *Id.* § 704.
100. The APA requires this Court to hold unlawful and set aside any agency action that is “contrary to constitutional right, power, privilege, or immunity” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” \textit{Id.} § 706(2)(B)–(C).

101. When Congress exercises its Spending Clause power, conditions on Congressional funds must enable the recipient to “clearly understand,” from the language of the law itself, the conditions to which they are agreeing to when accepting the federal funds. \textit{Arlington Cent. Sch. Bd. of Educ. v. Murphy}, 548 U.S. 291, 296 (2006). Defendants’ \textit{ex-post} rules, regulations, guidance and interpretations described herein are not in accord with the understanding that existed when the States opted into the programs. \textit{Bennett v. New Jersey}, 470 U.S. 632, 638 (1985) (providing that a state’s obligation under cooperative federalism program “generally should be determined by reference to the law in effect when the grants were made”).

102. The text employed by Congress does not support understanding the term “sex” in the manner put forth by Defendants. Congress expressed its intent to cover “gender identity,” as a protected class, in other pieces of legislation, \textit{see}, \textit{e.g.}, 18 U.S.C. § 249(a)(2)(A); 42 U.S.C. § 13925(b)(13)(A), but not Title IX. In other legislation, Congress included “gender identity” along with “sex,” thus evidencing its intent for “sex” in Title IX to retain its original and only meaning—one’s immutable, biological sex as acknowledged at or before birth.
COUNT NINE

Declaratory Judgment Under 28 U.S.C. §§ 2201-2202 (DJA) and 5 U.S.C. § 706 (APA) that the new Rules, Regulations, Guidance and Interpretations at Issue Are Unlawful and Unconstitutionally Coercive

103. The allegations in paragraphs 1 through 102 are reincorporated herein.

104. Defendants are “agencies” under the APA, 5 U.S.C. § 551(1), and the new rules, regulations, guidance and interpretations described herein are “rules” under the APA, id. § 551(4), and constitute “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” Id. § 704.

105. The APA requires this Court to hold unlawful and set aside any agency action that is “contrary to constitutional right, power, privilege, or immunity” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” Id. § 706(2)(B)–(C).

106. By placing in jeopardy a substantial percentage of Plaintiffs’ budgets if they refuse to comply with the new rules, regulations, guidance and interpretations of Defendants, Defendants have left Plaintiffs no real choice but to acquiesce in such policy. See NFIB, 132 S. Ct. at 2605 (“The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce . . . .”).

Halderman, 451 U.S. 1, 17 (1981)). “Congress may use its spending power to create incentives for [entities] to act in accordance with federal policies. But when ‘pressure turns into compulsion,’ the legislation runs contrary to our system of federalism.” Id. (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)). “That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.” Id.

108. “[T]he financial ‘inducement’ [Defendants have] chosen is much more than ‘relatively mild encouragement’ – it is a gun to the head.” Id. at 2604. When conditions on the receipt of funds “take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the states to accept policy changes.” Id.; cf. South Dakota v. Dole, 483 U.S. 203, 211 (1987).

109. Furthermore, the Spending Clause requires that entities “voluntarily and knowingly accept[]” the conditions for the receipt of federal funds. NFIB, 132 S. Ct. at 2602 (quoting Halderman, 451 U.S. at 17).

110. Because Defendants’ new rules, regulations, guidance and interpretations change the conditions for the receipt of federal funds after the acceptance of Congress’s original conditions, the Court should declare that the new rules, regulations, guidance and interpretations are unconstitutional because they violate the Spending Clause.
COUNT TEN

Declaratory Judgment Under 28 U.S.C. §§ 2201-2202 (DJA) and 5 U.S.C. § 611 (RFA) that the new Rules, Regulations, Guidance and Interpretations Were Issued Without a Proper Regulatory Flexibility Analysis

111. The allegations in paragraphs 1 through 110 are reincorporated herein.

112. Before issuing any of the new rules, regulations, guidance and interpretations at issue, Defendants failed to prepare and make available for public comment an initial and final regulatory flexibility analysis as required by the RFA. 5 U.S.C. § 603(a). An agency can avoid performing a flexibility analysis if the agency’s top official certifies that the rule will not have a significant economic impact on a substantial number of small entities. Id. § 605(b). The certification must include a statement providing the factual basis for the agency’s determination that the rule will not significantly impact small entities. Id.

113. The new rules, regulations, guidance and interpretations impact a substantial number of small entities because they require public schools receiving Title IX-linked funds either to comply or lose a significant portion of their budgets. None of the Defendants even attempted such a certification. Thus, the Court should declare Defendants’ new rules, regulations, guidance and interpretations unlawful and set them aside.

V. DEMAND FOR JUDGMENT

Plaintiffs respectfully request the following relief from the Court:
114. A declaration that the new rules, regulations, guidance and interpretations are unlawful and must be set aside as actions taken “without observance of procedure required by law” under the APA;

115. A declaration that the new rules, regulations, guidance and interpretations are substantively unlawful under the APA;

116. A declaration that the new rules, regulations, guidance and interpretations are arbitrary and capricious under the APA;

117. A declaration that the new rules, regulations, guidance and interpretations are invalid because they abrogate Plaintiffs’ sovereign immunity;

118. A declaration that the new rules, regulations, guidance and interpretations are invalid because Defendants failed to conduct the proper regulatory flexibility analysis required by the RFA.

119. A vacatur, as a consequence of each or any of the declarations aforesaid, as to the Defendants’ promulgation, implementation, and determination of applicability of the Joint Letter, and its terms and conditions, along with all related rules, regulations, guidance and interpretations, as issued and applied to Plaintiffs and similarly situated parties throughout the United States, within the jurisdiction of this Court.

120. Preliminary relief, enjoining the new rules, regulations, guidance and interpretations from having any legal effect;
121. A final, permanent injunction preventing the Defendants from implementing, applying, or enforcing the new rules, regulations, guidance and interpretations; and

122. All other relief to which the Plaintiffs may show themselves to be entitled, including attorneys’ fees and costs of court.
Respectfully submitted,

<table>
<thead>
<tr>
<th>LUTHER STRANGE</th>
<th>KEN PAXTON</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorney General of Alabama</td>
<td>Attorney General of Texas</td>
</tr>
<tr>
<td>BRAD D. SCHIMEL</td>
<td>JEFFREY C. MATEER</td>
</tr>
<tr>
<td>Attorney General of Wisconsin</td>
<td>First Assistant Attorney General</td>
</tr>
<tr>
<td>PATRICK MORRISEY</td>
<td>BRANTLEY STARR</td>
</tr>
<tr>
<td>Attorney General of West Virginia</td>
<td>Deputy First Assistant Attorney General</td>
</tr>
<tr>
<td>HERBERT SLATERY, III</td>
<td>PRERAK SHAH</td>
</tr>
<tr>
<td>Attorney General of Tennessee</td>
<td>Senior Counsel to the Attorney General</td>
</tr>
<tr>
<td>MARK BRNOVICH</td>
<td>ANDREW LEONIE</td>
</tr>
<tr>
<td>Attorney General of Arizona</td>
<td>Associate Deputy Attorney General for Special Litigation</td>
</tr>
<tr>
<td>SCOTT PRUITT</td>
<td>AUSTIN R. NIMOCKS</td>
</tr>
<tr>
<td>Attorney General of Oklahoma</td>
<td>Associate Deputy Attorney General for Special Litigation</td>
</tr>
<tr>
<td>JEFF LANDRY</td>
<td>/s/ Austin R. Nimocks</td>
</tr>
<tr>
<td>Attorney General of Louisiana</td>
<td>AUSTIN R. NIMOCKS</td>
</tr>
<tr>
<td>SEAN REYES</td>
<td>Texas Bar No. 24002695</td>
</tr>
<tr>
<td>Attorney General of Utah</td>
<td><a href="mailto:Austin.Nimocks@texasattorneygeneral.gov">Austin.Nimocks@texasattorneygeneral.gov</a></td>
</tr>
<tr>
<td>SAM OLENS</td>
<td>Special Litigation</td>
</tr>
<tr>
<td>Attorney General of Georgia</td>
<td>P.O. Box 12548, Mail Code 001</td>
</tr>
<tr>
<td></td>
<td>Austin, Texas 78711-2548</td>
</tr>
</tbody>
</table>

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

STATE OF TEXAS et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA et al.,

Defendants.

Civil Action No. 7:16-cv-00054-O

PRELIMINARY INJUNCTION ORDER

Before the Court are Plaintiffs’ Application for Preliminary Injunction (ECF No. 11),
filed July 6, 2016; Defendants’ Opposition to Plaintiffs Application for Preliminary Injunction
(ECF No. 40), filed July 27, 2016; and Plaintiffs’ Reply (ECF No. 52), filed August 3, 2016.
The Court held a preliminary injunction hearing on August 12, 2016, and counsel for the parties
presented their arguments. See ECF No. 56.1

This case presents the difficult issue of balancing the protection of students’ rights and
that of personal privacy when using school bathrooms, locker rooms, showers, and other intimate
facilities, while ensuring that no student is unnecessarily marginalized while attending school.
The sensitivity to this matter is heightened because Defendants’ actions apply to the youngest
child attending school and continues for every year throughout each child’s educational career.
The resolution of this difficult policy issue is not, however, the subject of this Order. Instead, the

1 The Court also considers various amicus briefs filed by interested parties. See ECF Nos. 16, 28, 34, 36-
1, 38-1.
Constitution assigns these policy choices to the appropriate elected and appointed officials, who must follow the proper legal procedure.

That being the case, the issues Plaintiffs present require this Court to first decide whether there is authority to hear this matter. If so, then the Court must determine whether Defendants failed to follow the proper legal procedures before issuing the Guidelines in dispute and, if they failed to do so, whether the Guidelines must be suspended until Congress acts or Defendants follow the proper legal procedure. For the following reasons, the Court concludes that jurisdiction is proper here and that Defendants failed to comply with the Administrative Procedures Act by: (1) foregoing the Administrative Procedures Act’s notice and comment requirements; and (2) issuing directives which contradict the existing legislative and regulatory texts. Accordingly, Plaintiffs’ Motion should be and is hereby GRANTED.

I. BACKGROUND

The following factual recitation is taken from Plaintiffs’ Application for Preliminary Injunction (ECF No. 11) unless stated otherwise. Plaintiffs are composed of 13 states and agencies represented by various state leaders, as well as Harrold Independent School District of Texas and Heber-Overgaard Unified School District of Arizona. They have sued the U.S. Departments of Education (“DOE”), Justice (“DOJ”), Labor (“DOL”), the Equal Employment Opportunity Commission (“EEOC”), and various agency officials (collectively “Defendants”), challenging Defendants’ assertions that Title VII and Title IX require that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate spaces.

2 Plaintiffs include: (1) the State of Texas; (2) Harrold Independent School District (TX); (3) the State of Alabama; (4) the State of Wisconsin; (5) the State of West Virginia; (6) the State of Tennessee; (7) Arizona Department of Education; (8) Heber-Overgaard Unified School District (Arizona); (9) Paul LePage, Governor of the State of Maine; (10) the State of Oklahoma; (11) the State of Louisiana; (12) the State of Utah; (13) the state of Georgia; (14) the State of Mississippi, by and through Governor Phil Bryant; (15) the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin.
facilities which match their gender identity rather than their biological sex.  

3 Plaintiffs claim that on May 13, 2016, Defendants wrote to schools across the country in a Dear Colleague Letter on Transgender Students (the “DOJ/DOE Letter”) and told them that they must “immediately allow students to use the bathrooms, locker rooms and showers of the student’s choosing, or risk losing Title IX-linked funding.” Mot. Injunction 1, ECF No. 11. Plaintiffs also allege Defendants have asserted that employers who “refuse to permit employees to utilize the intimate areas of their choice face legal liability under Title VII.” Id. Plaintiffs complain that Defendants’ interpretation of the definition of “sex” in the various written directives (collectively “the Guidelines”)4 as applied to Title IX of the Education Amendments of 1972 (“Title IX”) and Title VII of the Civil Rights Act of 1964 (“Title VII”) is unlawful and has placed them in legal jeopardy.

Plaintiffs contend that when Title IX was signed into law, neither Congress nor agency regulators and third parties “believed that the law opened all bathrooms and other intimate facilities to members of both sexes.” Mot. Injunction. 1, ECF No. 11. Instead, they argue one of Title IX’s initial implementing regulations, 34 C.F.R. § 106.33 (“§ 106.33” or “Section 106.33”),

3 Plaintiffs refer to a person’s “biological sex” when discussing the differences between males and females, while Defendants refer to a person’s sex based on the sex assigned to them at birth and reflected on their birth certificate or based on “gender identity” which is “an individual’s internal sense of gender.” See Am. Compl. 12, ECF No. 6; Mot. Injunction 1, ECF No. 11; Am. Compl. Ex. C (Holder Transgender Title VII Memo) (“Holder Memo 2014”) App. 1 n.1, ECF No. 6-3 (“[G]ender identity” [is defined] as an individual’s internal senses of being male or female.”); Id. at Ex. J. (DOJ/DOE Letter) 2, ECF No. 6-10. When referring to a transgendered person, Defendants’ Guidelines state “transgender individuals are people with a gender identity that is different from the sex assigned to them at birth . . . .” Am. Compl., Ex. C (Holder Memo 2014), App. 1 n.1, ECF No. 6-3. “For example, a transgender man may have been assigned female at birth and raised as a girl, but identify as a man.” Id. at Ex. D (OSHA Best Practices Guide to Restroom Access for Transgender Employees) (“OSHA Best Practice Guide”), App. 1, ECF No. 6-4. The Court attempts to use the parties’ descriptions throughout this Order for the sake of clarity.

4 The Guidelines refer to the documents attached to Plaintiffs’ Amended Complaint: (1) Ex. A (DOE Bullying Memo 2010), ECF No. 6-1; (2) Ex. B (DOE Questions and Answers on Title IX and Sexual Violence Memo) (“DOE Q&A Memo), ECF No. 6-2; (3) Ex. C (“Holder Memo 2014”), ECF No. 6-3; (4) Ex. D (OSHA Best Practice Guide), ECF No. 6-4; (5) Ex. H (EEOC Fact Sheet), ECF No. 6-8; and (6) Ex. J (DOJ/DOE Dear Colleague Letter), ECF No. 6-10.
expressly authorized separate restrooms on the basis of sex. Section 106.33 provides: “A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.” 34 C.F.R. § 106.33. Plaintiffs assert the term sex in the pertinent statutes and regulations means the biological differences between a male and female. Mot. Injunction 2, ECF No. 11. Plaintiffs state that Defendants’ swift move to supplant the traditional, biological meaning of sex with a definition based on gender identity through the Guidelines, coupled with Defendants’ actions to enforce these new agency policies through investigations and compliance reviews, causes Plaintiffs to suffer irreparable harm for which a preliminary injunction is needed. Id. at 3–8; Pls.’ Reply 3–7, ECF No. 54.

Defendants contend that the Guidelines and recent enforcement actions are designed to prohibit sex discrimination on the basis of gender identity and are “[c]onsistent with the nondiscrimination mandate of [Title IX],” and that “these guidance documents . . . are merely expressions of the agencies’ views as to what the law requires.” Defs.’ Resp. 2–4, ECF No. 40. Defendants also contend that the Guidelines “are not legally binding, and they expose [P]laintiffs to no new liability or legal requirements” because DOE “has issued documents of this nature for decades, across multiple administrations, in order to notify schools and other recipients of federal funds about how the agency interprets the law and how it views new and emerging issues.” Id. at 4–5.5 Defendants also state that the “[g]uidance documents issued by [DOE] ‘do not create or confer any rights for or on any person and do not impose any requirements beyond those required under applicable law and regulations’” and these documents expressly state that they do

not carry the force of law. *Id.* at 5 (citing Holder Memo 2, ECF No. 6-10, to clarify that “the best reading of Title VII’s prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status,” but the memo “is not intended to otherwise prescribe the course of litigation or defenses that should be raised in any particular employment discrimination case”).

A. **TITLE IX**

Title IX, enacted in 1972, is the landmark legislation which prohibits discrimination among federal fund recipients by providing that no person “shall, on the basis of sex, . . . be subjected to discrimination under any educational program or activity receiving Federal financial assistance.” 20 USC § 1681. The legislative history shows Congress hailed Title IX as an indelible step forward for women’s rights. Mot. Injunction at 2–4. After its passage, the DOE and its predecessor implemented a number of regulations which sought to enforce Title IX, chief among them, and at issue here, § 106.33. *See G.G. ex rel Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 721 (4th Cir. 2016) (stating that the Department of Health, Education, and Welfare (“HEW”) adopted its Title IX regulations in 1975 pursuant to 40 Fed. Reg. 24,128 (June 4, 1975), and DOE implemented its regulations in 1980 pursuant to 45 Fed. Reg. 30802, 30955 (May 9, 1980)). Section 106.33, as well as several other related regulations, permit educational institutions to separate students on the basis of sex, provided the separate accommodations are comparable.

II. **LEGAL STANDARDS**

A. **The Administrative Procedure Act (the “APA”)**

“The APA authorizes suit by ‘[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.’”

An administrative action is “final agency action” under the APA if: (1) the agency’s action is the “consummation of the agency’s decision making process;” and (2) “the action [is] one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); and *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). “In evaluating whether a challenged agency action meets these two conditions, this court is guided by the Supreme Court’s interpretation of the APA’s finality requirement as ‘flexible’ and ‘pragmatic.’” *EEOC*, 2016 WL 3524242, at *5; *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) (quoting

\(^6\) Agency action is defined in 5 U.S.C. § 551(13) to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (quoting 5 U.S.C. § 551(13)). “All of those categories involve circumscribed, discrete agency actions, as their definitions make clear: ‘an agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy’ (rule); ‘a final disposition . . . in a matter other than rule making’ (order); a ‘permit . . . or other form of permission’ (license); a ‘prohibition . . . or . . . taking [of] other compulsory or restrictive action’ (sanction); or a ‘grant of money, assistance, license, authority,’ etc., or ‘recognition of a claim, right, immunity,’ etc., or ‘taking of other action on the application or petition of, and beneficial to, a person’ (relief).” *Id.* (quoting § 551(4), (6), (8), (10), (11)).
When final agency actions are presented for judicial review, the APA provides that reviewing courts should hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 150–151 (1991).

**B. Preliminary Injunction**

The Fifth Circuit set out the requirements for a preliminary injunction in *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). To prevail on a preliminary injunction, the movant must show: (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that granting the injunction is not adverse to the public interest. *Id.; see also Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008).

To qualify for a preliminary injunction, the movant must clearly carry the burden of persuasion with respect to all four requirements. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir. 2003). If the movant fails to establish any one of the four prerequisites to injunctive relief, relief will not be granted. *Women’s Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 419 n.15 (5th Cir. 2001). A movant who obtains a preliminary injunction must post a bond to secure the non-movant against any wrongful damages it suffers as a result of the injunction. Fed. R. Civ. P. 65(c).

The decision to grant or deny preliminary injunctive relief is left to the sound discretion of the district court. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621
A preliminary injunction “is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion.” *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). Even when a movant satisfies each of the four *Canal* factors, the decision whether to grant or deny a preliminary injunction remains discretionary with the district court. *Miss. Power & Light Co.*, 760 F.2d at 621. The decision to grant a preliminary injunction is to be treated as the exception rather than the rule. *Id.*

III. ANALYSIS

Plaintiffs argue that: (1) Defendants skirted the notice and comment process—a necessity for legislative rules; (2) the new mandates are incompatible with Title VII and Title IX and the agencies are not entitled to deference; (3) the mandates violate the clear notice and anti-coercion requirements which the federal government may attach to spending programs; and (4) nationwide relief is necessary to prevent the irreparable harm Defendants will cause Plaintiffs. Mot. Injunction 2–3, ECF No. 11.

Defendants assert that Plaintiffs are not entitled to a preliminary injunction because: (1) Plaintiffs do not have standing to bring their claims; (2) this matter is not ripe for review; (3) Defendants’ Guidelines do not violate the APA; (4) Plaintiffs cannot demonstrate irreparable harm and they have an alternative remedy; (5) Defendants did not violate the Spending Clause; (6) and an injunction would harm Defendants and third parties. Defs.’ Resp. 1–3, ECF No. 40. Defendants allege that should an injunction be granted, it should be implemented only to
Plaintiffs in the Fifth Circuit. *Id.* The Court addresses these issues, beginning with Defendants’ jurisdictional arguments.\(^7\)

**A. Jurisdiction**

1. **Standing**

   Defendants allege that “[P]laintiffs’ suit fails the jurisdictional requirements of standing and ripeness . . . because they have not alleged a cognizable concrete or imminent injury.” Defs.’ Resp. 12, ECF No. 40 (citing *Lopez v. City of Hous.*., 617 F.3d 336, 342 (5th Cir. 2015)). Defendants allege “a plaintiff must demonstrate that it has ‘suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.’” *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Defendants contend that “[t]he agencies have merely set forth their views as to what the law requires” regarding whether gender identity is included in the definition of sex, and “[a]t this stage, [P]laintiffs have alleged no more than an abstract disagreement with the agencies’ interpretation of the law,” since “[n]o concrete situation has emerged that would permit the Court to evaluate [P]laintiffs’ claims in terms of specific facts rather than abstract principles.” *Id.* at 13–14.

   Defendants also allege that Plaintiffs “have [not] identified any enforcement action to which they are or are about to be subject in which a defendant agency is seeking to enforce its

---

\(^7\) The parties have requested that the Court provide expedited consideration of the preliminary injunction. The briefing on this request was completed on August 3, 2016, and the matter was not ripe until after the hearing was completed on August 12, 2016. Because further legal issues concerning the basis for Plaintiffs’ Spending Clause claim were raised at the hearing and require further briefing, the Court will not await that briefing at this time. *See Hr’g Tr.* 35, 44, 52–53 (discussing new program requirements and whether a new program is the same as annual grants). Therefore, the Spending Clause issue is not addressed in this Order. *See ECF Nos.* 11–12. Finally, where referenced, Title VII is used to help explain the legislative intent and purpose of Title IX because the two statutes are commonly linked. *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 546 (1982).
view of the law. As such, any injury alleged by plaintiffs is entirely speculative, as it depended on the initiation of some kind of enforcement action . . . which may never occur.” Defs.’ Resp. 14, ECF No. 40.

Plaintiffs state that Defendants are affirmatively using the Guidelines to force compliance as evidenced by various resolution agreements reached in enforcement cases across the country and from the litigation against the state of North Carolina, all of which is designed to force Plaintiffs to amend their policies to comply or place their federal funding in jeopardy. Hrg Tr. at 78. Plaintiffs argue they are clearly the object of the Defendants’ Guidelines, and those directives run afoul of various state constitutional and statutory codes which permit Plaintiffs to exercise control of their education premises and facilities.8 Hrg Tr. at 77. Plaintiffs contend all

8 Plaintiffs’ motion provides the following citations to their state laws which give them legal control over the management of the safety and security policies of educational buildings in their states and which the Guidelines will compel them to disregard. Texas cites to Tex. Const. art 7 § 1 (“[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”); Tex. Educ. Code §§ 4.001(b) (stating the objectives of public education, including Objective 8: “School campuses will maintain a safe and disciplined environment conducive to student learning.”); 11.051 (“An independent school district is governed by a board of trustees who, as a corporate body, shall: (1) oversee the management of the district; and (2) ensure the superintendent implements and monitors plans, procedures, programs, and systems to achieve appropriate, clearly defined, and desired results in the major areas of district operations.”); 11.201 (listing the duties of the superintendent including “assuming administrative responsibility and leadership for planning, organization, operation, supervision, and evaluation of the education programs, services, and facilities of the district . . . .”); and 46.008 (“The commissioner shall establish standards for adequacy of school facilities. The standards must include requirements related to space, educational adequacy, and construction quality.”); Pls.’ Reply Ex. (Belew Decl.) 4, ECF No. 52-1 (stating the Texas Education Agency (“TEA”) is responsible for “[t]he regulation and administration of physical buildings and facilities within Texas public schools” among other duties). Plaintiffs also provided an exhaustive list of similar state constitution citations, statutes, codes, and regulations that grant each Plaintiff the power to control the regulations that govern the administration of public education and public education facilities. See Mot. Injunction 9–11 n. 9-22, ECF No. 11 (quoting Ala. Code §§ 16-3-11, 16-3-12, 16-8-8–16-8-12 (“Alabama law authorizes state, county, and city boards of education to control school buildings and property.”); Wis. stat. chs. 115, 118 (“In Wisconsin, local school boards and officials govern public school operations and facilities . . . with the Legislature providing additional supervisory powers to a Department of Public Instruction.”); Wis. Stat. § 120.12(1) (“School boards and local officials are vested with the ‘possession, care, control and management of the property and affairs of the school district, and must regulate the use of school property and facilities.”); Wis. Stat. § 120.13(17) (“Wisconsin law also requires school boards to ‘provide and maintain enough suitable and separate toilets and other sanitary
of this confers standing according to the Fifth Circuit’s opinion in Texas v. Equal Employment Opportunity Commission, No. 14-10940, 2016 WL 3524242 (5th Cir. June 27, 2016). Hr’g Tr. 78.

Defendants counter that EEOC was wrongly decided and, regardless, the facts here are distinguishable from that case.9 Id. Defendants primarily distinguish EEOC from this case based on the EEOC majority’s view that the “guidance [at issue] contained a ‘safe harbor’ [provision]” and “the [guidance at issue had] the immediate effect of altering the rights and obligations of the ‘regulated community’ . . . by offering them [ ] detailed and conclusive means

facilities for both sexes.”); W. Va. Const. art. XII, § 2; W. Va. code § 18-5-1, 18-5-9(4) (“West Virginia law establishes state and local boards of education . . . and charges the latter to ensure the good order of the school grounds, buildings, and equipment.”); Tenn. Code Ann. §§ 49-12, 1-302, 49-1-201 (“In Tennessee, the state board of education sets statewide academic policies, . . . and the department of education is responsible for implementing those policies[, while] [e]ach local board of education has the duty to “[m]anage and control all public schools established or that may be established under its jurisdiction.”); Tenn. Code Ann. §§ 49-1-201(a)-(c)(5), 49-2-203(a)(2) (“The State Board is also responsible for “implementation of law” established by the General Assembly, . . . and ensuring that the ‘regulations of the state board of education are faithfully executed.’”); Ariz. Rev. Stat. §§ 15-203(A)(1), 15-341(A)(1), 15-341(A)(3) (“Arizona law establishes state and local boards of education, . . . and empowers local school districts to ‘[m]anage and control the school property within its district.’”); Me. Rev. Stat. tit. 20-A, §§ 201–406, 1001(2), 6501 (“Maine provides for state and local control over public education. While state education authorities supervise the public education system, control over management of all school property, including care of school buildings[,] . . . [a]nd Maine law provides requirements related to school restrooms.”); Okla. Const. art. XIII, §§ 5, 5-117 (“Oklahoma law establishes a state board of education to supervise public schools. Local school boards are authorized by the board to operate and maintain school facilities and buildings.”); La. Const. art VIII, § 3, LSA-R. Stat. § 17:100.6 (“In Louisiana, a state board of education oversees public schools, . . . while local school boards are charged with the management, administration, and control of buildings and facilities within their jurisdiction.”); Utah Code §§ 53A-1-101, 53A-3-402(3) (“Utah law provides for state and local board of educations, . . . and authorizes the local boards to exercise control over school buildings and facilities.”); Ga. Code § 20-2-59, 520 (“Georgia places public schools under the control of a board of education, . . . and delegates control over local schools, including the management of school property, to county school boards govern local schools.”); Miss. Code Ann. § 37-7-301 (“In Mississippi, the state board of education oversees local school boards, which exercise control over local school property.”); Ky. Rev. Stat. §§ 156.070, 160.290 (“In Kentucky, the state board of education governs the state’s public school system, . . . while local boards of education control “all public school property” within their jurisdictions, . . . and can make and adopt rules applicable to such property.”).

9 Id. at 14 (“[T]he government respectfully disagrees with that decision for many of the reasons stated in Judge Higginbotham’s dissenting opinion, and . . . EEOC is distinguishable from this case in important respects.”); Hr’g Tr. 53 (“Let me say at the outset . . . the Government disagrees with that decision.”).
to avoid an adverse EEOC finding.” Defs.’ Resp. 15, ECF No. 40. Defendants claim that the same kind of facts are not present here. Defendants contend further that “the [transgender] guidance documents do not provide ‘an exhaustive procedural framework,’ [or] . . . a safe harbor, but merely express[] the agencies’ opinion about the proper interpretation of Title VII and Title IX.” Id. Thus, they argue, the Court lacks jurisdiction and should decline to enter a preliminary injunction. Id.\textsuperscript{10}

The Court finds that Plaintiffs have standing. “The doctrine of standing asks ‘whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.’” Cibolo Waste, Inc. v. City of San Antonio, 718 F.3d 469, 473 (5th Cir. 2013) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004)). Constitutional standing requires a plaintiff to establish that she has suffered an injury in fact traceable to the defendant’s actions that will be redressed by a favorable ruling. Lujan, 504 U.S. at 560–61. The injury in fact must be “concrete and particularized” and “actual or imminent,” as opposed to “conjectural” or “hypothetical.” Id. at 560. When “a plaintiff can establish that it is an ‘object’ of the agency regulation at issue, ‘there is ordinarily little question that the action or inaction has caused [the plaintiff] injury, and that a judgment preventing or requiring the action will redress it.’” EEOC, 2016 WL 3524242 at *2; Lujan, 504 U.S. at 561–62. The Fifth Circuit provided, “[w]hether someone is in fact an object of a regulation is a flexible inquiry rooted in common sense.” Id. at *6 (quoting Contender Farms LLP v. U.S. Dep’t of Agric., 779 F.3d 258, 265 (5th Cir. 2015)).

In EEOC, Texas sued the EEOC over employment guidance the EEOC issued to employers concerning their Title VII obligations. In response, the EEOC argued Texas lacked standing because the guidance was advisory only and imposed no affirmative obligation. The

\textsuperscript{10} The Court addresses Defendants’ claim that Plaintiffs have an adequate alternate remedy in Section III.A.4.
Fifth Circuit held that Texas had standing to seek relief because it was an object of the EEOC’s guidance as the guidance applied to Texas as an employer. *Id.* at *4.

This case is analogous. Defendants’ Guidelines are clearly designed to target Plaintiffs’ conduct. At the hearing, Defendants conceded that using the definition in the Guidelines means Plaintiffs are not in compliance with their Title VII and Title IX obligations. *Hrg Tr.* 74. Defendants argue that that this does not confer standing because the Guidelines are advisory only. *Defs.’ Resp.* 14, ECF No. 40. But this conflates standing with final agency action and the Fifth Circuit instructed district courts to address the two concepts separately. *See EEOC, 2016 WL 3524242* at *3. Defendants’ Guidelines direct Plaintiffs to alter their policies concerning students’ access to single sex toilet, locker room, and shower facilities, forcing them to redefine who may enter apart from traditional biological considerations.11 Plaintiffs’ counsel argued the Guidelines will force Plaintiffs to consider ways to build or reconstruct restrooms, and how to accommodate students who may seek to use private single person facilities, as other school districts and employers who have been subjected to Defendants’ enforcement actions have had to do. *Hrg Tr.* 80–81. That the Guidelines spur this added regulatory compliance analysis satisfies the injury in fact requirement. *EEOC, 2016 WL 3524242* at *4 (“[*T]he guidance does, at the very least, force Texas to undergo an analysis, agency by agency, regarding whether the certainty of EEOC investigations . . . overrides the State’s interest . . . . [*T]hese injuries are sufficient to confer constitutional standing, especially when considering Texas’s unique position as a sovereign state . . . .”). That Plaintiffs have standing is strengthened by the fact that Texas and

---

11 For example, Plaintiffs list Wisconsin’s state statutes regarding this matter, which state that school boards are required to “[p]rovide and maintain enough suitable and separate toilets and other sanitary facilities for both sexes.” *Mot. Injunction* 10 n.9, ECF No. 11 (citing Wis. Stat. s. 120.12(12)). Plaintiffs interpret this to mean that Wisconsin has the authority to maintain separate intimate facilities that correspond to a person’s biological sex. *Id.*
other Plaintiffs have a “stake in protecting [their] quasi-sovereign interests . . . [as] special solicitude[s].” *Mass. v. E.P.A.*, 549 U.S. 497, 520 (2007) (“Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. § 7607(b)(1). Given that procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”).

Accordingly, Plaintiffs have standing to pursue this lawsuit.

2. **Ripeness**

Defendants also argue that this case is not ripe for review. According to Defendants, this Court should avoid premature adjudication to avoid entangling itself in abstract disagreements over administrative policies.Defs.’ Resp. 13, ECF No. 40 (citing *Nat’l Park Hosp. Ass’n v. Dep. ’t Interior*, 538 U.S. 803, 807 (2003)). Defendants argue that more time should be given to allow the administrative process to run its course and develop more facts before the Court can address this case. *Id.* at 13 (citing *Abbott Labs*, 387 U.S. 136, 149 (1967)); Hr’g Tr. 62. Plaintiffs counter that, taking into account recent events where Defendants have investigated other entities that do not comply with the Guidelines, this case is ripe. Pls.’ Reply 4–7, ECF No. 52; Hr’g Tr. 79.

“A challenge to administrative regulations is fit for review if (1) the questions presented are ‘purely legal one[s],’ (2) the challenged regulations constitute ‘final agency action,’ and (3) further factual development would not ‘significantly advance [the court’s] ability to deal with the legal issues presented.”’ *Texas v. United States*, 497 F.3d 491, 498–99 (5th Cir. 2007) (citing *Nat’l Park Hosp. Ass’n*, 538 U.S. at 812).
The Court finds that Plaintiffs’ case is ripe for review. Here, the parties agree that the questions at issue are purely legal. Hr’g Tr. 61. Defendants asserted at the hearing that Plaintiffs are not in compliance with their obligations under Title IX given their refusal to change their policies. Hr’g Tr. 74. Furthermore, for the reasons set out below, the Court finds that Defendants’ actions amount to final agency action under the APA.\textsuperscript{12} \textit{EEOC}, 2016 WL 3524242 at *11 n.9 (“Having determined that the Guidance is ‘final agency action’ under the APA, it follows naturally that Texas’s APA claim is ripe for review. Texas’s challenge to the EEOC Guidance is a purely legal one, and as such it is unnecessary to wait for further factual development before rendering a decision.”) (Internal citations omitted).

Finally, the facts of this case have sufficiently developed to address the legal impact Defendants’ Guidelines have on Plaintiffs’ legal questions in this case. \textit{Texas}, 497 F.3d at 498–99. The only other factual development that may occur, given Defendants’ conclusion Plaintiffs are not in legal compliance, is whether Defendants actually seek to take action against Plaintiffs. But it is not clear how waiting for Defendants to actually take action would “significantly advance [the court’s] ability to deal with the legal issues presented.” \textit{Texas}, 497 F.3d at 498–99. As previously stated, Defendants’ Guidelines clash with Plaintiffs’ state laws and policies in relation to public school facilities and Plaintiffs have called into question the legality of those Guidelines. Mot. Injunction 9–12, ECF No. 11. Therefore, “further factual development would not ‘significantly advance the courts ability to deal with the legal issues presented.’” \textit{Texas}, 497 F.3d at 498–99. Accordingly, the Court finds that this case is ripe for review.

3. \textbf{Final Agency Action under the APA}

\textsuperscript{12} The Court further addresses this issue in section III.A.3.
The Court now evaluates whether the Guidelines are final agency action meeting the jurisdictional threshold under the APA. *EEOC*, 2016 WL 3524242 at *5. Defendants argue that there has been no final agency action as the documents in question are merely “paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA.” Defs.’ Resp. 18, ECF No. 40. Defendants also allege that the Guidelines are “[v]alid interpretations of the statutory and regulatory authorities on which they are premised” because although Title IX and § 106.33 provide that federal recipients may provide for separate, comparable facilities, the regulation and statute “do not address how they apply when a transgender student seeks to use those facilities . . . .” Id. at 20–21.

Plaintiffs allege that the agencies’ Guidelines are binding nationwide and the Defendants’ enforcement patterns in various states clearly demonstrate that legal actions against those that do not comply will follow. Mot. Injunction 9–12, ECF No. 11; Reply 2–8, ECF No. 52. Plaintiffs identify a number of similar cases where Defendants have investigated schools that refused to comply with the new Guidelines and where they sued North Carolina over its state law which, in part, made it legal to require a person to use the public restroom according to their biological sex. Reply 6, ECF No. 52.

An administrative action is “final agency action” under the APA if: (1) the agency’s action is the “consummation of the agency’s decision making process;” and (2) “the action [is] one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett*, 520 U.S. at 177–78. “In evaluating whether a challenged agency action meets these two conditions, the court is guided by the Supreme Court’s interpretation of the APA’s finality requirement as ‘flexible’ and ‘pragmatic.’” *EEOC*, 2016 WL 3524242 at *5 (quoting *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011)).
The Court finds that the Guidelines are final agency action under the APA. Defendants do not dispute that the Guidelines are a “consummation” of the agencies’ decision-making process. Hr’g Tr. 61; Nat’l Pork Producers Council v. E.P.A., 635 F.3d 738, 755–56 (5th Cir. 2011) (citing Her Majesty the Queen in Right of Ontario v. Envtl. Prot. Agency, 912 F.2d 1525, 1532 (D.C. Cir. 1990) (deciding that EPA guidance letters constitute final agency actions as they “serve[d] to confirm a definitive position that has a direct and immediate impact on the parties . . . .”).

The second consideration is also satisfied in this case because legal consequences flow from the Defendants’ actions. Defendants argue no legal consequences flow to Plaintiffs because there has been no enforcement action, or threat of enforcement action. Hr’g Tr. 71. The Fifth Circuit held in EEOC however that “an agency action can create legal consequences even when the action, in itself, is disassociated with the filing of an enforcement proceeding, and is not authority for the imposition of civil or criminal penalties.” 2016 WL 3524242 at *8. According to the Fifth Circuit, “legal consequences’ are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability.” Id. (citing U.S. Army Corps of Eng’rs v. Hawkes Co., 136 S. Ct. 1807, 1814–15 (May 31, 2016) (holding that using the pragmatic approach, an agency action asserting that plaintiff’s land was subject to the Clean Water Act’s permitting process was a final agency action which carried legal consequences). The Fifth Circuit concluded that “[i]t is also sufficient that the Enforcement Guidance [at issue in EEOC] has the immediate effect of altering the rights and obligations of the ‘regulated community’ (i.e. virtually all state and private employers) by offering them a detailed and conclusive means to avoid an adverse EEOC finding . . . .” 2016 WL 3524242 at * 6.
In this case, although the Guidelines provide no safe harbor provision, the DOJ/DOE Letter provides not only must Plaintiffs permit individuals to use the restrooms, locker rooms, showers, and housing consistent with their gender identity, but that they find no safe harbor in providing transgender students individual-user facilities as an alternative accommodation. Indeed, the Guidelines provide that schools may, consistent with Title IX, make individual-user facilities available for other students who “voluntarily seek additional privacy.” See DOJ/DOE Letter 3, ECF No. 6-10. Using a pragmatic and common sense approach, Defendants’ Guidelines and actions indicate that Plaintiffs jeopardize their federal education funding by choosing not to comply with Defendants’ Guidelines.13

13 The Holder Memorandum concludes, “For these reasons, the [DOJ] will no longer assert that Title VII’s prohibition of discrimination based on sex does not encompass gender identity per se (including transgender discrimination).” Holder Memo 2, ECF No. 6-3. Other guidance from Defendants take similar actions. See also DOJ/DOE Letter 4–5, ECF No. 6-10.
manual simply expressed the agency’s view with respect to employers’ actions and compliance with Title VII).

Accordingly, the Court finds that Defendants’ Guidelines are final agency action such that the jurisdictional threshold is met. *EEOC*, 2016 WL 3524242 at *5.

4. **Alternative Legal Remedy**

Defendants also contend that district court review is precluded and Plaintiffs should not be allowed to avoid the administrative process by utilizing the APA at this time. *Defs.’ Resp.* 16, ECF No. 40. Defendants allege that “review by a court of appeals is an ‘adequate remedy’ within the meaning of the APA,” and “[s]ection 704 of the APA thus prevents plaintiffs from circumventing the administrative and judicial process Congress provided them.” *Id.* Defendants argue “Congress has precluded district court jurisdiction over pre-enforcement actions like this.” *Id.* at 17. Defendants cite several cases, including the Supreme Court’s opinions in *Thunder Basin v. Reich*, 510 U.S. 200 (1994) and *Elgin v. Department of Treasury*, 132 S.Ct. 2126 (2012), in support of this argument.14

Defendants’ assertion that there is no jurisdiction to review Plaintiffs’ APA claims fails and their reliance on *Thunder Basin, Elgin*, and the other cited cases is misplaced. In *Thunder Basin*, the Supreme Court held that the Mine Act’s statutory review scheme precluded the district

---

14 Defendants also assert *NAACP v. Meese* supports this argument but the Court disagrees. In that case, the plaintiffs sought to enjoin the Attorney General from reopening or agreeing to reopen any consent decree in any civil rights action pending in any other court. The district court denied this request, holding such actions would violate principles of separation of powers and comity. 615 F. Supp. 200, 201–02 (D.D.C. 1985) (“Plaintiffs’ action must fail (1) under the principle of the separation of powers, and (2) because this Court lacks authority to interfere with or to seek to guide litigation in other district courts throughout the United States.”). The *Meese* court also concluded there was no final agency action to enjoin and, by definition, there would be an alternative legal remedy related to those cases where a consent decree existed because those decrees were already subject to a presiding judge. *Id.* at 203 n.9. Additionally, Defendants reliance on *Dist. Adult Prob. Dep’t v. Dole*, 948 F.2d 953 (5th Cir. 1991) does not apply because there was no final agency action in that case.
court from exercising subject-matter jurisdiction over a pre-enforcement challenge. To
determine whether pre-enforcement challenges are prohibited courts look to whether this “intent
is ‘fairly discernible in the statutory scheme.”’ Thunder Basin, 510 U.S. at 207 (quoting Block v.
Community Nutrition Institute, 467 U.S. 340, 351 (1984)). The Supreme Court held that
“[w]hether a statute is intended to preclude initial judicial review is determined from the statute’s
language, structure, and purpose, its legislative history . . . and whether the claims can be
afforded meaningful review.” Id. (internal citation omitted).

Although the Mine Act was silent about pre-enforcement claims, the Supreme Court held
that “its comprehensive enforcement structure demonstrate[d] that Congress intended to preclude
challenges,” and the Mine Act “expressly authorize[d] district court jurisdiction in only two
provisions . . . [which allowed] the Secretary [of Labor] to enjoin [] violations of health and
safety standards and to coerce payment of civil penalties.” Id. at 209. Thus, plaintiffs had to
“complain to the Commission and then to the court of appeals.” Id. (italics omitted).

Elgin reached a similar conclusion, holding that the Civil Service Reform Act (“CSRA”)
was the exclusive avenue to judicial review for petitioners’ claims against the Treasury
Department. 132 S. Ct. 2126, 2128 (“Just as the CSRA’s ‘elaborate’ framework [citation
omitted] demonstrates Congress’ intent to entirely foreclose judicial review to employees to
whom the CSRA denies statutory review, it similarly indicates that extrastatutory review is not
available to those employees to whom the CSRA grants administrative and judicial review.”).

No similar elaborate statutory framework exists covering Plaintiffs’ claims. Neither Title
VII nor Title IX presents statutory schemes that would preclude Plaintiffs from bringing these
claims in federal district court. Indeed, the Supreme Court has held that Title IX’s enforcement
provisions, codified at Title 20 U.S.C. §§ 1681–1683, does not provide the exclusive statutory
remedy for violations. See Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) (holding that Title IX did not preclude a private right of action for damages). Given Defendants lack of authority to the contrary, the presumption of reviewability for all agency actions applies. EEOC, 2016 WL 3524242 at *11 (citing Abbott Labs., 387 U.S. at 140) (“To wholly deny judicial review, however, would be to ignore the presumption of reviewability, and to disregard the Supreme Court’s instruction that courts should adopt a pragmatic approach for the purposes of determining reviewability under the APA.”).

Having concluded that Plaintiffs claims are properly subject to judicial review, the Court next evaluates whether a preliminary injunction is appropriate.

B. Preliminary Injunction

1. Likelihood of Success on the Merits

The first consideration is whether Plaintiffs have shown a likelihood of success on the merits for their claims. Plaintiffs aver that they have shown a substantial likelihood that they will prevail on the merits because Defendants have violated the APA by (1) circumventing the notice and comment process and (2) by issuing final agency action that is contrary to law. Mot. Injunction 12–16, ECF No. 11. Furthermore, Plaintiffs contend that Defendants’ new policies are not valid agency interpretations that should be granted deference because “[a]gencies do not receive deference where a new interpretation conflicts with a prior interpretation.” Pls.’ Reply 11, ECF No. 52 (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)).

Defendants contend that their actions do not violate the APA because the Guidelines are interpretive rules and are therefore exempt from the notice and comment requirements. Defs.’ Resp. 12–18, ECF No. 40. Defendants argue the Guidelines are exempt because they do not carry the force of law, even though “the agencies’ interpretations of the law are entitled to some
deference.” Further, they argue because their interpretation is reasonable, this interpretation is entitled to deference.\textsuperscript{15} Defendants also assert they did not act contrary to law because the Guidelines are valid interpretations of Title IX as the statute and regulations “do not address how [the laws] apply when a transgender student seeks to use those facilities” or “how a school should determine a transgender student’s sex when providing access to sex-segregated facilities.” \textit{Id.} at 20–21. Thus, according to Defendants, this situation presents an ambiguity in the regulatory scheme and Defendants are allowed to provide guidelines to federal fund recipients on this matter. \textit{Id.} at 21.\textsuperscript{16}

In their Reply, Plaintiffs counter that DOE’s implementing regulation, § 106.33, is not “ambiguous[,] as a physiologically-grounded regulation, it covers every human being and therefore all those within the reach of Title IX.” Reply 8, ECF No. 52. They contend further, “[t]o create legal room to undo what Congress (and preceding regulators) had done, Defendants

\textsuperscript{15} Defendants argue the Court should be guided in this decision by the Fourth Circuit’s decision in \textit{G.G. ex rel Grimm v. Gloucester Cty. Sch. Bd.}, 822 F.3d 709 (4th Cir. 2016) (“G.G.”). Defendants contend the Fourth Circuit’s majority opinion in \textit{G.G.} should be followed as it provides the proper analysis. The Supreme Court recalled the Fourth Circuit’s mandate and stayed the preliminary injunction entered by the district court in that case. \textit{See Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm}, No. 16-A-52, 2016 WL 4131636 at *1 (Aug. 3, 2016) (Breyer, J. concurring) (“In light of the facts that four Justices have voted to grant the application referred to the Court by THE CHIEF JUSTICE, that we are currently in recess, and that granting a stay will preserve the status quo (as of the time the Court of Appeals made its decision) until the Court considers the forthcoming petition for certiorari, I vote to grant the application as a courtesy.”). The Supreme Court takes such actions only on the rarest of occasions. \textit{Bd. of Ed. of City School Dist. of City of New Rochelle v. Taylor}, 82 S.Ct. 10, 10 (1961) (“On such an application, since the Court of Appeals refused the stay ‘** this court requires an extraordinary showing, before it will grant a stay of the decree below pending the application for a certiorari.’”); \textit{Russo v. Byrne}, 409 U.S. 1219, 1221 (1972) (“If the application presents frivolous questions it should be denied. If it tenders a ruling out of harmony with our prior decisions, or questions of transcending public importance, or issues which would likely induce this Court to grant certiorari, the stay should be granted.”). Because it is impossible to know the precise issue (s) that prompted the Supreme Court to grant the stay, it is difficult to conclude that \textit{G.G.} would control the outcome here. \textit{See New Motor Vehicle Bd. Orrin W. Fox Co.}, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (declaring it is very difficult to predict anticipated Supreme Court decision). Nevertheless, the Court has reviewed the opinion and considers the well-expressed views of each member of the panel in reaching the decision in this case.

\textsuperscript{16} Defendants characterize their Guidelines as, “supply[ing] ‘crisper and more detailed lines’ than the statutes and regulations that they interpret,” without “alter[ing] the legal obligations of regulated entities.” \textit{Id.} at 20 (citing \textit{Am. Mining Cong. Mine Safety & Health Admin.}, 995 F.2d 1106, 1112 (D.C. Cir. 1993)).
manufacture an ambiguity, claiming that ‘these regulations do not address how they apply when a transgender student seeks to use those facilities . . . .’” Id. (citing Defs.’ Response 20–21, ECF No. 40). Plaintiffs continue, “[i]n enacting Title IX, Congress was concerned that women receive the same opportunities as men, [t]hus, Congress utilized ‘sex’ in an exclusively biological context[,] [and] “[t]he two sexes are not fungible.” Id. at 8–9 (quoting Ballard v. United States, 329 U.S. 187, 193 (1946). It is the biological differences between men and women, Plaintiffs allege, that led Congress in 1972 to “permit differential treatment by sex only[,]” provide a basis for DOE “to approve ‘separate toilet, locker rooms, and shower facilities on the basis of sex’ in § 106.33, and led the Supreme Court “to conclude that educational institutions must ‘afford members of each sex privacy from the other sex.’” Id. at 9 (quoting 118 Cong. Rec. 5807 (1972)); United States v. Virginia, 518 U.S., 550 n.19 (1996)).

The Court finds that Plaintiffs have shown a likelihood of success on the merits because: (1) Defendants bypassed the notice and comment process required by the APA; (2) Title IX and § 106.33’s text is not ambiguous; and (3) Defendants are not entitled to agency deference under Auer v. Robbins, 519 U.S. 452 (1997).17

i. Notice and Comment under the APA

Defendants state that “[t]he APA does not require agencies to follow notice and comment procedures in all situations [, and the APA] specifically excludes interpretive rules and statements of agency policy from these procedures.” Defs.’ Resp. 17–18, ECF No. 40. Defendants allege “[t]he guidance documents are . . . paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA.” Id. at 18. According to Defendants,

17 Defendants’ counsel stated at the hearing that Defendants would not be entitled to Chevron deference for the Guidelines. See Hr’g Tr. 72. Thus, the Court addresses only Defendants’ claim that they are entitled to Auer deference when interpreting § 106.33.
“the interpretations themselves do not carry the force of law . . . .” Id. at 19. Defendants rely on G.G., 822 F.3d 709, 720 (4th Cir. 2016) to support their claim that DOE’s “interpretation of the single-sex facility regulation implementing Title IX is reasonable, and does not conflict with those regulations in any way.” Id.

Plaintiffs contend that Defendants’ rules are legislative because: “(1) they grant rights while also imposing significant obligations; (2) they amend prior legislative rules or longstanding agency practice; and (3) bind the agencies and regulated entities,” requiring them to go through the notice and comment process. Mot. Injunction 12, ECF No. 11.

The APA requires agency rules to be published in the Federal Register and that the public be given an opportunity to comment on them. 5 U.S.C. §§ 553(b) –(c). This is referred to as the notice and comment requirement. The purpose is to permit the agency to understand and perhaps adjust its rules based on the comments of affected individuals. Prof’ls and Patients for Customized Care v. Shalala, 56 F.3d 592, 595 (5th Cir.1995). However, not every action an agency takes is required to go through the notice and comment process. “The APA divides agency action, as relevant here, into three boxes: legislative rules, interpretive rules, and general statements of policy.” Nat’l Min. Ass’n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014). “Legislative rules generally require notice and comment, but interpretive rules and general statements of policy do not.” Id. (citing 5 U.S.C. § 553). “In order for a regulation to have the ‘force and effect of law,’ it must have certain substantive characteristics and be the product of certain procedural requisites.” Chrysler Corp. v. Brown, 441 U.S. 281, 301–03, (1979).

The APA does not define a legislative or “substantive” rule, but in Morton v. Ruiz, 415 U.S. 199, 234 (1974), the Supreme Court held that a substantive rule or “a legislative-type rule,” is one that “affect[s] individual rights and obligations.” Id. at 232. The Supreme Court also
held, “the promulgation of these regulations must conform with any procedural requirements imposed by Congress.” *Chrysler Corp.*, 441 U.S. at 303. Thus, agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which “assure fairness and mature consideration of rules of general application.” *Id.* (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969)). If a rule is substantive, notice and comment requirements must be adhered to scrupulously. *Prof’ls and Patients for Customized Care*, 56 F.3d at 595.

“[L]egislative rules (and sometimes interpretive rules) may be subject to pre-enforcement review” because they subject a party to a binding obligation which can be the subject of an enforcement action. *McCarthey*, 758 F.3d at 251. (“An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule . . .”). The APA treats interpretive rules and general statements of policy differently. *Id.* (“As to interpretive rules, an agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule.”).\(^{18}\)

Courts have focused on several factors to evaluate whether rules are interpretative or legislative. Courts analyze the agency’s characterization of the guidance and post-guidance events to determine whether the agency has applied the guidance as if it were binding on regulated parties. *McCarthey*, 758 F.3d at 252–53. However, “the most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated parties.

\(^{18}\) *Catawba Cty.* provides: “An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.”
entities.” *McCarthy*, 758 F.3d at 252 (quoting *Catawba Cty. v. EPA*, 571 F.3d 20, 33–34; *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002)). “A touchstone of a substantive rule is that it establishes a binding norm.” *Prof’ls and Patients for Customized Care*, 56 F.3d at 596; *see also Texas v. United States*, 809 F.3d 134, 202 (5th Cir. 2015) (King, J., dissenting) (declaring that an agency action establishing binding norms which permit no discretion is a substantive rule requiring notice and comment). If agency action “draws a ‘line in the sand’ that, once crossed, removes all discretion from the agency” the rule is substantive. *Id.* at 601.

Here, the Court finds that Defendants’ rules are legislative and substantive. Although Defendants have characterized the Guidelines as interpretive, post-guidance events and their actual legal effect prove that they are “compulsory in nature.” *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000); *see also Prof’ls and Patients for Customized Care*, 56 F.3d at 596 (the label an agency places on its exercise of administrative power is not conclusive, rather it is what the agency does with that policy that determines the type of action). Defendants confirmed at the hearing that schools not acting in conformity with Defendants’ Guidelines are not in compliance with Title IX. Hr’g Tr. 71. Further, post-Guidelines events, where Defendants have moved to enforce the Guidelines as binding, buttress this conclusion. *Id.* at 7; Mot. Injunction 15–16, ECF No. 11; Reply 4–8, ECF No. 52. The information before the Court demonstrates Defendants have “drawn a line in the sand” in that they have concluded Plaintiffs must abide by the Guidelines, without exception, or they are in breach of their Title IX obligations. Thus, it would follow that the “actual legal effect” of the Guidelines is to force

---

19 In *Appalachian Power*, the D.C. Circuit held that an EPA guidance was a legislative rule despite the guidance document’s statement that it was advisory. The Court analyzed the document as a whole and found that “the entire Guidance, from beginning to end—except the last paragraph—reads like a ukase. It commands, it requires, it orders, it dictates.” 208 F.3d at 1022-23. Similarly, the DOJ/DOE Letter uses the words “must,” and various forms of the word “require” numerous times throughout the document. Am. Compl. Ex. J (DOJ/DOE Letter), ECF No. 6-10.
Plaintiffs to risk the consequences of noncompliance. *McCarthy*, 758 F.3d at 252; *Catawba Cty.*, 571 F.3d at 33–34; *Gen. Elec. Co.*, 290 F.3d at 382; see also *Nat’l Ass’n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005). Plaintiffs, therefore, are legally affected in a way they were not before Defendants issued the Guidelines. The Guidelines are, in practice, legislative rules—not just interpretations or policy statements because they set clear legal standards. *Panhandle Producers and Royalty Owners Ass’n v. Econ. Regulatory Admin*, 847 F.2d 1168, 1174 (5th Cir. 1988) (stating that a substantive rule is one that establishes standards of conduct that carry the force of law). As such, Defendants should have complied with the APA’s notice and comment requirement. 5 U.S.C. § 553; *Nat’l Min. Ass’n*, 758 F.3d at 251; *Chrysler Corp.*, 441 U.S. at 301–03. Permitting the definition of sex to be defined in this way would allow Defendants to “create de facto new regulation” by agency action without complying with the proper procedures. *Christensen v. Harris Cty.*, 529 U.S. 576, 586–88 (2000). This is not permitted.

Accordingly the Court finds that Plaintiffs would likely succeed on the merits that Defendants violated the notice and comment requirements of the APA.

*ii. Agency Action Contrary to Contrary to Law (5 U.S.C. § 553)*

Plaintiffs contend that Defendants’ Guidelines are contrary to the statutory and regulatory text, Congressional intent, and the plain meaning of the term. Mot. Injunction 14, ECF No. 11. When an agency acts contrary to law, its action must be set aside. 5 U.S.C. § 706(2)(A). Plaintiffs argue that Defendants’ interpretation of the meaning of the term “sex” as set out in the Guidelines contradicts its meaning in Title VII, Title IX, and § 106.33. They assert “the meaning of the terms ‘sex,’ on the one hand, and ‘gender identity,’ on the other, both now and at the time
Titles VII and IX were enacted, forecloses alternate constructions.” Mot. Injunction 16, ECF No. 11 (citing Thomas Jefferson Univ., 512 U.S. at 512. They also allege that the ordinary meaning of the term controls. Id. at 17 (citing Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995)).

Defendants contend that Plaintiffs’ arguments for legislative history and intent at the time of passage are irrelevant. Hr’g Tr. 33 (“But it may very well be that Congress did not intend the law to protect transgender individuals. [But,] . . . as the Supreme Court has made it absolutely clear in Oncale, the fact that Congress may have understood the term sex to mean anatomical sex at birth is largely irrelevant.”) Defendants also allege that “Title IX and Title VII should be construed broadly” to protect any person, including transgendered persons, from discrimination. Hr’g Tr. 33–34.

The starting point to analyze this dispute begins with the actual text of the statute or regulation, where the words should be given their ordinary meaning. Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003) (quoting Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253–54 (1992)). When the words are unambiguous, the “judicial inquiry is complete.” Id. (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)). The pertinent statutory text at issue in this case provides: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .” 20 U.S.C. § 1681. Title IX expressly permits educational institutions to maintain separate living facilities for the different sexes. Id. at § 1686. The other language at issue comes from one of the DOE regulations promulgated to implement Title IX, which states: “A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of
one sex shall be comparable to such facilities provided for students of the other sex.” 34 C.F.R. § 106.33.

Defendants assert the Guidelines simply provide clarity to an ambiguity in this regulation, and that ambiguity is how to define the term sex when dealing with transgendered students.Defs.’ Resp. 20, ECF No. 40. Because they contend the regulation is ambiguous, Defendants argue “[f]oundational principles of administrative law instruct [the Court] to give controlling weight to [their] interpretations of their own ambiguous regulations unless [they are] plainly erroneous.” Id.

Plaintiffs contend the text of both Title VII and Title IX is not ambiguous. Mot. Injunction 16–19, ECF No. 11. They argue when Congress passed both statutes it clearly intended sex to be defined based on the biological and anatomical differences between males and females. See id. at 17–18 (citing legislative history and common understanding of its meaning at the time of passage). Plaintiffs likewise assert § 106.33 is unambiguous, for the same reason, as it was designed to separate students based on their biological differences because they have a privacy right to avoid exhibiting their “nude or partially nude body, genitalia, and other private parts” before members of the opposite sex. Pls.’ Reply 8–9, ECF No. 52. Based on this, they argue Defendants have manufactured an ambiguity so they can then unilaterally change the law to suit their policy preferences. Id. at 8.

iii. Auer Deference

Because Defendants assert their regulation is ambiguous, the Court must determine whether their interpretation is entitled to deference. Defendants contend an agency may interpret its own regulation by issuing an opinion letter or other guidance which should be given controlling weight if: (1) the regulation is ambiguous; and (2) the interpretation is not plainly
erroneous or inconsistent with the regulation.Defs.’ Resp. 21, ECF No. 40;Christensen, 529 U.S. at 588 (“Auer deference is warranted only when the language of the regulation is ambiguous.”);Auer v. Robbins, 519 U.S. 452, 461 (1997) (“[An agency’s] interpretation of [its regulation] is, under our jurisprudence, controlling unless ‘plainly erroneous or inconsistent with the regulation.’”) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)).

This deference is only warranted however when the language of the regulation is ambiguous. Moore v. Hannon Food Services, Inc., 317 F.3d 489, 495 (5th Cir. 2003). Legislation is ambiguous if it is susceptible to more than one accepted meaning. Calix v. Lynch, 784 F.3d 1000, 1005 (5th Cir. 2015). “Multiple accepted meanings do not exist merely because a statute’s ‘authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope.’” Id. (citing Moore, 317 F.3d at 497 and applying this rule of construction to regulations).

If a regulation is not ambiguous, the agency’s interpretation may be considered but only according to its persuasive power. Moore, 317 F.3d at 495. “Thus, a court must determine whether ‘all but one of the meanings is ordinarily eliminated by context.’” Calix, 784 F.3d at 1005 (quoting Deal v. United States, 508 U.S. 129, 132–33 (1993)). When a term is not defined, courts may generally give the words their common and ordinary meaning in accordance with legislative intent. D.C. Bd. of Elections & Ethics v. D.C., 866 A.2d 788, 798 n.18 (D.C. 2005) (“In finding the ordinary meaning, ‘the use of dictionary definitions is appropriate in interpreting undefined statutory terms.’”); 1618 Twenty–First St. Tenants Ass’n, Inc. v. Phillips Collection, 829 A.2d 201, 203 (D.C. 2003) (same). Furthermore, “an agency is not entitled to deference when it offers up an interpretation of [a regulation] that [courts] have already said to be
unambiguously foreclosed by the regulatory text.” *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 399 (5th Cir. 2014) (citing *Christensen*, 529 U.S. at 588).

Based on the foregoing authority, the Court concludes § 106.33 is not ambiguous. It cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth. *See* 34 C.F.R. § 106.33; 45 Fed. Reg. 30955 (May 9, 1980); *Thomas Jefferson Univ.*, 512 U.S. at 512 (holding that intent determined at the time the regulations are promulgated). It appears Defendants at least tacitly agree this distinction was the intent of the drafter. *See* Holder Memo 1, ECF No. 6-3 (“The federal government’s approach to this issue has also evolved over time.”); *see also* Hr’g Tr. 33 (“[I]t may very well be that Congress did not intend the law to protect transgender individuals.”).

Additionally, it cannot reasonably be disputed that DOE complied with Congressional intent when drawing the distinctions in § 106.33 based on the biological differences between male and female students. Pls.’ Mot. Injunction 17–18, ECF No. 11 (citing legislative history and common understanding of its meaning at the time of passage). As the support identified by Plaintiffs shows, this was the common understanding of the term when Title IX was enacted, and remained the understanding during the regulatory process that led to the promulgation of § 106.33. *See* Pls.’ Am. Compl. ¶¶ 8–13, ECF No. 6; *see also* G.G., 822 F.3d at 736 (Niemeyer, J., dissenting) (providing comprehensive list of various definitions from the 1970s which demonstrated “during that time period, virtually every dictionary definition of ‘sex’ referred to the physiological distinctions between males and females, particularly with respect to their reproductive functions.”). This undoubtedly was permitted because the areas identified by the regulations are places where male and female students may have to expose their “nude or
partially nude body, genitalia, and other private parts,” and separation from members of the opposite sex, those whose bodies possessed a different anatomical structure, was needed to ensure personal privacy. See G.G., 822 F.3d at 723.

This conclusion is also supported by the text and structure of the regulations. Section 106.33 specifically permits educational institutions to provide separate toilets, locker rooms, and showers based on sex, provided that the separate facilities are comparable. The sections immediately preceding and following § 106.33 likewise permit educational institutions to separate students on the basis of sex. For instance, § 106.32 permits educational institutions to provide separate housing for students on the basis of sex, again so long as the separate housing is comparable, and § 106.33 permits separate educational sessions for boys and girls when dealing with instruction concerning human sexuality. 34 C.F.R. §§ 106.32, 106.34. Without question, permitting educational institutions to provide separate housing to male and female students, and separate educational instruction concerning human sexuality, was to protect students’ personal privacy, or discussion of their personal privacy, while in the presence of members of the opposite biological sex. G.G., 822 F.3d at 723. Accordingly, this interpretation of § 106.33 is consistent with the structure and purpose of the regulations.

Based on the foregoing, the Court concludes § 106.33 is not ambiguous. Given this regulation is not ambiguous, Defendants’ definition is not entitled to Auer deference, meaning it does not receive controlling weight. Auer, 519 U.S. at 461. Instead, Defendants’ interpretation is entitled to respect, but only to the extent it has the power to persuade. Christensen, 529 U.S. at 587. In his dissent in G.G., Judge Niemeyer characterized Defendants’ definition as “illogical and unworkable.” G.G., 822 F.3d at 737. He outlined a number of scenarios, which need not be repeated here, where the Defendants’ interpretation only causes more confusion for educational
institutions.  *Id.*  A definition that confuses instead of clarifies is unpersuasive. Additionally, since this definition alters the definition the agency has used since its enactment, its persuasive effect is decreased.  See *Morton*, 415 U.S. at 237; see also *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (holding that an agency announcement of an interpretation preceded by a very lengthy period with no interpretation indicates agency considered prior practice lawful). Accordingly, the Court concludes Defendants’ interpretation is insufficient to overcome the regulation’s plain language and for the reasons stated above is contrary to law.

2. **Threat of Irreparable Harm**

The Court next addresses irreparable harm. Defendants allege that Plaintiffs have not identified any pending or imminent enforcement action, and the Guidelines “expose [P]laintiffs to no new liability or legal requirements.”  Defs.’ Resp. 7, ECF No. 40 (citing *Google v. Hood*, 822 F.3d 212, 227 (5th Cir. 2016).  Defendants argue that, “[a]lthough [P]laintiffs do identify a small number of specific ‘policies and practices’ that they claim are in conflict with [D]efendants’ interpretation of Title IX, they have identified no enforcement action being taken against them—now or in the future—as a result of these polices.”  Defs.’ Resp. 8–9, ECF No. 40. They assert that even if DOE were “to decide to bring an administrative enforcement action against plaintiffs for noncompliance . . . at some point in the future, [P]laintiffs still would be unable to make a showing of irreparable harm because they would have an opportunity to challenge the interpretation in an administrative process prior to any loss of federal funds.”  *Id.* at 9 (quoting *Morgan v. Fletcher*, 518 F.2d 236, 240 (5th Cir. 1975)).

Plaintiffs counter that “Defendants’ actions cause irreparable harm by forcing policy changes, imposing drastic financial consequences, and usurping [Plaintiffs’] legitimate authority.”  Mot. Injunction 21, ECF No. 11. According to Plaintiffs, Defendants’ actions
present “a Hobson’s choice between violating federal rules (labeled as regulations, guidance, and interpretations) on the one hand, and transgressing longstanding policies and practices, on the other.” Id. Thus, Plaintiffs characterize Defendants’ administrative letters and notices as “mandates” which effectively carry the force of law. Id. Plaintiffs also allege that Defendants’ rules are “irreconcilable with countless polices regarding restrooms, showers, and intimate facilities,” while threatening to override the practices of “countless schools,” which had previously been allowed to differentiate intimate facilities on the basis of biological sex consistent with Title IX, federal regulations, and laws protecting privacy and dignity. Id. (citing Mot. Injunction, Ex. P. (Thweatt Dec.) 5–7, ECF No. 11-2).

Defendants’ appear to concede the Guidelines conflict with Plaintiffs’ policies and practices, see Defs.’ Resp. 8–9; ECF No. 40 (“[P]laintiffs do identify a small number of specific ‘policies and practices’ . . . .”); however, they argue that additional threats of enforcement are required before irreparable harm exists. Case law does not support this contention. Instead the authorities hold, “any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” See Coalition for Econ. Equity v. Wilson, 122 F.3d 718, 719 (9th Cir. 1997) (stating, whenever an enactment of a state’s people is enjoined, the state suffers irreparable injury); accord Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 419 (5th Cir. 2013) (“When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.”); Maryland v. King, 133 S. Ct. 1, 3 (2012) (citing New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (“[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”).
As Defendants have conceded the conflict between the Guidelines and Plaintiffs’ policies, and Plaintiffs have identified a number of statutes that conflict, the Court concludes Plaintiffs have sufficiently demonstrated a threat of irreparable harm. 20

3. Balance of Hardships and Public Interest 21

The Court next considers whether the threatened injury to the Plaintiffs outweighs whatever damage the proposed injunction may cause Defendants and its impact on the public interest. Nichols, 532 F.3d at 372. Plaintiffs risk either running afoul of Defendants’ Guidelines or complying and violating various state statutes and, in some cases, their state constitutions. Mot. Injunction 21, ECF No. 11. Plaintiffs also state that they likely risk legal action from parents, students, and other members of their respective communities should they actually comply with Defendants’ Guidelines. Defendants argue these harms do not outweigh the damage that granting the injunction will cause because it will impede their ability to eliminate discrimination in the workplace and educational settings, prevent them from definitively explaining to the public the rights and obligations under these statutes, and it would have a deleterious effect on the transgendered.

The Court concludes Plaintiffs have established that the failure to grant an injunction will place them in the position of either maintaining their current policies in the face of the federal government’s view that they are violating the law, or changing them to comply with the Guidelines and cede their authority over this issue. See DOJ/DOE Letter, ECF No. 6-10 (“This letter summarizes a school’s Title IX obligations regarding transgender students and explains

---

20 Defendants also contend the injunction should be denied because Plaintiffs delayed in seeking this relief. The DOJ/DOE Letter is dated May 13, 2016. This case was filed very soon after on May 25, 2016, and the parties reached an agreement on a briefing schedule to consider this request. The Court concludes Plaintiffs did not fail to act timely.

21 The Parties address the third and fourth Canal factors together, therefore they are treated together in this Order as well.
how [DOE and DOJ] evaluate a school’s compliance with these obligations.”). Plaintiffs’ harms in this regard outweigh those identified by Defendants, particularly since the Supreme Court stayed the Fourth Circuit’s decision supporting Defendants’ position, and a decision from the Supreme Court in the near future may obviate the issues in this lawsuit. As a result, Plaintiffs interests outweigh those identified by Defendants. Further, Defendants have not offered evidence that Plaintiffs are not accommodating students who request an alternative arrangement. Indeed, the school district at issue in G.G. provided its student an accommodation.

Accordingly, the Court finds that Plaintiffs have met their burden and these factors weigh in favor of granting the preliminary injunction.

C. Scope of the Injunction

Finally, the Court must determine the scope of the injunction. Plaintiffs seek to apply the injunction nationwide. Mot. Injunction 3, ECF No. 11; Pls.’ Reply 13, ECF No. 52. Defendants counter that the injunction should be narrowly tailored to Plaintiffs in the Fifth Circuit. Defs.’ Resp. 28, ECF No. 40.

“Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.” Califano v. Yamasaki, 442 U.S. 682, 705 (1979). “[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.” Id. at 702 (permitting a nationwide injunction because the class action was proper and finding that a nationwide injunction was not more burdensome than necessary to redress plaintiffs’ complaints).

The Court concludes this injunction should apply nationwide. As the separate facilities provision in § 106.33 is permissive, states that authorize schools to define sex to include gender
identity for purposes of providing separate restroom, locker room, showers, and other intimate facilities will not be impacted by it. Those states who do not want to be covered by this injunction can easily avoid doing so by state law that recognizes the permissive nature § 106.33. It therefore only applies to those states whose laws direct separation. However, an injunction should not unnecessarily interfere with litigation currently pending before other federal courts on this subject regardless of the state law. As such, the parties should file a pleading describing those cases so the Court can appropriately narrow the scope if appropriate.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs’ application for a preliminary injunction (ECF No. 11) should be and is hereby GRANTED. See Fed. R. Civ. P. 65. It is FURTHER ORDERED that bond is set in the amount of one hundred dollars.22 See Fed. R. Civ. P. 65(c). Defendants are enjoined from enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions. Further, while this injunction remains in place, Defendants are enjoined from initiating, continuing, or concluding any investigation based on Defendants’ interpretation that the definition of sex includes gender identity in Title IX’s prohibition against discrimination on the basis of sex. Additionally, Defendants are enjoined from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order. All parties to this cause of action must maintain the status quo as of the date of issuance of this Order and this preliminary injunction will remain in effect until the Court rules on the merits of this claim, or until further direction from the Fifth Circuit Court of Appeals. This preliminary injunction shall be binding on Defendants and any officers, agents, servants, employees, attorneys, or other

22 Neither party addressed the appropriate bond amount should an injunction be entered.
persons in active concert or participation with Defendants, as provided in Federal Rule of Civil Procedure Rule 65(d)(2).

SO ORDERED on this 21st day of August, 2016.

[Signature]

Reed O'Connor
UNITED STATES DISTRICT JUDGE
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA; STATE OF ARKANSAS, ARKANSAS DIVISION OF YOUTH SERVICES; STATE OF KANSAS; ATTORNEY GENERAL BILL SCHUETTE, FOR THE PEOPLE OF THE STATE OF MICHIGAN; STATE OF MONTANA; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF WYOMING,

Plaintiffs,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR., in his Official Capacity as United States Secretary of Education; UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, in her Official Capacity as Attorney General of the United States; VANITA GUPTA, in her Official Capacity as Principal Deputy Assistant Attorney General; UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; JENNY R. YANG, in her Official Capacity as Chair of the United States Equal Employment Opportunity Commission; UNITED STATES DEPARTMENT OF LABOR; THOMAS E. PEREZ, in his Official Capacity as United States Secretary of Labor; DAVID MICHAELS, in his Official Capacity as the Assistant Secretary of Labor for the Occupational Safety and Health Administration,

Defendants.

Case No. _________

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
INTRODUCTION

The State of Nebraska and nine additional States seek a declaration that the Department of Education (“ED”) has violated the Administrative Procedure Act and numerous other federal laws by rewriting the unambiguous term “sex” under Title VII and Title IX to include “gender identity,” thereby seeking to control even local school determinations regarding how best to designate locker room and bathroom assignments. Without engaging in any rulemaking procedures—and in violation of the plain text and longstanding meaning of Titles VII and IX—ED issued a joint letter with the Department of Justice (“DOJ”) on May 13, 2016, declaring “significant guidance.” The letter confirmed that the federal executive branch has formalized its new definition of the term “sex” and threatened enforcement action against any of the more than 100,000 elementary and secondary schools that receive federal funding if those schools choose to provide students with showers, locker rooms, and restrooms designated by biological sex, consistent with one’s genes and anatomy.

Plaintiffs include States from all regions of the country that authorize, support, supervise, or operate school systems and other institutions subject to ED’s final agency action and enforcement threat. Plaintiffs stand united behind the constitutional principle that it is the duty of Congress to legislate, while it is the duty of the Executive Branch, including its various federal agencies, to administer and enforce the laws that Congress enacts. Defendants lack authority to amend those laws by executive fiat and to threaten Plaintiffs and their
subdivisions with the loss of billions of dollars in federal education funding if
Plaintiffs continue to abide by the laws Congress actually passed.

I. PARTIES

A. Plaintiffs

1. Plaintiff State of Nebraska is subject to Title VII as the employer of
thousands of people statewide. The State of Nebraska also oversees and controls
several agencies that receive federal funding subject to Title IX. For example, the
Nebraska Correctional Youth Facility ("NCYF"), Geneva North School, and Kearney
West School are operated by the State of Nebraska and receive federal funding
subject to Title IX. For federal fiscal year 2015-2016, the Nebraska Department of
Correctional Services has received to date $125,107 in federal education funds. For
federal fiscal year 2015-2016, Geneva North received $59,584.70 in federal education
funds and Kearney West received $143,407.45 in federal education funds.
Additionally, for federal fiscal year 2015-2016, the Nebraska Department of
Education received $328,604,163 in federal funding for K-12 education, of which
$308,534,665 was distributed to local school districts in the State of Nebraska. For
the federal fiscal year 2016-2017, the Nebraska Department of Education estimates
that it will receive federal funding in the amount of $332,421,410, of which
$312,215,578, will be distributed to local school districts.

2. As Title IX has expressly permitted until now, Nebraska law allows for
school districts to adopt policies which maintain separate locker room and restroom
Nebraska Equal Opportunity in Education Act does not prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes.”

3. Plaintiff States of Arkansas, Kansas, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota and Wyoming are similarly situated to the State of Nebraska in that one or more of the following circumstances is present: (1) they are employers covered by Title VII, (2) their agencies and departments are subject to Title IX, (3) their agencies and departments receive other federal grant funding that requires, as a condition of the grant, compliance with the Title IX provisions at issue in this lawsuit, and/or (4) they have public educational institutions, school districts, departments, or agencies in their State that are subject to Title IX.

4. For instance, Arkansas’ Division of Youth Services also operates residential treatment centers for juveniles adjudicated delinquent, including the Mansfield Juvenile Treatment Center, the Mansfield Juvenile Treatment Center for Girls, and the Arkansas Juvenile Assessment and Treatment Center. Additionally, Arkansas operates several other specialized schools, including the Arkansas School for Mathematics, Science, and the Arts, the Arkansas School for the Blind and Visually Impaired, and the Arkansas School for the Deaf. Those institutions all receive federal funding subject to Title IX.

5. The State of Wyoming, through its Department of Family Services, directly operates residential treatment centers for juveniles adjudicated delinquent,
the Wyoming Boys’ School and Wyoming Girls’ School. Wyoming also plans for and constructs all K-12 public school facilities through a centralized state agency, the school facilities division of the state construction department. These entities are subject to Title IX.

6. The State of South Carolina received approximately $870 million in federal education funds in federal fiscal year 2015-2016.

7. The State of Kansas received $534.7 million in federal education funds during federal fiscal year 2015-2016, of which $511 million was distributed to local school districts in the State of Kansas. For federal fiscal year 2016-2017, Kansas estimates that the amounts received from the federal government and distributed to local school districts will be approximately the same as in the 2015-2016 federal fiscal year. Kansas also operates two specialized schools, the Kansas School for the Deaf and the Kansas State School for the Blind that receive federal funding subject to Title IX. For federal fiscal year 2015-2016, the Kansas School for the Deaf received $325,826 in federal education funds, and the Kansas State School for the Blind received $517,901 in federal education funds. Kansas estimates that both schools will receive approximately the same amount in federal education funds in the 2016-2017 federal fiscal year. In addition, Kansas’s Department of Corrections operates two juvenile correctional facilities, the Kansas Juvenile Correctional Complex and the Larned Juvenile Correctional Facility. The Larned facility houses only males. Both facilities provide education services including high school diploma and general education development (“GED”) programs. Each of these facilities receives federal
funding subject to Title IX. The Kansas Constitution delegates to the Kansas State Board of Education the “general supervision of public schools, educational institutions and all the educational interests of the state, except educational functions delegated by law to the state board of regents.” Kan. Const. art. 6, § 2(a). On June 14, 2016, the Kansas State Board of Education officially opposed the May 13, 2016 “guidance” issued by ED and DOJ, and unanimously adopted a response, which states in part: “The recent directive from the civil rights offices of the United States Department of Education and the U.S. Department of Justice regarding the treatment of transgender students removes the local control needed to effectively address this sensitive issue. We must continue to provide our schools the flexibility needed to work with their students, families and communities to effectively address the needs of the students they serve.” Kansas State Department of Education, Kansas State Board of Education statement in response to “Dear Colleague” letter on Title IX federal guidance. http://bit.ly/28LzQ1Q.

B. Defendants

8. Defendant ED is an executive agency of the United States and responsible for the administration and enforcement of Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 (“Title IX”).

9. Defendant John B. King, Jr., is the United States Secretary of Education. In this capacity, he is responsible for the operation and management of ED. He is sued in his official capacity.
10. Defendant DOJ is an executive agency of the United States and responsible for the enforcement of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, known as Title VII. DOJ also has the authority to bring actions enforcing Title IX. Exec. Order No. 12250, 28 C.F.R. Part 41 app. A (1980).

11. Defendant Loretta A. Lynch is the Attorney General of the United States and head of DOJ. She is sued in her official capacity.

12. Defendant Vanita Gupta is Principal Deputy Assistant Attorney General at DOJ and acting head of the Civil Rights Division of DOJ. She is assigned the responsibility to bring enforcement actions under Title VII and Title IX. 28 C.F.R. §42.412. She is sued in her official capacity.

13. Defendant Equal Employment Opportunity Commission (“EEOC”) is a federal agency that administers, interprets, and enforces certain laws, including Title VII. EEOC is, among other things, responsible for investigating employment and hiring discrimination complaints.

14. Defendant Jenny R. Yang is the Chair of the EEOC. In this capacity, she is responsible for the administration and implementation of policy within EEOC, including the investigating of employment and hiring discrimination complaints. She is sued in her official capacity.

15. Defendant United States Department of Labor (“DOL”) is the federal agency responsible for supervising the formulation, issuance, and enforcement of rules, regulations, policies, and forms by the Occupational Safety and Health Administration (“OSHA”).
16. Defendant Thomas E. Perez is the United States Secretary of Labor. In this capacity he is authorized to issue, amend, and rescind the rules, regulations, policies, and forms of OSHA. He is sued in his official capacity.

17. Defendant David Michaels is the Assistant Secretary of Labor for OSHA. In this capacity, he is responsible for assuring safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance. He is sued in his official capacity.

II. JURISDICTION AND VENUE

18. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this suit concerns Defendants’ unlawful revision of the term “sex” under multiple provisions of the United States Code and the new obligations Defendants are imposing on Plaintiffs under Title VII and Title IX. This Court also has jurisdiction to compel an officer of the United States or any federal agency to perform his or her duty pursuant to 28 U.S.C. § 1361.

19. Venue is proper in the Federal District Court of Nebraska pursuant to 28 U.S.C. § 1391 because the United States, several of its agencies, and several of its officers in their official capacity are Defendants, and because a substantial part of the events or omissions giving rise to Plaintiffs’ claims occurred in this District.

20. This Court is authorized to award the requested declaratory relief under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, and the Declaratory

III. STATEMENT OF FACTS

A. Nebraska Law

21. Nebraska law allows for school districts to adopt policies which maintain separate locker room and restroom facilities for different sexes. Specifically, Neb. Rev. Stat. § 79-2,124 (Reissue 2014) provides: “The Nebraska Equal Opportunity in Education Act does not prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes.” Title IX regulations issued by ED likewise expressly allow recipients of federal funding to “provide separate toilet, locker room, and shower facilities on the basis of sex,” provided that the facilities provided for “students of one sex” are “comparable” to the facilities provided for “students of the other sex.”

22. Nebraska law provides school districts with the flexibility to fashion policies which weigh the dignity, privacy, and safety concerns of all students, while accommodating the legitimate interests of individuals who self-identify as having a gender that is the opposite of their sex.

B. The Meaning of Title VII and Title IX

24. Eight years later, Congress passed Title IX of the Education Amendments of 1972. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...” 20 U.S.C. § 1681.

25. The regulations implementing Title IX provide, in relevant part, that “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular...or other education program or activity operated by a recipient which receives Federal financial assistance.” 34 C.F.R. § 106.31(a).

26. The implementing regulations also provide that a funding recipient shall not, on the basis of sex: “Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; ... Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; ... Deny any person any such aid, benefit, or service; ... Subject any person to separate or different rules of behavior, sanctions, or other treatment; ...[or] Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.” 34 C.F.R. § 106.31(b).

27. Nothing in Title IX’s text, structure, legislative history, or accompanying regulations address gender identity.

28. The term “gender identity” does not appear in the text of Title IX.
29. The term “gender identity” does not appear in the regulations accompanying Title IX.

30. The legislative history of Title IX reveals no intent to include “gender identity” within the meaning of “sex.”

31. In fact, the term “sex,” as used in Title IX and its implementing regulations, means male and female, under the traditional binary conception of sex consistent with one’s genes and anatomy. Title IX specifically allows institutions to differentiate intimate facilities by sex. 20 U.S.C. § 1686 (“Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.”). Section 1686, which contains language substantially similar to Neb. Rev. Stat. § 79-2,124 (Reissue 2014), was added to address concerns that Title IX would force a college to allow women in dormitories designated for only men, and vice versa.

32. Existing federal law does not forbid schools to provide students with showers, locker rooms, or restrooms designated by biological sex, consistent with one’s genes and anatomy.

33. Because Title IX only covers “sex,” not “gender identity,” various attempts have been made to amend the law. For example, since 2011, legislation has been introduced numerous times in the Senate that would protect against discrimination based on gender identity. This legislation has failed to pass every year it has been introduced.
34. As this statutory and legislative history displays, Congress allowed for intimate living facilities separated by sex, and Title IX regulations, too, allow for separate showers, locker rooms, restrooms and changing areas for the different sexes. Like the Senate, the House has repeatedly declined invitations to expand Titles VII and IX to cover gender identity.” For example, in 2007, the “Employment Non-Discrimination Act” was introduced in the House of Representatives, which would have expanded Title VII’s scope to include gender identity. Just like the proposals the Senate has declined to adopt, this legislation has failed to pass every year it has been introduced.

C. The New Obligations Imposed by Defendants Under Title VII and Title IX.

35. The progression leading to the new obligations Defendants are imposing under Title VII and Title IX is recent in origin and constitutes a complete reversal of the long-accepted understanding of the term “sex”:

- In 2005, DOJ took the position that, as used in Title VII, “sex” unambiguously means male and female, and thus concluded that it prohibits discrimination against men because they are men and against women because they are women. It expressly determined that “sex” for purposes of Title VII does not include “transgender status” and nor, therefore, gender identity. See Defendant’s Motion to Dismiss at 6, Schroer v. Billington, No. 05-1090 (August 1, 2005).

- In 2014, ED’s Office of Civil Rights (“OCR”) stated 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.” OCR, Questions and Answers on Title IX and Sexual Violence B-2 (Apr. 29, 2014).

- Attorney General Eric Holder then issued a memorandum in 2014 concluding that Title VII’s prohibition of sexual discrimination “encompasses discrimination based on gender identity, including

- Then, in 2015, OSHA announced that it had published “guidance” for employers regarding restroom access for individuals who identify with the sex opposite their own. Press Release, OSHA, *OSHA publishes guide to restroom access for transgender workers* (June 1, 2015), available at https://www.osha.gov/newsrelease/trade-20150601.html. OSHA’s so-called guidance concluded that “all employees should be permitted to use the facilities that correspond with their gender identity,” which is “internal” and could be “different from the sex they were assigned at birth.” OSHA, *A guide to Restroom Access for Transgender Workers* (2015).

36. The new obligations Defendants are imposing require that access be provided to all showers, locker rooms, and restrooms for individuals who self-identify as that sex. There are no limits whatsoever on how or why an individual so identifies.

37. On May 9, 2016, DOJ acted under ED’s redefinition of federal law by suing North Carolina and its University System, claiming that they were in violation of Title VII and Title IX based on the new obligations Defendants are imposing under Title VII and Title IX.

**D. The DOJ/ED Dear Colleague Letter**

38. On May 13, 2016, DOJ and ED issued a joint “Dear Colleague Letter” (“Letter”), which set forth the new obligations Defendants seek to impose under Title IX as applicable to more than 100,000 elementary and secondary schools that receive federal funding. *Dear Colleague Letter on Transgender Students, available at* http://1.usa.gov/1TanAGJ.

39. ED has communicated this Letter to school districts nationwide.
40. The Letter directs that Title IX’s use of the word “sex” now also means “gender identity.” Further, the Letter threatens that schools that interpret Title IX as it has been understood by regulators and courts alike since 1972 will face legal action and the loss of federal funds. The Letter concerns “Title IX obligations regarding transgender students” and provides insight as to the manner in which ED and DOJ will evaluate how schools “are complying with their legal obligations” (emphasis added). It refers to an accompanying document collecting examples from school policies and recommends that school officials comb through the document “for practical ways to meet Title IX’s requirements” (same). Indeed, the Letter amounts to “significant guidance” (emphasis in original).

41. According to the Letter, schools must now treat a student’s “gender identity” as the student’s “sex” for purposes of Title IX compliance. “Gender identity,” the Letter explains, refers to a person’s “internal sense of gender,” without regard to sex (i.e., anatomy or genetics). Gender identity can be the same as a person’s sex, or different, and it can change over time.

42. ED—the agency with primary enforcement authority over Title IX—has concluded that, although recipients may provide separate showers, locker rooms, and restrooms for males and females, when a school does so, it must treat individuals consistent with their gender identity, rather than their biological or genetic sex, with no regard for how or why the individual has so identified.

43. Defendants are treating these new rules, regulations, and guidance as binding on all schools that are subject to Title IX.
44. Defendants’ new rules, regulations, and guidance constitute final agency action. *E.g.*, *Bennett v. Speaker*, 520 U.S. 154, 177-78 (1997) (an agency action is final when it “mark[s] the ‘consummation’ of the agency’s decision making process” and [is] one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow[,]”); *Ciba-Geigy Corp. v. United States EPA*, 801 F.2d 430, 438 n.9 (D.C. Cir. 1986) (“[A]n agency may not avoid judicial review merely by choosing the form of a letter to express its definitive position on a general question of statutory interpretation.”).

45. Defendants’ new rules, regulations, and guidance were not conditioned on the basis of site-specific facts.

46. Defendants’ new rules, regulations, and guidance impose new obligations that never previously existed.

47. Defendants’ new rules, regulations, and guidance were enacted without following the notice and comment procedures that the APA requires.

**E. Federal Education Funding**

48. The Letter bluntly states that allowing students to use private facilities consistent with their gender identity, irrespective of their sex, is “a condition of receiving federal funds.” This loss of all federal funding for State and local education programs would have a major effect on State education budgets. All 50 States receive a share of the $69 billion in annual funding that the Federal Government directs to State and local education. ED, *Funds for State Formula-Allocated and Selected Student Aid Programs*, U.S. Dep’t of Educ. Funding,
available at http://1.usa.gov/1BMc2yb (charts listing the amount of federal education funding by program nationally and by state).

49. ED estimates that the federal government will spend over $36 billion in State and local elementary and secondary education, and over $30 billion in State and local postsecondary education programs in 2016.

50. Not counting funds paid directly to state education agencies, or funds paid for non-elementary and secondary programs, the national amount of direct federal funding to public elementary and secondary schools alone exceeds $55 billion on average annually—which amounts to 9.3% of the average State’s total revenue for public elementary and secondary schools, or $1,128 per pupil.

F. Current and impending federal enforcement against Plaintiffs.

51. The State of Nebraska operates NCYF, Geneva North School, and Kearney West School.

52. Kearney West High School operates as an all-male special purpose junior/senior high school at the Youth Rehabilitation and Treatment Center at Kearney.

53. Geneva North High School operates as an all-female special purpose school at the Youth Rehabilitation and Treatment Center at Geneva.

54. At Kearney West and Geneva North, accommodations are made for students who self-identify as the opposite sex. Such students are provided private shower, locker room, and restroom facilities.
55. The United States Attorney General has indicated the Department of Justice will enforce the new obligations under Title VII and Title IX.

56. Defendants have indicated they will enforce these new obligations under Title IX by direct and immediate action against entities, such as NCYF, Geneva North School, and Kearney West School that do not adhere to its new obligations.

57. Indeed, ED has already enforced these new obligations under Title IX (in addition to the above-referenced pending action in North Carolina) on numerous occasions. ED’s Office of Civil Rights, has included on its Web site a List of OCR Case Resolutions and Court Filings. See http://1.usa.gov/1YpXbFa.

58. For instance, on June 21, 2016, ED determined that a public elementary school (Dorchester County School District Two) in South Carolina violated Title IX when it refused to allow a male student who identified as female to use the school's multiple-occupancy girls’ restrooms, even though the elementary school made special accommodations for the student to use several single-occupancy restrooms throughout the building. ED concluded that the school discriminated against the student on the basis of sex in contravention of Title IX, including its implementing regulations that allow covered entities to provide separate restrooms on the basis of sex. Because ED determined that “sex” means “gender identity” for purposes of Title IX compliance, and therefore that the student was similarly situated to any other student who identified as female, it required the school to enter a Resolution Agreement promising to allow the biological male student to use
the girls’ restrooms – and to participate in all of the schools programs and activities – in accord with that student’s gender identity.

59. ED and DOJ have informed Plaintiffs and their school districts that failure to conform to the executive branch’s new mandate will bring adverse consequences, including a loss of federal education funding.

60. Because of the final agency action and threat of enforcement from the federal government, various Plaintiffs are impelled immediately and significantly to modify behavior that was lawful before the new obligations, but are deemed unlawful by the federal government under the new obligations.

61. Because of the final agency action and threat of enforcement from the federal government, various Plaintiffs are coerced to immediately budget and reallocate resources now to prepare for the loss of future federal funding.

IV. CLAIMS FOR RELIEF

COUNT ONE

Relief Under 5 U.S.C. § 706 (APA) that the new Rules, Regulations, and Guidance at Issue Are Being Imposed Without Observance of Procedure Required by Law

62. The allegations in paragraphs 1 through 61 are reincorporated herein.

63. The APA requires this Court to hold unlawful and set aside any agency action taken “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).
64. Defendants are “agencies” under the APA, id. § 551(1), and the new rules, regulations, and guidance described herein are “rules” under the APA, id. §§ 551(4), 701(b)(2), and constitute “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” Id. § 704.

65. Defendants have promulgated new rules, regulations, and guidance, unilaterally declaring that Title IX’s term, “sex,” means, or includes, “gender identity.”

66. Defendants have given these rules the full force of law.

67. The new rules, regulations, and guidance impose new obligations on Plaintiffs.

68. With exceptions that are not applicable here, the APA requires that any “rules which do not merely interpret existing law or announce tentative policy positions but which establish new policy positions that the agency treats as binding must comply with the APA’s notice-and-comment requirements, regardless of how they initially are labeled.” 72 Fed. Reg. 3433.

69. The Supreme Court has held that all legislative rules—which are those having the force and effect of law and are accorded weight in agency adjudicatory processes—must go through the notice-and-comment requirements. *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1204 (2015).

70. At minimum, notice-and-comment rulemaking requires that ED (1) issue a public notice of the proposed rule, most often by publishing notice in the
Federal Register, (2) give all interested parties a fair opportunity to submit comments on the proposed rule as well as evaluate and respond to significant comments received, and (3) include in the final rule’s promulgation a concise statement of the rule’s basis and purpose.

71. Under Title IX, all final rules, regulations, and orders of general applicability that ED issues must be approved by the President of the United States. 20 U.S.C. § 1682.

72. In creating new obligations under Title VII and Title IX, Defendants failed to properly engage in notice-and-comment rulemaking, and they promulgated their new rules without the President’s signature. Accordingly, the new rules, regulations, and guidance are invalid.

COUNT TWO

Relief Under 5 U.S.C. § 706 (APA) that the new Rules, Regulations, and Guidance at Issue Are Unlawful by Exceeding Congressional Authorization

73. The allegations in paragraphs 1 through 72 are reincorporated herein.

74. The new rules, regulations, and guidance described herein constitute “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704.

75. Defendants are “agencies” under the APA, id. § 701(b)(1), and the new rules, regulations, and guidance described herein are “rules” under the APA. Id. § 701(b)(2).
76. The APA requires this Court to hold unlawful and set aside any agency action that is “contrary to constitutional right, power, privilege, or immunity” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” *Id.* § 706(2)(B)–(C).

77. Defendants’ actions in promulgating and enforcing its new obligations are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” because they redefine the unambiguous term “sex” in Title VII and Title IX, add gender identity to Titles VII and IX, and impose new obligations without Congressional authorization. In other words, Defendants have effectively amended the relevant statutory language via unilateral administrative action.

78. Congress has not delegated to ED the authority to define, or redefine, unambiguous terms in Title VII or Title IX.

79. Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination...” 20 U.S.C. § 1681(a).

80. The term “sex” as used in Title IX means male and female, under the traditional binary conception of sex consistent with one’s anatomy and genes.

81. The meaning of “sex”, as used in Title IX, is not ambiguous.

82. The meaning of “male” and “female,” as used in Title IX, are not ambiguous.

83. Title IX makes no reference to “gender identity” in the language of the statute.
84. The enacting regulations, which interpret Title IX, likewise make no reference to “gender identity.”

85. Title IX’s implementing regulations are not ambiguous in their instruction that a school district may separate showers, locker rooms, and restrooms on the basis of sex.

86. The regulations implementing Title IX state that schools receiving federal funding “may provide separate toilet, locker room, and shower facilities on the basis of sex, [as long as] such facilities provided for students of one sex [are] comparable to such facilitates provided for students of the other sex.” 34 C.F.R. § 106.33.

87. Title IX does not require that covered entities cease providing showers, locker rooms, and restrooms designated by biological sex.

88. Title VII’s use of the word “sex” is just as unambiguous as Title IX’s use of the word.

89. Defendants’ unilateral decree that “sex” in Title VII and Title IX means, or includes, “gender identity,” is contrary to Title VII’s and Title IX’s text, implementing regulations, and legislative history.

90. The Constitution provides Congress the power and responsibility to make law, while providing the Executive Branch, including federal agencies, the power and responsibility to administer and enforce the law. The new rules, regulations, and guidance described herein change the plain meaning of Title VII and Title IX, imposing new statutory obligations that Congress did not enact. Thus, the
new rules, regulations, and guidance functionally exercise lawmaking power reserved only to Congress. U.S. CONST. art. I, § 1 (“All legislative powers herein granted shall be vested in ... Congress”).

91. Because the new rules, regulations, and guidance are not in accordance with the law articulated above, they are unlawful, violate 5 U.S.C. § 706, and should be set aside.

92. Even if Defendants’ new rules, regulations, and guidance were interpretive, they would still be in excess of statutory authority and should be declared unlawful and set aside.

COUNT THREE


93. The allegations in paragraphs 1 through 92 are reincorporated herein.

94. The APA requires this Court to hold unlawful and set aside any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

95. Congress requires that whenever an agency takes action, it do so after engaging in a process by which it “examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” Motor Veh. Mfrs. Ass’n v. State Farm Ins., 463 U.S. 29, 43 (1983) (quotation omitted).
96. An agency action is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or product of agency expertise.

97. Defendants gave no explanation for their redefinition of the term “sex” in Title VII or Title IX, whereby Defendants unilaterally decreed that the term “sex” in Title VII and Title IX means, or includes, gender identity.

98. Nor did Defendants give any explanation of the relevant factors that were the basis of their actions.

99. Defendants failed to consider important aspects of the dignity and privacy issues implicated for schools and other institutions caused by redefining the word “sex” in these statutory schemes, including the language and structure of Title VII and Title IX and their regulations, the congressional and judicial histories of Title VII and Title IX and their regulations, or the practical and constitutional harms created by Defendants’ unlawful application of Title VII and Title IX.

100. Defendants’ actions were also taken without a rational explanation for usurping the local choices federal statutory law permits.

101. Defendants’ actions departed from explicit Title IX statutory text that allows schools to maintain private showers, locker rooms, and restrooms
separated by sex; and, it rested on considerations related to “gender identity,” despite the fact that the plain statutory language and legislative history indicates Congress did not intend “sex” to mean anything other than biological sex, i.e., sex as indicated by an individual’s anatomy and genes.

102. Defendants’ actions are arbitrary and capricious and not otherwise in accordance with the law.

103. Defendants’ new rules, regulations, and guidance would be unlawful if they were interpretive, instead of legislative, because they would still be arbitrary, capricious, an abuse of discretion, and not in accordance with law, and so should be declared unlawful and set aside.

COUNT FOUR

Relief Under 5 U.S.C. § 706 (APA) that the new Rules, Regulations, and Guidance at Issue Are Unlawful by Exceeding Congressional Authorization

104. The allegations in paragraphs 1 through 103 are reincorporated herein.

105. The new rules, regulations, and guidance described herein constitute “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704.

106. Defendants are “agencies” under the APA, id. § 701(b)(1), and the new rules, regulations, and guidance described herein are “rules” under the APA. Id. § 701(b)(2).

107. The APA requires this Court to hold unlawful and set aside any agency action that is “contrary to constitutional right, power, privilege, or immunity” or “in
excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”

Id. § 706(2)(B)–(C).

108. Defendants’ actions in promulgating and enforcing its new rule are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” because they redefine the unambiguous terms “discriminate” and “discrimination” and impose new obligations without the authorization of Congress.

109. Congress has not delegated to Defendants the authority to define, or redefine, unambiguous terms in Title VII or Title IX.

110. Title VII makes it unlawful for employers to “discriminate against any individual . . . because of such individual’s . . . sex.” 42 U.S.C. s. 2000e-2(a) (emphasis added). Title IX states that “[n]o person in the United States shall, on the basis of sex, be . . . subjected to discrimination . . . .” 20 U.S.C. s. 1681(a) (emphasis added).

111. The term “discriminate,” as used in Title VII, means to treat persons differently on the basis of a protected characteristic listed in the statute. The term “discrimination,” as used in Title IX, means differential treatment of persons on the basis of a protected characteristic listed in the statute. In other words, under Title VII and Title IX, discrimination occurs when a protected characteristic, listed in the applicable statute, is made a basis for determining how persons are treated with regard to a matter encompassed by the statutes. Conversely, discrimination does not occur when a protected characteristic, listed in the applicable statute, is not taken into account for determining how persons are treated.
112. The definitions of “discriminate” and discrimination,” as used in Title VII and Title IX, are not ambiguous.

113. The Constitution provides Congress the sole power and responsibility to make law, while providing the Executive Branch, including federal agencies, the power and responsibility to administer and enforce the law. The new rules, regulations, and guidance described herein change the meaning of Title VII and Title IX, imposing new statutory obligations that Congress did not enact while eliminating choices over the designation of intimate facilities that Congress affirmatively protected. Thus, the new rules, regulations, and guidance functionally exercise lawmaking power reserved only to Congress. U.S. CONST. art. I, § 1 (“All legislative powers herein granted shall be vested in … Congress”).

114. Because the new rules, regulations, and guidance are not in accordance with the law articulated above, they are unlawful, violate 5 U.S.C. § 706, and should be set aside.

115. Even if Defendants’ new rules, regulations, and guidance were interpretive, they would still be in excess of statutory authority and should be declared unlawful and set aside.

COUNT FIVE


116. The allegations in paragraphs 1 through 115 are reincorporated herein.
117. The APA requires this Court to hold unlawful and set aside any agency action that is “contrary to constitutional right, power, privilege, or immunity.” 5 U.S.C. § 706(2)(B).

118. When Congress exercises its Spending Clause power, principles of federalism require that Congress speak with a clear voice so that the recipient can “clearly understand,” from the language of the law itself, the conditions to which they are agreeing to when accepting the federal funds. Arlington Cent. Sch. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006). Further, any interpretation of a federal law tied to State funding should be based on its meaning at the time the States opted into the spending program. Bennett v. New Jersey, 470 U.S. 632, 638 (1985) (providing that a state’s obligation under cooperative federalism program “generally should be determined by reference to the law in effect when the grants were made”).

119. Neither the text nor the legislative history of Title IX supports an interpretation of the term “sex” as meaning anything other than one’s sex as determined by anatomy and genetics, which was the meaning assigned “sex” by the leading dictionaries at the time Congress enacted the statute. This reality is reinforced by the fact that Congress has specifically used the phrase “gender identity” when it intended to use that concept to identify a protected class in other pieces of legislation. See, e.g., 18 U.S.C. § 249(a)(2)(A); 42 U.S.C. § 13925(b)(13)(A). In such legislation, Congress specifically included the phrase “gender identity” along with the term “sex,” thus evidencing its understanding that the phrase and term
mean different things and demonstrating its intent for the term “sex” to retain its original and only meaning—sex determined by anatomy and genetics.

120. Defendants’ new rules, regulations, and guidance change the meaning of Title IX, and so changes the terms for funding. This violates the constitutional requirements for legislation enacted pursuant to the Spending Clause power and so is unconstitutional.

121. Defendants also run afoul of the Constitution by redefining “sex” in Title VII. Indeed, because Congress passed Title VII pursuant to its powers under Section 5 of the Fourteenth Amendment, the provisions thereof may not be altered to change the meaning of the Constitution itself. “Congress does not enforce a constitutional right by changing what the right is.” City of Boerne v. Flores, 521 U.S. 507, 519 (1997). Congress may only “enforce” – not redefine – constitutional protections when acting pursuant to Section 5 of the Fourteenth Amendment. For this reason, there must be a “congruence and proportionality” between the statutory provisions at issue and an authorized purpose – i.e., either the prevention of, or remedy for, a violation of the Constitution. Id. at 508. However, while the Equal Protection Clause of the Fourteenth Amendment has long been understood to prohibit discrimination on the basis of “sex,” it has also always been construed to allow for disparate treatment of the sexes based on “inherent” “physiological differences between male and female individuals” and thus to allow institutions to provide male – or female-designated showers, locker rooms, and restrooms to
122. Thus, Defendants new rules, regulations, and guidance redefining “sex” in Title VII are not congruent and proportional to the Fourteenth Amendment.

COUNT SIX


123. The allegations in paragraphs 1 through 122 are reincorporated herein.

124. By placing in jeopardy a substantial percentage of Plaintiffs’ budgets if they refuse to comply with the new rules, regulations, and guidance of Defendants, Defendants have left Plaintiffs no real choice but to acquiesce in such policy. See NFIB v. Sebelius, 132 S. Ct. 2566, 2605 (2012) (“The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce . . .”).

125. “The legitimacy of Congress’s exercise of the spending power ‘thus rests on whether the [entity] voluntarily and knowingly accepts the terms of the ‘contract.’” NFIB, 132 S. Ct. at 2602 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). “Congress may use its spending power to create incentives for [entities] to act in accordance with federal policies. But when ‘pressure turns into compulsion,’ the legislation runs contrary to our system of federalism.” Id. (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)). “That is
true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.” Id.

126. When conditions on the receipt of funds “take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the states to accept policy changes.” Id.; cf. South Dakota v. Dole, 483 U.S. 203, 211 (1987).

127. Furthermore, the Spending Clause requires that the entities “voluntarily and knowingly accept[]” the conditions for the receipt of federal funds. NFIB, 132 S. Ct. at 2602 (quoting Halderman, 451 U.S. at 17).

128. Because Defendants’ new rules, regulations, and guidance change the conditions for the receipt of federal funds after the states had already accepted Congress’s original conditions for many decades, this Court should declare that the new rules, regulations, and guidance are unconstitutional because they violate the Spending Clause.

COUNT SEVEN

Declaratory Judgment Under 28 U.S.C. §§ 2201 and 2202 (DJA) and 5 U.S.C. § 611 (RFA) that the new Rules, Regulations, and Guidance Were Issued Without a Proper Regulatory Flexibility Analysis

129. The allegations in paragraphs 1 through 128 are reincorporated herein.

130. Before issuing any of the new rules, regulations, and guidance at issue, Defendants failed to prepare and make available for public comment an initial and final regulatory flexibility analysis as required by the RFA. 5 U.S.C.
§ 603(a). An agency can avoid performing a flexibility analysis only if the agency’s top official certifies that the rule will not have a significant economic impact on a substantial number of small entities. Id. § 605(b). The certification must include a statement providing the factual basis for the agency’s determination that the rule will not significantly impact small entities. Id.

131. Defendants have not even attempted such a certification. Thus, the Court should declare Defendants’ new rules, regulations, and guidance unlawful and set them aside.

II. DEMAND FOR JUDGMENT

Plaintiffs respectfully request the following relief from the Court:

132. A declaration that the new rules, regulations, and guidance are unlawful and must be set aside as actions taken “without observance of procedure required by law” under the APA;

133. A declaration that the new rules, regulations, and guidance are substantively unlawful under the APA;

134. A declaration that the new rules, regulations, and guidance are arbitrary and capricious under the APA;

135. A declaration that the new rules, regulations, and guidance are invalid because Defendants failed to conduct the proper regulatory flexibility analysis required by the RFA.

136. A vacatur, as a consequence of each or any of the declarations aforesaid, as to the Defendants’ promulgation, implementation, and determination
of applicability of the “significant guidance” document, and its terms and conditions, along with all related rules, regulations, and guidance, as issued and applied to Plaintiffs and similarly situated parties throughout the United States, within the jurisdiction of this Court.

137. A final, permanent injunction preventing the Defendants from implementing, applying, or enforcing the new rules, regulations, and guidance; and

138. All other relief to which Plaintiffs may show themselves to be entitled, including attorney fees and costs.

Respectfully submitted,

STATE OF NEBRASKA; STATE OF ARKANSAS, ARKANSAS DIVISION OF YOUTH SERVICES, STATE OF KANSAS, ATTORNEY GENERAL BILL SCHUETTE, FOR THE PEOPLE OF THE STATE OF MICHIGAN, STATE OF MONTANA, STATE OF NORTH DAKOTA, STATE OF OHIO, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF WYOMING, Plaintiffs.

By: DOUGLAS J. PETERSON
   Attorney General of Nebraska

By: s/ David Bydalek
   David Bydalek, NE #19675
   Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682
Dave.Bydalek@nebraska.gov
LESLIE RUTLEDGE  
Attorney General of Arkansas

DEREK SCHMIDT  
Attorney General of Kansas

BILL SCHUETTE  
Attorney General of Michigan

TIM FOX  
Attorney General of Montana

WAYNE STENEHJEM  
Attorney General of North Dakota

MIKE DEWINE  
Attorney General of Ohio

ALAN WILSON  
Attorney General of South Carolina

MARTY JACKLEY  
Attorney General of South Dakota

PETER MICHAEL  
Attorney General of Wyoming
Assembly Bill No. 1266

CHAPTER 85

An act to amend Section 221.5 of the Education Code, relating to pupil rights.

[Approved by Governor August 12, 2013. Filed with Secretary of State August 12, 2013.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1266, Ammiano. Pupil rights: sex-segregated school programs and activities.

Existing law prohibits public schools from discriminating on the basis of specified characteristics, including gender, gender identity, and gender expression, and specifies various statements of legislative intent and the policies of the state in that regard. Existing law requires that participation in a particular physical education activity or sport, if required of pupils of one sex, be available to pupils of each sex.

This bill would require that a pupil be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.

The people of the State of California do enact as follows:

SECTION 1. Section 221.5 of the Education Code is amended to read:

221.5. (a) It is the policy of the state that elementary and secondary school classes and courses, including nonacademic and elective classes and courses, be conducted, without regard to the sex of the pupil enrolled in these classes and courses.

(b) A school district may not prohibit a pupil from enrolling in any class or course on the basis of the sex of the pupil, except a class subject to Chapter 5.6 (commencing with Section 51930) of Part 28 of Division 4 of Title 2.

(c) A school district may not require a pupil of one sex to enroll in a particular class or course, unless the same class or course is also required of a pupil of the opposite sex.

(d) A school counselor, teacher, instructor, administrator, or aide may not, on the basis of the sex of a pupil, offer vocational or school program guidance to a pupil of one sex that is different from that offered to a pupil of the opposite sex or, in counseling a pupil, differentiate career, vocational, or higher education opportunities on the basis of the sex of the pupil counseled. Any school personnel acting in a career counseling or course selection capacity to a pupil shall affirmatively explore with the pupil the
possibility of careers, or courses leading to careers, that are nontraditional for that pupil’s sex. The parents or legal guardian of the pupil shall be notified in a general manner at least once in the manner prescribed by Section 48980, in advance of career counseling and course selection commencing with course selection for grade 7 so that they may participate in the counseling sessions and decisions.

(e) Participation in a particular physical education activity or sport, if required of pupils of one sex, shall be available to pupils of each sex.

(f) A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.
SECTION 1. Section 221.5 of the Education Code is amended to read:

221.5. (a) It is the policy of the state that elementary and secondary school classes and courses, including nonacademic and elective classes and courses, be conducted, without regard to the sex of the pupil enrolled in these classes and courses.

(b) A school district shall not prohibit a pupil from enrolling in any class or course on the basis of the sex of the pupil, except a class subject to Chapter 5.6 (commencing with Section 51930) of Part 28 of Division 4 of Title 2.

(c) A school district shall not require a pupil of one sex to enroll in a particular class or course, unless the same class or course is also required of a pupil of the opposite sex.

(d) A school counselor, teacher, instructor, administrator, or aide shall not, on the basis of the sex of a pupil, offer vocational or school program guidance to a pupil of one sex that is different from that offered to a pupil of the opposite sex or, in counseling a pupil, differentiate career, vocational, or higher education opportunities on the basis of the sex of the pupil counseled. Any school personnel acting in a career counseling or course selection capacity to a pupil shall affirmatively explore with the pupil the possibility of careers, or courses leading to careers, that are nontraditional for that pupil’s sex. The parents or legal guardian of the pupil shall be notified in a general manner at least once in the manner prescribed by Section 48980, in advance of career counseling and course selection commencing with course selection for grade 7 so that they may participate in the counseling sessions and decisions.

(e) Participation in a particular physical education activity or sport, if required of pupils of one sex, shall be available to pupils of each sex.

(f) A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.
A safe, nondiscriminatory school environment—where students are not distracted by fear nor disengaged from learning because of nonacceptance by their peers or staff—is essential to student achievement. Governing boards play a critical role in ensuring that the schools in their community are free of discrimination, harassment, intimidation and bullying.

This policy brief focuses on efforts to prevent discrimination against transgender and other gender-nonconforming students, although the strategies may be applied to other types of discrimination as well. Both state and federal law protect transgender and gender-nonconforming students from discrimination. As described in the section “Legal Requirements” below, new state law (AB 1266, Ch. 85, 2013) attempts to clarify how nondiscrimination laws apply to sex-segregated programs, activities and facilities. Although the status of the new law is uncertain at the time of this writing due to a petition to place a referendum on the ballot to overturn the law, its fate does not affect the responsibility of districts and county offices of education (COEs) to ensure the safety and well-being of such students at school.

Because of societal prejudice and lack of awareness or understanding, transgender students and gender-nonconforming students may experience ongoing rejection, criticism or bullying, affecting their emotional health and academic achievement.1 Therefore, along with ensuring compliance with nondiscrimination laws, districts/COEs are encouraged to develop strategies to minimize social stigmatization for such students and maximize opportunities for social integration so that all students have an equal opportunity to attend school, be engaged and achieve academic success.

Definitions

Education Code 210.7 defines “gender” and “gender expression” as follows:

- “Gender” refers to a person’s sex and includes his/her gender identity and gender expression.
- “Gender expression” means a person’s gender-related appearance and behavior, whether or not stereotypically associated with the person’s assigned sex at birth.

Although not defined in law, the following are generally accepted definitions of other related terms:1,3

- “Gender identity” refers to a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth.
- “Transgender” describes people whose gender identity or gender expression is different from that traditionally associated with their assigned sex at birth.
- “Gender nonconforming” describes a person whose gender expression differs from stereotypical expectations, such as “feminine” boys, “masculine” girls and those who are perceived as androgynous.
- “Sexual orientation” refers to a person’s emotional and sexual attraction to other people based on the gender of the other person. Sexual orientation is not the same as gender identity. Not all transgender youth identify as gay, lesbian or bisexual, and not all gay, lesbian and bisexual youth display gender-nonconforming characteristics.
Harassment based on gender identity and nonconformity

Studies on bullying tend to reveal that the behaviors of harassers “reinforce expected cultural norms for boys and girls and punish students who don’t fit the ideals of traditional gender roles.”4

Insults that refer to perceptions of gender roles or sexuality are common among students. Students whose behavior is perceived to be different in some way can often be isolated and harassed. It is more frequently gender stereotyping, not sexual orientation, that is largely responsible for the frequency and severity of bullying directed at students who identify as gay or lesbian.

In a national study of students in grades 6-12, the majority reported hearing homophobic remarks frequently or often: 85 percent frequently or often heard “gay” used in a negative way, 71 percent heard other homophobic remarks and 61 percent heard negative remarks about students not acting “masculine enough” or “feminine enough.”5

The personal effects of harassment can be traumatic and enduring. One study found that “the damage to the victims of bullying may be physical, emotional and psychological and the resulting trauma can last a lifetime.”6 This study also found that students who have experienced harassment at school because of their gender are twice as likely as their peers to report having carried a gun to school or to report attempting suicide.

Furthermore, when students feel unsafe, they are more likely to be truant or to be academically disengaged. A California Safe Schools Coalition survey found that nearly 109,000 school absences at the middle and high school levels in California each year are due to harassment based on actual or perceived sexual orientation, costing California districts at least $39.9 million each year.7

Other studies of lesbian, gay, bisexual and transgender (LGBT) students reveal that 31 percent report having missed at least one day of school in the previous month because they did not feel safe at school. In fact, LGBT students are four times more likely to skip school out of safety concerns.8

Although it is difficult to find research showing a direct causal relationship between harassment of LGBT students and negative impact on student achievement, it is reasonable to expect that lower school attendance and a negative school climate would result in lower levels of achievement. The findings of a national study suggest that students who have higher grade point averages are those who feel safer in their school environment (mean GPA of 3.2 with lower victimization based on sexual orientation or gender expression compared to a mean GPA of 2.9 with higher victimization) and that students who feel safe in their schools are more likely to plan to go to college.9

Research shows that the extent to which LGBT students feel safe in school can be improved by the availability of resources and supports in schools. For example, in schools with comprehensive anti-harassment policies that specify sexual orientation or gender expression, students report that they hear biased remarks less frequently and experience significantly lower severities of victimization related to their sexual orientation and gender expression. They are also more likely to report any victimization to school staff and to believe that reporting to school staff was effective.10

Legal requirements

State and federal law prohibits discrimination of students based on their actual or perceived sex, gender, sexual orientation, gender identity or expression, race, color, ancestry, national origin, ethnic group identification, age, religion, marital or parental status, physical or mental disability or genetic information (Education Code 220; 42 USC 2000d-2000e-17, 2000h-2000h-6).

In addition, Education Code 234.1, as amended by AB 9 (Ch. 728, Statutes of 2011), mandates that districts adopt policy prohibiting discrimination, harassment, intimidation and bullying based on the above categories at school or in any school activity related to school attendance or under the authority of the district. Education Code 234.1 further requires districts to adopt a process requiring school personnel to immediately intervene, when it is safe to do so, whenever they witness acts of discrimination, harassment, intimidation or bullying based on the characteristics specified in Education Code 220 or 234.1 or Penal Code 422.55, including gender identity.

Education Code 221.5 specifically prohibits discrimination on the basis of sex with regards to enrollment in classes or courses, career counseling and availability of physical education activities or sports to both sexes.

In 2013, AB 1266 amended Education Code 221.5 to clarify that students must be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with their gender identity, regardless of the gender listed in their student records. As of this
writing, the status of AB 1266 is uncertain due to a referendum effort challenging its enactment. Regardless of the eventual outcome of this referendum effort, it is still prudent to follow the guidance set forth in this brief given existing state and federal nondiscrimination law. For instance, prior to the passage of AB 1266, the U.S. Department of Education’s Office for Civil Rights and U.S. Department of Justice’s Civil Rights Division reached a resolution agreement with the Arcadia Unified School District in which the district agreed to provide transgender and gender-nonconforming students with equal access to district facilities, programs and activities consistent with their gender identity (http://1.usa.gov/1aQCkVe).

Recommendations for implementing these nondiscrimination laws are discussed below in the sections “Policy Considerations” and “Other Board Actions.”

Policy considerations

It is recommended that districts/COEs adopt policies and administrative regulations that prohibit harassment and discrimination against transgender and gender-nonconforming students, address appropriate accommodations, establish consequences for those who harass or discriminate against students and set a tone that allows students to feel safe to report harassment. Proactive adoption of such materials provides a consistent districtwide plan and an opportunity to develop an understanding among staff, students, parents/guardians and the community regarding legal requirements and actions being taken to ensure student privacy.

CSBA provides a sample board policy, BP 5145.3 - Nondiscrimination/Harassment, which addresses the nondiscrimination and harassment of students on the basis of sex, gender, gender identity, gender expression, sexual orientation and other prohibited categories of discrimination. In January 2014, CSBA updated BP 5145.3 and added a new sample administrative regulation AR 5145.3 to include best practices designed to ensure nondiscrimination with respect to transgender and gender-nonconforming students. At the same time, CSBA updated BP 0410 - Nondiscrimination in District Programs and Activities and AR 6145.2 - Athletic Competition to address related concepts.

Other policies and administrative regulations may also be used to support the board’s priority on providing safe school environments for all students and should be aligned, such as BP/AR 0450 - Comprehensive Safety Plan, BP/AR 5131 - Conduct, BP 5131.2 - Bullying, BP 5137 - Positive School Climate, BP/AR 5145.7 - Sexual Harassment and BP 5145.9 - Hate-Motivated Behavior.

Issues that boards and superintendents should consider addressing in policy or administrative regulation include, but are not limited to:

» Determination of a student’s gender identity.
The district/COE should accept a student’s assertion of his/her gender identity and not require any particular substantiating evidence. However, if district/COE personnel have a credible basis for believing that a student’s gender-related identity is being asserted for an improper purpose, this basis should be documented and a written response should be provided to the student and, if appropriate, his/her parents/guardians.

» Preferred names and pronouns. State regulations (5 CCR 432) require districts/COEs to maintain a mandatory permanent student record for each student which includes the legal name of the student and the student’s sex. If a student provides documentation of a legal name or gender change, then the official student record must be changed to reflect this. However, students should be allowed to be addressed by their preferred name and the pronoun that corresponds to their gender identity without being required to obtain a court-ordered name or gender change or to change their official records. A school employee’s intentional and persistent refusal to respect a student’s gender identity is considered discriminatory.

» Access to sex-segregated facilities. Although schools may maintain separate restrooms, locker rooms or other facilities for males and females, students must be allowed to use the facility that corresponds to their gender identity upon request. Where available, a “gender-neutral” restroom or changing area may be offered to any student who desires increased privacy, regardless of the underlying reason. Other options to address privacy concerns include a bathroom stall with a door, an area in the locker room separated by a curtain or screen, access to a staff member’s office, or use of the locker room before or after the other students. However, no student who is entitled to use a facility consistent with his/her gender identity can be required to use an alternative arrangement. Any alternative arrangement should be used only at the request of the student and, if applicable, in a manner that keeps the student’s gender identity confidential.

» Physical education and interscholastic athletic activities. Whenever the school provides sex-segregated physical education classes or athletic activities, students must be allowed to participate
in a manner consistent with their gender identity. For schools participating in interscholastic athletic competitions, bylaws of the California Interscholastic Federation (CIF) also provide that all students should have the opportunity to participate in CIF activities consistent with their gender identity.

» Dress. Students should have the right to dress in accordance with their gender identity, within the constraints of district and school dress codes or school uniform policies.

» Privacy for transgender students. Students must be able to decide when, with whom and how much highly personal information they want to share about themselves with others. This includes the right to control dissemination of highly personal and private information such as one’s gender identity, transgender status or sexual orientation. District/COE personnel should not disclose a student’s actual or perceived sexual orientation, gender identity or gender expression to others, including other students, parents/guardians or other school personnel, unless required to do so by law or unless the student has agreed in writing. However, certain requests (e.g., a name and pronoun change) cannot be kept private. Therefore, school personnel are strongly encouraged to be in regular contact with a transgender student to ensure that issues of privacy can be discussed and addressed.

» Privacy for nontransgender students. There may be a student who feels that participating in sex-segregated school programs and activities or being in sex-segregated facilities (e.g., a restroom or a locker room where students undress) with another student of the opposite biological sex is a violation of his/her right to privacy or his/her religious tenets. It is recommended that all students and parents/guardians be notified of the possibility before one arises. However, sending out a notification—such as to a physical education class—that a student is transitioning from one gender to another would violate the transgender student’s privacy. Therefore, in order to balance these potentially competing rights, the annual notices sent to students and parents/guardians at the beginning of each school year could include a disclosure stating that the district allows students, consistent with their gender identity, to use facilities and to participate in sex-segregated school programs and activities, including athletic teams and competitions. The disclosure should also mention that a student for whom this presents a potential violation of his/her right to privacy or religious expression should notify school personnel, who will work with the student and, if appropriate, the parents/guardians to find an acceptable arrangement (see “Access to sex-segregated facilities” above).

It is important to make the nondiscrimination policy and related complaint procedures readily accessible to students and parents/guardians through the policy manual, student handbook, district/COE or school website, school offices and other appropriate venues. By making the policy widely known and distributing information, students who are bullied may be less likely to fear reporting discrimination or harassment.

When a student requests any accommodations consistent with his/her gender identity, it is recommended that site or district administrators meet with the transgender student and, if appropriate, the student’s parents/guardians to develop a plan to accommodate the student’s needs and requests. Similarly, if a nontransgender student requests any accommodations for privacy or religious reasons, it is recommended that administrators meet with the student and, if appropriate, the student’s parents/guardians to develop a plan to accommodate the student’s needs and requests. As needed, the district/COE should also consult with legal counsel in responding to all such requests.

Other board actions

The board, working with the superintendent, can promote a culture free from discrimination and harassment throughout its major areas of responsibility:

» Setting direction for the community’s schools. As the governance team establishes a long-term vision, goals and priorities, it should consider specific statements related to ensuring that all students are safe at school and that harassment is not tolerated. The board has an opportunity to foster an understanding among the governance team about the importance of establishing a safe school environment and its link to student attendance, engagement, learning and academic achievement.

» Establishing an effective structure for the district/COE. As noted in the section “Policy Considerations” above, the adoption of board policies and administrative regulations is one of the primary tools of the district/COE to ensure compliance with the law. The governance team also establishes structure for the district/COE through its decisions related to the budget, facilities and curriculum, all of which can be aligned with the prioritization of student safety and promotion of a positive school climate.

» Providing support to district/COE staff as they carry out the board’s direction. Once the policy of nondiscrimination is adopted, it is important that
district/COE personnel appropriately and consistently implement the policy. The superintendent or designee should develop administrative regulations as appropriate to assist in policy implementation. Staff should be notified of the policy and regulations and provided with information and staff development as needed to ensure they understand the right of all students to a safe environment, the law and district/COE expectations regarding accommodations for transgender and gender-nonconforming students, the law requiring staff to immediately intervene when they observe acts of bullying and disciplinary consequences for staff and students who engage in discrimination or harassment.

School staff might also consider how the use of gender to divide groups of students (e.g., dividing boys and girls into separate lines to exit or enter the classroom) can subject transgender and gender-nonconforming students to teasing and ridicule.

**Ensure accountability to the public.** The governance team has a responsibility to monitor and evaluate the effectiveness of efforts to prevent and reduce harassment. The board and superintendent should agree on the data that will be collected (e.g., incidence of hate-related violence, graffiti, suspensions or expulsions; student surveys of school climate; accommodations or strategies that have been implemented to prevent harassment) and how often such data will be reported to the board. The data should be used to recommend policy revisions, if necessary.

**Act as community leaders.** The governance team has a responsibility to explain to parents/guardians, students, staff and the community the obligations of the district/COE under state and federal nondiscrimination laws. The governance team should also work with parents/guardians, community partners, community agencies, law enforcement and other stakeholders in efforts that promote a culture of safe schools for all students. Such stakeholders might be involved in developing goals, policy or specific strategies related to nondiscrimination; providing counseling or other services to assist at-risk students; and/or assisting in program evaluation.

Through these actions, the board can clearly declare its opposition to any form of discrimination or harassment. By publicizing its efforts and providing clear steps for how issues will be resolved, the district/COE can encourage students to feel safe in reporting issues of harassment. Prohibition of harassment based on gender identity or gender nonconformity will be one part of a broader effort to create a safe school environment so that all students have an equal opportunity to attend school, be engaged in the classroom and ultimately to achieve academic success.

**Questions to consider**

As the governance team discusses and determines how it will address issues of discrimination and harassment based on gender identity and gender nonconformity and how it will work to protect the safety of all students, it might consider the following questions:

» What policy direction can the board provide to ensure that school climates are safe, that students have confidence that complaints will be investigated appropriately and that there will not be retaliation for reporting incidents of discrimination, harassment, intimidation and bullying?

» Do students and staff understand how to access the complaint procedures should an alleged incident of discrimination or harassment occur?

» How will the governance team ensure that there is consistent implementation of policies prohibiting discrimination and harassment on the basis of gender identity and gender nonconformity across all grade levels and school sites?

» What methods can be used to communicate with students, parents/guardians and staff regarding legal requirements and board policy related to nondiscrimination?

» How might issues of privacy be impacted by any accommodations granted to transgender students? Are there additional actions that can be taken to ensure student privacy?

» How might policies about dress code and student appearance be impacted by the nondiscrimination policy?

» Do school personnel understand the requirements regarding the use of student names and pronouns?

» Is professional development needed to ensure that all staff understand the law and board expectations regarding nondiscrimination, harassment, intimidation and bullying?

» What types of data should the district/COE gather and analyze in order to determine the effectiveness of its nondiscrimination/harassment policy and practices?
Resources

**California School Boards Association** provides sample board policies, policy briefs, publications and other resources on a variety of topics related to school safety, including *Interim Guidance Regarding Transgender Students, Privacy, and Facilities* (September 27, 2013). [www.csba.org](http://www.csba.org)

**American Civil Liberties Union** provides information about protecting the rights of lesbian, gay, bisexual and transgender people, including *Q & A: Adding Sexual Orientation and Gender Identity to Discrimination and Harassment Policies in Schools*. [www.aclu.org](http://www.aclu.org)

**California Safe Schools Coalition** is a statewide partnership of organizations and individuals dedicated to eliminating discrimination and harassment on the basis of actual or perceived sexual orientation and gender identity in California schools. [www.casafeschools.org](http://www.casafeschools.org)

**Gay, Lesbian and Straight Education Network** is a national education organization focused on ensuring safe schools for all students, regardless of their sexual orientation, gender identity or gender expression. [www.glsen.org](http://www.glsen.org)

**Gay-Straight Alliance Network** is a national youth leadership organization connecting gay-straight alliances to each other and community resources. [www.gsanetwork.org](http://www.gsanetwork.org)

**Suicide Prevention Resource Center** promotes a public health approach to suicide prevention. Resources include *Suicide Risk and Prevention for Lesbian, Gay, Bisexual and Transgender Youth*. [www.sprc.org](http://www.sprc.org)

**Transgender Law Center** is a civil rights organization advocating for transgender communities, connecting transgender people and their families to technically sound and culturally competent legal services. Publications include *Transgender and Gender Non-Conforming Youth—Recommendations for Schools*. [www.transgenderlawcenter.org](http://www.transgenderlawcenter.org)

In addition to the above organizations, the following journal articles may be useful:


Endnotes


LGBTQ STUDENT RIGHTS

SAN FRANCISCO UNIFIED SCHOOL DISTRICT

❖ Right to be treated equally and to be free from bullying, harassment and discrimination, regardless of sexual orientation, gender identity or gender expression
(SFUSD Board Policy 5162; California Education Code Section 200-220)

❖ Right to be respected and to dress and act in ways that do not conform to stereotypes associated with your gender, with respect to the student dress code
(SFUSD Board Regulation R5163a; California Education Code Section 221.5)

❖ Right to LGBTQ-inclusive social studies, history and comprehensive sexual health education
(California Education Code Section 51204.5, and 51930-51939)

❖ Right to be referred to by the gender pronoun and name that fits your gender identity
(SFUSD Board Regulation R5163a; California Education Code Section 221.5)

❖ Right to be involved in school activities, and access spaces such as locker rooms and restrooms, that fit with your gender identity
(SFUSD Board Regulation R5163a; California Education Code Section 221.5)

❖ Right to speak out about LGBTQ issues, including wearing LGBTQ-affirming t-shirts, stickers and bracelets, and access information about LGBTQ issues on school computers, and to bring same gender dates to prom (California Education Code Sections 48907&48950)

❖ Right to form and organize Gay-Straight Alliance, or similarly LGBTQ-related student clubs
(Federal Equal Access Act; California Education Code Section 220)

❖ Right to be "out" and be yourself at school, and give permission to school staff of when and to whom they can share your LGBTQ identity

❖ Right to consent to sensitive LGBTQ or sexual health-related services without permission from your parent/guardian or primary caregiver, if you are age 12 or older
(California Health and Safety Code 124260; SB 543; California Family Code 6924)

ALWAYS REPORT THREATS, SLURS AND BULLYING TO A TRUSTED TEACHER OR ADULT AT YOUR SCHOOL OR CALL SAFE SCHOOL LINE AT (415) 241-2141
OR EMAIL: SAFESCHOOL@SFUSD.EDU
REMEMBER TO REPORT WHO/WHAT/WHERE/WHEN IN DESCRIBING INCIDENTS
ARTICLE 5: STUDENTS
SECTION: Non-Discrimination for Students and Employees

This regulation implements Board Policy 5163.

This regulation is meant to advise school site staff and administration regarding transgender and gender non-conforming student concerns in order to create a safe learning environment for all students, and to ensure that every student has equal access to all components of their educational program.

California Law Prohibits Gender-Based Discrimination in Public Schools

The California Education Code states that “all pupils have the right to participate fully in the educational process, free from discrimination and harassment.” Cal. Ed. Code Section 201(a). Section 220 of the Education Code provides that no person shall be subject to discrimination on the basis of gender in any program or activity conducted by an educational institution that receives or benefits from state financial assistance. The Code further provides that public schools have an affirmative obligation to combat sexism and other forms of bias, and a responsibility to provide equal educational opportunity to all pupils. Cal. Ed. Code Section 201(b).

California Education Code Section 221.5(f) specifically requires that “A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.”

The California Code of Regulations similarly provides that “No person shall be excluded from participation in or denied the benefits of any local agency's program or activity on the basis of sex, sexual orientation, gender, ethnic group identification, race, ancestry, national origin, religion, color, or mental or physical disability in any program or activity conducted by an ‘educational institution’ or any other ‘local agency’. . .that receives or benefits from any state financial assistance.” 5 CCR Section 4900(a).

The California Code of Regulations defines “gender” as: “a person's actual sex or perceived sex and includes a person's perceived identity, appearance or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with a person's sex at birth.” 5 CCR Section 4910(k).

SFUSD Board Policy Prohibits Gender-Based Harassment

SFUSD Board Policy 5163 requires that “All educational programs, activities and employment practices shall be conducted without discrimination based on . . .sex, sexual orientation, [or]
gender identity . . .” Board Policy 5162 requires that “students should treat all persons equally and respectfully and refrain from the willful or negligent use of slurs against any person” based on sex or sexual orientation.

Therefore, transgender and gender non-conforming students must be protected from discrimination and harassment in the public school system. Staff must respond appropriately to ensure that schools are free from any such discrimination or harassment.

Names/Pronouns

Students shall have the right to be addressed by a name and pronoun corresponding to their gender identity as expressed by the student and asserted at school. Students are not required to obtain a court ordered name 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. This directive does not prohibit inadvertent slips or honest mistakes, but it does apply to an intentional and persistent refusal to respect a student’s gender identity. The requested name shall be included in the District’s electronic database in addition to the student’s legal name, in order to inform teachers of the name and pronoun to use when addressing the student.

Official Records

The District is required to maintain a mandatory permanent pupil record which includes the legal name of the pupil, as well as the pupil’s gender. 5 Cal. Code Reg. 432(b)(1)(A), (D). The District shall change a student’s official records to reflect a change in legal name or gender upon receipt of documentation that such legal name and/or gender have been changed pursuant to California legal requirements.

Restroom Accessibility

Students shall have access to the restroom that corresponds to their gender identity as expressed by the student and asserted at school. Where available, a single stall bathroom may be used by any student who desires increased privacy, regardless of the underlying reason. The use of such a single stall bathroom shall be a matter of choice for a student, and no student shall be compelled to use such bathroom.

Locker Rooms or Other Facilities

Transgender students shall have access to use facilities consistent with their gender identity as expressed by the student and asserted at school, irrespective of the gender listed on the pupil’s records, including but not limited to locker rooms. Where available, accommodations may be used by any student who desires increased privacy, regardless of the underlying reason. The use of such accommodations shall be a matter of choice for a student, and no student shall be compelled to use such accommodations. Based on availability and appropriateness to address privacy concerns, such accommodations could include, but are not limited to:
• Use of a private area in the public area (i.e., a bathroom stall with a door, an area separated by a curtain, a PE instructor’s office in the locker room);
• A separate changing schedule (either utilizing the locker room before or after other students); or
• Use of a nearby private area (i.e., a nearby restroom, a nurse’s office).

**Sports and Gym Class**

Transgender students shall not be denied the opportunity to participate in physical education, nor shall they be forced to have physical education outside of the assigned class time. Transgender students shall be permitted to participate in gender-segregated recreational gym class activities, athletic teams and competitions in accordance with the student’s gender identity as expressed by the student and asserted at school.

**Dress Codes**

School sites can enforce dress codes that are adopted pursuant to Education Code 35291. Students shall have the right to dress in accordance with their gender identity that as expressed by the student and asserted at school, within the constraints of the dress codes adopted at their school site. This regulation does not limit a student’s right to dress in accordance with the Dress/Appearance standards articulated in the Student and Parent/Guardian Handbook, page 23.

**Gender Segregation in Other Areas**

As a general rule, in any other circumstances where students are separated by gender in school activities or programs (i.e., class discussions, field trips), students shall be permitted to participate in accordance with their gender identity as expressed by the student and asserted at school. Activities that may involve the need for accommodations to address student privacy concerns will be addressed on a case by case basis. In such circumstances, staff shall make a reasonable effort to provide an available accommodation that can address any such concerns.

---

**HISTORY/AUTHORIZATION**

2003
2006
2013

___________________________
Richard Carranza
Superintendent of Schools
Nondiscrimination/Harassment

The Board of Education desires to provide a safe school environment that allows all students equal access and opportunities in the district's academic and other educational support programs, services, and activities. District schools, programs, activities, and practices shall be free from unlawful discrimination, including discriminatory harassment, intimidation, and bullying of any student based on the student's actual or perceived race, color, ancestry, national origin, nationality, ethnicity, ethnic group identification, age, religion, marital or parental status, physical or mental disability, sex, sexual orientation, gender, gender identity, or gender expression or association with a person or group with one or more of these actual or perceived characteristics.

This policy shall apply to all acts related to school activity or to school attendance occurring within a district school. (Education Code 234.1)

Unlawful discrimination, including discriminatory harassment, intimidation, or bullying, includes physical, verbal, nonverbal, or written conduct based on any of the categories listed above. Unlawful discrimination also shall include the creation of a hostile environment when the prohibited conduct is so severe, persistent, or pervasive that it affects a student's ability to participate in or benefit from an educational program or activity; creates an intimidating, threatening, hostile, or offensive educational environment; has the effect of substantially or unreasonably interfering with a student's academic performance; or otherwise adversely affects a student's educational opportunities.

Unlawful discrimination also includes disparate treatment of students based on one of the categories above with respect to the provision of opportunities to participate in school programs or activities or the provision or receipt of educational benefits or services.

The Board also prohibits any form of retaliation against any individual who files or otherwise participates in the filing or investigation of a complaint or report regarding an incident of discrimination. Retaliation complaints shall be investigated and resolved in the same manner as a discrimination complaint.

The Superintendent or designee shall facilitate students' access to the educational program by publicizing the district's nondiscrimination policy and related complaint procedures to students, parents/guardians, and employees. He/she shall provide training and information on the scope and use of the policy and complaint procedures and take other measures designed to increase the school community's understanding of the requirements of law related to discrimination. The Superintendent or designee shall regularly review the implementation of the district's nondiscrimination policies and practices and, as necessary, shall take action to remove any identified barrier to student access to or participation in the educational program. He/she shall report his/her findings and recommendations to the Board after each review.

Students who engage in unlawful discrimination, including discriminatory harassment, intimidation, retaliation, or bullying, in violation of law, Board policy, or administrative regulation shall be subject to appropriate intervention, consequence or discipline, which may include suspension or expulsion for behavior that is severe or pervasive as defined in Education Code 48900.4. Any employee who permits or engages in prohibited discrimination, including discriminatory harassment, intimidation, retaliation, or bullying, shall be subject to disciplinary action, up to and including dismissal.

Legal Reference:
EDUCATION CODE

200-262.4 Prohibition of discrimination

48900.3 Suspension or expulsion for act of hate violence

48900.4 Suspension or expulsion for threats or harassment

48904 Liability of parent/guardian for willful student misconduct

48907 Student exercise of free expression

48950 Freedom of speech

48985 Translation of notices

49020-49023 Athletic programs

51500 Prohibited instruction or activity

51501 Prohibited means of instruction

60044 Prohibited instructional materials

CIVIL CODE

1714.1 Liability of parents/guardians for willful misconduct of minor

PENAL CODE

422.55 Definition of hate crime

422.6 Crimes, harassment

CODE OF REGULATIONS, TITLE 5

432 Student record

4600-4687 Uniform complaint procedures

4900-4965 Nondiscrimination in elementary and secondary education programs

UNITED STATES CODE, TITLE 20

1681-1688 Title IX of the Education Amendments of 1972

12101-12213 Title II equal opportunity for individuals with disabilities

UNITED STATES CODE, TITLE 29

794 Section 504 of Rehabilitation Act of 1973

UNITED STATES CODE, TITLE 42

503
2000d-2000e-17 Title VI and Title VII Civil Rights Act of 1964, as amended

2000h-2-2000h-6 Title IX of the Civil Rights Act of 1964

6101-6107 Age Discrimination Act of 1975

CODE OF FEDERAL REGULATIONS, TITLE 28

35.107 Nondiscrimination on basis of disability; complaints

CODE OF FEDERAL REGULATIONS, TITLE 34

100.3 Prohibition of discrimination on basis of race, color or national origin

104.7 Designation of responsible employee for Section 504

106.8 Designation of responsible employee for Title IX

106.9 Notification of nondiscrimination on basis of sex

COURT DECISIONS


Management Resources:

CSBA PUBLICATIONS

Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender-Nonconforming Students, Policy Brief, February 2014

Final Guidance Regarding Transgender Students, Privacy, and Facilities, March 2014

Safe Schools: Strategies for Governing Boards to Ensure Student Success, 2011

FIRST AMENDMENT CENTER PUBLICATIONS

Public Schools and Sexual Orientation: A First Amendment Framework for Finding Common Ground, 2006

NATIONAL SCHOOL BOARDS ASSOCIATION PUBLICATIONS

Dealing with Legal Matters Surrounding Students' Sexual Orientation and Gender Identity, 2004

U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS PUBLICATIONS

Dear Colleague Letter: Harassment and Bullying, October 2010

Notice of Non-Discrimination, January 1999

WEB SITES
CSBA: http://www.csba.org

California Department of Education: http://www.cde.ca.gov

California Safe Schools Coalition: http://www.casafeschools.org

First Amendment Center: http://www.firstamendmentcenter.org

National School Boards Association: http://www.nsba.org

U.S. Department of Education, Office for Civil Rights: http://www.ed.gov/about/offices/list/ocr

Policy SAN FRANCISCO UNIFIED SCHOOL DISTRICT

adopted: March 2, 1976 San Francisco, California

revised: March 14, 2006

revised: June 26, 2012

revised: September 29, 2015
Nondiscrimination/Harassment

The district designates the individual(s) identified below as the employee(s) responsible for coordinating the district's efforts to comply with state and federal civil rights laws, including Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and the Age Discrimination Act of 1975, and to answer inquiries regarding the district's nondiscrimination policies. The individual(s) shall also serve as the compliance officer(s) specified in AR 1312.3 - Uniform Complaint Procedures as the responsible employee to handle complaints regarding unlawful discrimination, including discriminatory harassment, intimidation, or bullying, based on actual race, color, ancestry, national origin, nationality, ethnicity, ethnic group identification, age, religion, marital or parental status, physical or mental disability, sex, sexual orientation, gender, gender identity, gender expression, or any other legally protected status; the perception of one or more of such characteristics; or association with a person or group with one or more of these actual or perceived characteristics. The coordinator/compliance officer(s) may be contacted at: (Education Code 234.1; 5 CCR 4621)

Director of the Office of Equity/Title IX Coordinator

555 Franklin Street, 3rd Floor

Telephone: (415) 355-7334

Fax: (415) 355-7333

Email: equity@sfusd.edu

Measures to Prevent Discrimination

To prevent unlawful discrimination, including discriminatory harassment, intimidation, retaliation, and bullying, of students at district schools or in school activities and to ensure equal access of all students to the educational program, the Superintendent or designee shall implement the following measures:

1. Publicize the district's nondiscrimination policy and related complaint procedures to students, parents/guardians, employees, volunteers, and the general public and post them on the district's web site and other locations that are easily accessible to students. (Education Code 234.1)

2. Provide to students a handbook that contains age-appropriate information that clearly describes the district's nondiscrimination policy, procedures for filing a complaint, and resources available to students who feel that they have been the victim of any such behavior. (Education Code 234.1)

3. Annually notify all students and parents/guardians of the district's nondiscrimination policy. The notice shall inform students and parents/guardians of the possibility that students will participate in a sex-segregated school program or activity together with another student of the opposite biological sex, and that they may inform the compliance officer if they feel such participation would be against the student's religious beliefs and/or practices or a violation of his/her right to privacy. In such a case, the compliance officer shall meet with the student and/or parent/guardian who raises the objection to determine how best to accommodate that student. The notice shall inform students and parents/guardians that the district will not typically notify them of individual instances of transgender students participating in a program or activity.
4. The Superintendent or designee shall ensure that all students and parents/guardians, including students and parents/guardians with limited English proficiency, are notified of how to access the relevant information provided in the district's nondiscrimination policy and related complaint procedures, notices, and forms in a language they can understand.

If 15 percent or more of students enrolled in a particular district school speak a single primary language other than English, the district's policy, regulation, forms, and notices concerning nondiscrimination shall be translated into that language in accordance with Education Code 234.1 and 48985. In all other instances, the district shall ensure meaningful access to all relevant information for parents/guardians with limited English proficiency.

5. Provide to students, employees, volunteers, and parents/guardians age-appropriate training and information regarding the district's nondiscrimination policy; what constitutes prohibited discrimination, including discriminatory harassment, intimidation, retaliation, 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.

6. At the beginning of each school year, inform school employees that any employee who witnesses any act of unlawful discrimination, including discriminatory harassment, intimidation, or bullying, against a student is required to intervene if it is safe to do so. (Education Code 234.1)

7. At the beginning of each school year, inform each principal or designee of the district's responsibility to provide appropriate assistance or resources to protect students' privacy rights and ensure their safety from threatened or potentially discriminatory behavior.

Enforcement of District Policy

The Superintendent or designee shall take appropriate actions to reinforce BP 5145.3 - Nondiscrimination/Harassment. As needed, these actions may include any of the following:

1. Removing vulgar or offending graffiti
2. Providing training to students, staff, and parents/guardians about how to recognize unlawful discrimination and how to respond
3. Disseminating and/or summarizing the district's policy and regulation regarding unlawful discrimination
4. Consistent with the laws regarding the confidentiality of student and personnel records, communicating the school's response to students, parents/guardians, and the community
5. Taking appropriate action against perpetrators and anyone determined to have engaged in wrongdoing, including any student who is found to have made a complaint of discrimination that he/she knew was not true

Process for Initiating and Responding to Complaints

Any student who feels that he/she has been subjected to unlawful discrimination described above or in district policy is strongly encouraged to immediately contact the compliance officer, principal, or any other staff member. In addition, any student who observes any such incident is strongly encouraged to report the incident to the compliance officer or principal, whether or not the alleged victim files a complaint.
Any school employee who observes an incident of unlawful discrimination, including discriminatory harassment, intimidation, retaliation, or bullying, or to whom such an incident is reported shall report the incident to the compliance officer or principal within a school day, whether or not the alleged victim files a complaint.

Any school employee who witnesses an incident of unlawful discrimination, including discriminatory harassment, intimidation, retaliation, or bullying, shall immediately intervene to stop the incident when it is safe to do so. (Education Code 234.1)

When any report of unlawful discrimination, including discriminatory harassment, intimidation, retaliation, or bullying, is submitted to or received by the principal or compliance officer, he/she shall inform the student or parent/guardian of the right to file a formal complaint pursuant to the provisions in AR 1312.3 - Uniform Complaint Procedures. Any report of unlawful discrimination involving the principal, compliance officer, or any other person to whom the complaint would ordinarily be reported or filed shall instead be submitted to the Superintendent or designee. Even if the student chooses not to file a formal complaint, the principal or compliance officer shall implement immediate measures necessary to stop the discrimination and to ensure all students have access to the educational program and a safe school environment.

Upon receiving a complaint of discrimination, the compliance officer shall immediately investigate the complaint in accordance with the district's uniform complaint procedures specified in AR 1312.3.

Transgender and Gender-Nonconforming Students

Gender identity means a student's gender-related identity, appearance, or behavior, whether or not that gender-related identity, appearance, or behavior is different from that traditionally associated with the student's physiology or assigned sex at birth.

Gender expression means a student's gender-related appearance and behavior, whether stereotypically associated with the student's assigned sex at birth. (Education Code 210.7)

Gender transition refers to the process in which a student changes from living and identifying as the sex assigned to the student at birth to living and identifying as the sex that corresponds to the student's gender identity.

Gender-nonconforming student means a student whose gender expression differs from stereotypical expectations.

Transgender student means a student whose gender identity or gender expression is different from that traditionally associated with the assigned sex at birth.

Acts of verbal, nonverbal, or physical aggression, intimidation, or hostility that are based on sex, gender identity, or gender expression, regardless of whether they are sexual in nature, where the act has the purpose or effect of having a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment are prohibited under state and federal law. Examples of types of conduct which are prohibited in the district and which may constitute gender-based harassment include, but are not limited to:

1. Refusing to address a student by a name and the pronouns consistent with his/her gender identity
2. Disciplining or disparaging a transgender student because his/her mannerisms, hairstyle, or style of dress
correspond to his/her gender identity, or a non-transgender student because his/her mannerisms, hairstyle, or style of dress do not conform to stereotypes for his/her gender or are perceived as indicative of the other sex

3. Blocking a student's entry to the bathroom that corresponds to his/her gender identity because the student is transgender or gender-nonconforming

4. Taunting a student because he/she participates in an athletic activity more typically favored by a student of the other sex

5. Revealing a student's transgender status to individuals who do not have a legitimate need for the information

6. Use of gender-specific slurs

7. Physical assault of a student motivated by hostility toward him/her because of his/her gender, gender identity, or gender expression

The district's uniform complaint procedures (AR 1312.3) shall be used to report and resolve complaints alleging discrimination against transgender and gender-nonconforming students. Examples of bases for complaints include, but are not limited to, the above list as well as improper rejection by the district of a student's asserted gender identity, denial of access to facilities that correspond with a student's gender identity, improper disclosure of a student's transgender status, discriminatory enforcement of a dress code, and other instances of gender-based harassment.

To ensure that transgender and gender-nonconforming students are afforded the same rights, benefits, and protections provided to all students by law and Board policy, the district shall address each situation on a case-by-case basis, in accordance with the following guidelines:

1. Right to privacy: A student's transgender or gender-nonconforming status is his/her private information and the district will only disclose the information to others with the student's prior written consent, except when the disclosure is otherwise required by law or when the district has compelling evidence that disclosure is necessary to preserve the student's physical or mental well-being. In the latter instance, the district shall limit disclosure to individuals reasonably believed to be able to protect the student's well-being. Any district employee to whom a student discloses his/her transgender or gender-nonconforming status shall seek the student's permission to notify the compliance officer. If the student refuses to give permission, the employee shall keep the student's information confidential, unless he/she is required to disclose or report the student's information pursuant to this procedure, and shall inform the student that honoring the student's request may limit the district's ability to meet the student's needs related to his/her status as a transgender or gender-nonconforming student. If the student permits the employee to notify the compliance officer, the employee shall do so within three school days.

As appropriate given the physical, emotional, and other significant risks to the student, the compliance officer may consider discussing with the student any need to disclose the student's transgender or gender-nonconformity status to his/her parents/guardians and/or others, including other students, teacher(s), or other adults on campus. The district shall offer support services, such as counseling, to students who wish to inform their parents/guardians of their status and desire assistance in doing so.

2. Determining a Student's Gender Identity: The compliance officer shall accept the student's assertion unless district personnel present a credible basis for believing that the student's assertion is for an improper purpose. In such a case, the compliance officer shall document the improper purpose and, within seven school days of
receiving notification of the student's assertion, shall provide a written response to the student and, if appropriate, to his/her parents/guardians.

3. Addressing a Student's Transition Needs: The compliance officer shall arrange a meeting with the student and, if appropriate, his/her parents/guardians to identify potential issues, including transition-related issues, and to develop strategies for addressing them. The meeting shall discuss the transgender or gender-nonconforming student's rights and how those rights may affect and be affected by the rights of other students and shall address specific subjects related to the student's access to facilities and to academic or educational support programs, services, or activities, including, but not limited to, sports and other competitive endeavors. In addition, the compliance officer shall identify specific school site employee(s) to whom the student may report any problem related to his/her status as a transgender or gender-nonconforming individual, so that prompt action could be taken to address it. Alternatively, if appropriate and desired by the student, the school may form a support team for the student that will meet periodically to assess whether the student's arrangements are meeting his/her educational needs and providing equal access to programs and activities, educate appropriate staff about the student's transition, and serve as a resource to the student to better protect the student from gender-based discrimination.

4. Accessibility to Sex-Segregated Facilities, Programs, and Activities: The district may maintain sex-segregated facilities, such as restrooms and locker rooms, and sex-segregated programs and activities, such as physical education classes, intramural sports, and interscholastic athletic programs. A student shall be entitled to access facilities and participate in programs and activities consistent with his/her gender identity. If available and requested by any student, regardless of the underlying reason, the district shall offer options to address privacy concerns in sex-segregated facilities, such as a gender-neutral or single-use restroom or changing area, a bathroom stall with a door, an area in the locker room separated by a curtain or screen, access to a staff member's office, or use of the locker room before or after the other students. However, the district shall not require a student to utilize these options because he/she is transgender or gender-nonconforming. In addition, a student shall be permitted to participate in accordance with his/her gender identity in other circumstances where students are separated by gender, such as for class discussions, yearbook pictures, and field trips. A student's right to participate in a sex-segregated activity in accordance with his/her gender identity shall not render invalid or inapplicable any other eligibility rule established for participation in the activity.

5. Student Records: A student's legal name or gender as entered on the mandatory student record required pursuant to 5 CCR 432 shall only be changed pursuant to a court order. However, at the written request of a student or, if appropriate, his/her parents/guardians, the district shall use the student's preferred name and pronouns consistent with his/her gender identity on all other district-related documents.

6. Names and Pronouns: If a student so chooses, district personnel shall be required to address the student by a name and the pronouns consistent with his/her gender identity, without the necessity of a court order or a change to his/her official district record. However, inadvertent slips or honest mistakes by district personnel in the use of the student's name and/or consistent pronouns shall not constitute a violation of this administrative regulation or the accompanying district policy.

7. Uniforms/Dress Code: A student has the right to dress in a manner consistent with his/her gender identity, subject to any dress code adopted on a school site.

Regulation SAN FRANCISCO UNIFIED SCHOOL DISTRICT

approved: October 13, 2015 San Francisco, California
To SFUSD employees reviewing this document: Student records may only be reviewed if necessary for the performance of job responsibilities. Confidential student information shall not be shared with any other persons unless authorized by the parent/guardian or student over 18. Violation of federal and state confidentiality laws and Board policy may be cause for discipline up to and including termination.

- The school roster shall use the name and gender provided by the student/family pursuant to AR 5163a (below)
- The school principal will be informed of the legal name/gender. The principal shall consult with the parent/guardian/student to determine which other staff should be informed, if any
- The family/student must notify the District if transcripts or other documents with legal name/gender are needed for college or financial aid applications, or any other reason
- The birth certificate/hospital record shall be maintained in the student cumulative folder

SFUSD Administrative Regulation 5163a provides that “Students shall have the right to be addressed by a name and pronoun corresponding to their gender identity as expressed by the student and asserted at school. Students are not required to obtain a court ordered name 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. This directive does not prohibit inadvertent slips or honest mistakes, but it does apply to an intentional and persistent refusal to respect a student's gender identity. The requested name shall be included in the District's electronic database in addition to the student's legal name, in order to inform teachers of the name and pronoun to use when addressing the student.”

The birth certificate or hospital document with legal name and gender will be maintained in the cumulative folder, as required by state regulation. 5 Cal. Code Reg. 432(b)(1)(A), (D) (District must maintain permanent record with legal name and gender). The permanent record will be changed if there is a legal change of name or gender.
SF schools ‘on the right track’ with transgender inclusivity

Laura Dudnick | May 17, 2016 | San Francisco Examiner

Original article

When it comes to safeguarding transgender students, San Francisco public schools have been ahead of the curve for more than a decade.

So when the Obama administration announced Friday that public schools must permit transgender students to use bathrooms and lockers consistent with their chosen gender identity, public school leaders in The City took it as a nod of encouragement that schools nationally will continue to mirror in the direction of California’s public schools.

In 2013, California became the first state in the United States to guarantee certain rights for transgender K-12 students in state law — nearly 10 years after San Francisco’s public schools adopted their own policy.

“The president is acknowledging the complexity of our children,” said Kevin Gogin, director of safety and wellness for the San Francisco Unified School District’s Student, Family and Community Support Department. “He wants to be sure our schools are not only providing quality education but also doing so in a safe and inclusive environment.”

In 2003, a San Francisco high school student who was transitioning prompted the district’s first-ever policy guaranteeing the rights of transgender students, Gogin said.

The district worked with the Human Rights Commission and Transgender Law Center to ensure transgender students “have access to facilities that would allow them to be successful in school,” he said.

That policy was updated in 2006 and again in 2013, when Gov. Jerry Brown signed into law Assembly Bill 1266, which gives students the right “to participate in sex-segregated programs, activities and facilities” based on their self-perception and regardless of their birth gender.

The directive issued Friday from leaders at the departments of Education and Justice says public schools are obligated to treat transgender students in a way that matches their gender identity, even if their education records or identity documents indicate a different sex.

Because all public schools in The City already offer gender-neutral bathrooms, the SFUSD has been focusing on how to further such lessons into the classroom. There are nurses and social workers in schools who are trained to support transgender students, and the district provides consultation and technical assistance to families.

“We’re on the right track,” Gogin said in response to the federal directive. “We’re acknowledging that we have students in our schools that are transgender, we are listening to their voice and we are working to be sure they are safe and healthy and ready to learn.”

In fact, the district in recent weeks has discussed how to “consistently integrate” LGBT studies in the general curriculum of middle and high school social studies and language arts classes, Gogin said.

The district already provides inclusionary courses following a Board of Education resolution approved in 2010 to expand services for LGBT students. This year, the SFUSD offered its first on-site LGBT studies class at Ruth Asawa School of the Arts that could be expanded to one or two other high schools next school year.

SFUSD eighth-grade students outperforming peers in math

A new report from SRI Education on SFUSD’s Science, Technology, Engineer and Math (STEM) Learning Initiative shows that SFUSD’s eighth-grade students are ahead of peers in other school districts when it comes to math performance. ...

Read more
The idea behind the new curriculum, which could be offered as early as the 2016-17 school year, is to incorporate LGBT studies similar to the class that was taught at Ruth Asawa, which planned to include basic terminology, identities and history of LGBT leaders, and the current portrayal of those who identify as LGBT.

“We don’t want to target just 20 kids in a high school,” Gogin explained of why the SFUSD is looking to offer the lessons elsewhere. “All of our students deserve the same education.”

The Youth Risk Behavior Survey and California Healthy Kids Survey, both conducted in 2011, 2013 and 2015, found that about 1 percent of middle schoolers (100 students) and 1 percent of high schoolers (150 students) in San Francisco identify as transgender.

Elementary school students don’t take those surveys, but the SFUSD offers guidance to students of that age who identify as transgender. This school year, Miraloma Elementary School became the first in The City to offer gender-neutral bathrooms to all first-grade students.

“Miraloma is a very inclusive school; we have all types of families and all types of students,” Sam Bass, the school’s principal, previously told the San Francisco Examiner. “Our community values inclusivity and making sure every person feels safe and welcome at school.”

Each of the bathrooms are used by one student at a time. Bass said the school planned to expand the practice of eliminating the breakdown of male and female restrooms to each grade in the coming years.

“Since we have also been more proactive in making it known that we are transgender friendly for our students, we’ve also had students come out even younger,” Gogin added.

Page updated on 05/17/16
A. PURPOSE AND SCOPE

1. This procedure advises school site staff and administration regarding the continuum of transgender student concerns in order to create a safe learning environment for all students, and to ensure that every student has equal access to all components of the educational program.

2. Related Procedures:
   - Nondiscrimination on the Basis of Sex and Gender in District Programs and Activities .. 0112
   - Uniform Complaint Procedure ……………………………………………………………… … 1700
   - Administration of Athletics …………………………………………………………………... ... 4170
   - Student-to-Student Bullying, Harassment or Intimidation ……………………………… ….. 6381

B. LEGAL AND POLICY BASIS

1. Reference: Board policies A-3000, A-3550, H-2200, I-5500, and K-4010; Education Code §200 et seq., 35291, 48985 and 49013; Penal Code §422.55; 5 CCR §432(b)(1)(A) and (D), 4600, 4622, 4631, 4632, 4633, 4650, 4900(a), 4910(k), and 4964; Assembly Bill 1266, School Success and Opportunity Act of 2013

C. GENERAL

1. Originating Office. Suggestions or questions concerning this procedure should be directed to the ADA/504/Title IX Coordinator, Student Services Division.

2. Definitions.

   a. Gender: Refers to a person’s sex, and includes a person’s gender identity and gender expression. (Education Code §210.7; 5 CCR §4910(k))

   b. Gender Expression: Refers to a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth. (Education Code §210.7)

   c. Gender Identity: Refers to how a person identifies his/her own gender regardless of the person’s assigned sex at birth.

   d. Sex: The biological condition of being a female or male.

   e. Transgender: Refers to a person whose gender identity is different from the sex assigned at birth, and whose gender expression is different from the way males or females are stereotypically expected to look or behave. The transgender continuum may include people whose gender expression differs from stereotypical expectations. It may also include gender nonconforming characteristics such as feminine boys, masculine girls and androgynous characteristics.

D. IMPLEMENTATION
1. **Requests.** Student or parent/guardian, on behalf of a student, requesting protections and/or access under this procedure should consult with the site principal or designee. The principal or designee shall work collaboratively with the student and parent/guardian when responding to requests for access or protections under this procedure. The principal or designee may request support, staff training, parent resource materials and/or assistance from the Office of Student Services.

2. **Issues or Privacy.** All persons, including students, have a right to privacy; this includes keeping a student’s actual or perceived gender identity and gender expression private.
   
   a. School personnel should not disclose a student’s actual or perceived gender identity or gender expression to others, including, but not limited to, other students, parents/guardians, and/or other school personnel, unless there is a specific “need to know” in order to implement accommodations or protections under this procedure.
   
   b. School personnel must be mindful of the confidentiality and privacy rights of students when contacting parents/guardians so as to not reveal, imply, or refer to a student’s actual or perceived gender identity or gender expression.
   
   c. To ensure confidentiality, whenever discussing a particular issue such as conduct, discipline, grades, attendance, health, or any other school related matter, school personnel should focus on the conduct or particular issue, and not on any assumptions regarding the student’s actual or perceived gender identity or gender expression.
   
   d. All students (including transgender) have the right to openly discuss their gender identity and gender expression and to decide when, with whom, and how much to share private information.

3. **Names/Pronouns.** Students have the right to be addressed by a name and pronoun corresponding to their gender identity that is consistently asserted at school.
   
   a. Students are not required to obtain a court ordered name 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. Inadvertent misuse of pronouns may occur, however intentional and persistent misuse of pronouns consistent with a student’s gender identity is prohibited under this procedure.
   
   b. The requested name (“Preferred Name” in PowerSchool) shall be included in the district’s electronic database in addition to the student’s legal name, in order to inform teachers.

4. **Official Records.** The district is required to maintain a mandatory permanent student record that includes the legal name of the student, as well as the student’s gender. (5 CCR §432[b][1][A], [D]) The district shall change a student’s official records to reflect a change in legal name or gender upon receipt of documentation that such legal name and/or gender have been changed pursuant to California legal requirements.

5. **Restroom Accessibility.** Students shall have access to the restroom that corresponds to their gender identity exclusively and consistently asserted at school.
a. Where available, a single stall restroom may be used by any student who desires increased privacy, regardless of the underlying reason.

b. Use of such a single stall restroom shall be a matter of choice for a student, and no student shall be compelled to use such a restroom.

6. **Locker Rooms or Other Facilities.** Transgender students shall have access to use facilities consistent with their gender identity exclusively and consistently asserted at school, irrespective of the gender listed on the student’s records, including but not limited to locker rooms. Where available, accommodations may be used by any student who desires increased privacy, regardless of the underlying reason. The use of such accommodations shall be a matter of choice for a student, and no student shall be compelled to use such accommodations. Based on availability and appropriateness to address privacy concerns, such accommodations could include, but are not limited to:

a. Use of a private area in the public area (i.e., a restroom with a door, an area separated by a curtain);

b. Use of a nearby private area (i.e., a nearby restroom, a nurse’s office).

7. **Sports and Physical Education Classes.**

a. Transgender students shall not be denied the opportunity to participate in physical education, nor shall they be forced to have physical education outside of the assigned class time.

b. Transgender students shall be permitted to participate in gender-segregated recreational physical education class activities and athletic teams and competitions in accordance with the student’s gender identity that is exclusively and consistently asserted at school.

c. The district’s Physical Education, Health and Athletics Department should be contacted with questions regarding California Interscholastic Federation (CIF) eligibility.

8. **Dress Codes.** School sites can enforce dress codes that are adopted pursuant to Education Code §35291. Students shall have the right to dress in accordance with their gender identity that is consistently asserted at school, within the constraints of the dress codes adopted at the school site.

9. **Gender Segregation in Other Areas.** As a general rule, in any other circumstances where students are separated by gender in school activities or programs (i.e., class discussions, field trips), students shall be permitted to participate in accordance with their gender identity consistently asserted at school. Activities that may involve the need for accommodations to address student privacy concerns will be addressed on a case-by-case basis.

E. **FORMS AND AUXILIARY REFERENCES**

1. California Interscholastic Federation (CIF) “Guidelines for Gender Equity Participation”

F. **REPORTS AND COMPLAINTS**
1. Schools must ensure that transgender students are provided with a safe school environment that is free of discrimination, harassment, and bullying. Any student, parent/guardian, third party or other individual or organization who believes that he/she or another student or group has been subjected to unlawful discrimination, or who has witnessed such conduct, may report the conduct orally to any school employee or administrator, and/or file a formal written complaint under Administrative Procedure 1700.

   a. Oral reports to any school employee or administrator.

      (1) A staff member who receives a report of discrimination, including discriminatory harassment, intimidation and/or bullying, shall promptly notify the site principal/designee. In addition, any school employee who observes any incident of unlawful discrimination involving a student shall, within one school day, report this observation to the principal/designee, whether or not the victim makes a report.

      (a) Where an oral report is made of unlawful discrimination, including discriminatory harassment, intimidation and/or bullying involving the principal/designee to whom the report would ordinarily be communicated, the employee who receives the report or who observes the incident shall instead make the report to the district’s ADA/504/Title IX Coordinator.

      (2) The principal/designee shall, within one day of receiving an oral report of unlawful discrimination, including discriminatory harassment, intimidation and/or bullying, inform the individual making the report of the resolution options under these procedures, including the right to file a written complaint. If a complainant is unable to make a written complaint due to conditions such as a disability or illiteracy, district staff shall assist him/her in the filing of the complaint. (5 CCR § 4600)

   b. File a formal written complaint under these procedures with the district’s ADA/504/Title IX Coordinator. If a written complaint is submitted to a school site administrator, the administrator shall, within two school days of receiving it, send the complaint to the district’s ADA/504/Title IX Coordinator.

2. Interim Measures. After a report or complaint is made, the responsible administrator (principal/designee and/or the district’s ADA/504/Title IX Coordinator) shall determine whether interim measures are necessary to stop, prevent, or address the effects of discrimination, including discriminatory intimidation or retaliation, harassment or bullying during and pending any informal resolution and/or investigation, such as placing students in separate classes or transferring a student to a class taught by a different teacher. Interim measures will be implemented in a manner that minimizes the burden on the individual who was the target of the discrimination.

3. Optional Informal Resolution at the Site Level. When a written complaint alleging unlawful discrimination against an individual is submitted under these procedures, with the consent of the individual who is the subject of the complaint and, when appropriate, his/her parent/guardian, the site principal/designee may engage in informal efforts to resolve the complaint. The principal/designee will notify the district’s ADA/504/Title IX Coordinator that
informal resolution has been requested. The informal resolution process must be completed within 10 days of receipt of the complaint.

a. The principal/designee will notify the individual who is the subject of the complaint and, when appropriate, his or her parent/guardian of the right to terminate informal resolution at any time and request that the district’s ADA/504/Title IX Coordinator proceed with investigation of the complaint.

b. The individual who is the subject of the complaint or his/her parent/guardian may not be asked or required to meet directly with the accused individual as part of the informal resolution process. The subject of the complaint or parent/guardian filing the complaint, or their representative, must be advised that he or she may file a formal complaint at any time during or after the informal process.

c. **Optional Mediation:** In cases of student-on-student unlawful discrimination including discriminatory harassment, intimidation, and/or bullying, when both the student who complained and, when appropriate, his/her parent/guardian, and the accused student so agree, the principal/designee may arrange for them to resolve the complaint informally with the help of a counselor, teacher, administrator, or trained mediator.

d. At the conclusion of 10 school days, the principal/designee will document whether informal resolution has been successful in resolving the complaint to the satisfaction of subject individual, and if appropriate, his/her parent/guardian, and will notify the district’s ADA/504/Title IX Coordinator in writing of the outcome.

4. **Formal Complaint.**

a. **Initiation of Investigation.** The district’s ADA/504/Title IX Coordinator shall initiate an impartial investigation of an allegation of unlawful discrimination, including discriminatory harassment, intimidation and/or bullying, within five school days of receiving a formal complaint under this procedure. The time may be extended if informal resolution is undertaken pursuant to Section F.3. above. However, in all cases investigation must begin within 10 days of receipt of the complaint unless the district’s ADA/504/Title IX Coordinator has confirmed that the complaint has been resolved informally to the satisfaction of the subject individual, and when appropriate, his/her parent/guardian.

(1) If the district’s ADA/504/Title IX Coordinator receives an anonymous complaint or media report about alleged unlawful discrimination including discriminatory harassment, intimidation and/or bullying, he/she shall determine whether it is appropriate to pursue an investigation considering the specificity and reliability of the information, the seriousness of the alleged incident, and whether any individuals can be identified who were subjected to the alleged harassment.

(2) A complainant’s refusal to provide the district’s investigator with documents or other evidence related to the allegations in the complaint, failure or refusal to cooperate in the investigation, or engagement in any other obstruction of the investigation may result in the dismissal of the complaint because of a lack of evidence to support the allegation. (5 CCR §4631)
b. **Initial Interview with the Subject of the Complaint.** At the beginning of an investigation, the district’s ADA/504/Title IX Coordinator shall describe the district’s complaint procedure to the subject of the complaint and, when appropriate, his/her parent/guardian, and discuss what actions are being sought in response to the complaint. The subject of the complaint shall have an opportunity to describe the incident, identify witnesses who may have relevant information and provide other evidence or information leading to evidence of the alleged conduct.

(1) If the subject of the complaint and/or his or her parent/guardian requests confidentiality, he/she shall be informed that such a request may limit the district’s ability to investigate or take other action. If the subject individual insists that his or her name not be revealed, the district’s ADA/504/Title IX Coordinator should nevertheless take all reasonable steps to investigate and respond to the complaint consistent with the request.

c. **Investigation Process.** The district’s ADA/504/Title IX Coordinator shall keep the complaint and allegation confidential, except as necessary to carry out the investigation or take other subsequent necessary action. (5 CCR § 4964)

(1) The district’s ADA/504/Title IX Coordinator shall interview individuals who have information relevant to the investigation, including, but not limited to, the subject of the complaint and, when appropriate, his or her parents/guardians, the person accused of unlawful discrimination, anyone who witnessed the reported conduct, and anyone mentioned as having relevant information. The district’s ADA/504/Title IX Coordinator will also review any records, notes, or statements related to the complaint and may take other steps such as visiting the location where the conduct is alleged to have taken place.

(2) When necessary to carry out his/her investigation or to protect student safety, and consistent with federal and state privacy laws, the district’s ADA/504/Title IX Coordinator also may discuss the complaint with the Superintendent or designee, the parent/guardian of the accused individual if the accused individual is a student, a teacher or staff member whose knowledge of the students involved may help in determining the facts, law enforcement and/or child protective services, the district’s Legal Counsel or the district’s Risk Manager.

(3) Interviews of the alleged victim, alleged perpetrator, and all relevant witnesses are conducted privately, separately, and are confidential. At no time will the alleged perpetrator and victim be interviewed together.

(4) Interviews and other information gathered will be documented. Documentation of complaints and their resolution will be maintained for a minimum of two years.

d. **Factors in Reaching a Determination.**

(1) In reaching a decision about the complaint, the district’s ADA/504/Title IX Coordinator may consider:

(a) Statements made by the subject of the complaint, the individual accused, and other persons with knowledge relevant to the allegations.
5. **Written Report on Findings and Follow-Up.**

   a. Within 60 calendar days of receiving the complaint, the district’s ADA/504/Title IX Coordinator shall conclude the investigation and prepare a written report of his/her findings, as described below. This timeline may be extended for good cause. If an extension is needed, the district’s ADA/504/Title IX Coordinator shall notify the complainant and explain the reason(s) for the extension.

   b. The district’s decision shall be made in writing and sent to the complainant. (5 CCR §4631)

   c. The district’s decision shall be written in English and, when required by Education Code §48985, in the complainant’s primary language. Additionally, when otherwise necessary to provide access to information for limited English proficient students and parents/guardians, as required by federal law, the decision shall be translated into the student’s or parent’s/guardian’s primary language.

   d. For all complaints, the decision shall include: (5 CCR §4631)

      (1) The findings of fact based on the evidence gathered.

      (2) As to each allegation, the district’s conclusion(s) as to whether unlawful discrimination has occurred.
(3) Rationale for such conclusion(s).

(4) Corrective actions, if they are warranted, which may include consequences imposed on the individual found to have engaged in the discriminatory conduct that relate directly to the subject of the complaint, as required by law, individual remedies offered or provided to the subject of the complaint, such as counseling, academic remedies or other measures, and systemic measures taken to eliminate any hostile environment and prevent the discrimination from recurring.¹

e. Notice that the individual who was the subject of the complaint and, when appropriate, his/her parent/guardian should immediately report any recurrence of the conduct or retaliation to the district’s ADA/504/Title IX Coordinator or principal/designee.

f. Notice of the complainant’s right to appeal the district’s decision within 15 calendar days to the California Department of Education (CDE) and procedures to be followed for initiating such an appeal.

g. Any decision concerning a complaint of discrimination, including discriminatory harassment, intimidation, or bullying shall include a notice that the complainant must wait until 60 calendar days have elapsed from the filing of an appeal with the CDE before pursuing state/civil law remedies. (Education Code §262.3)


a. Remedial action will be designed to end the discriminatory conduct, prevent its recurrence and address its effects on the targeted student. Examples of appropriate action include:

   (1) Interventions for the individual who engaged in the discrimination, such as parent/guardian or supervisor notification, discipline (see Section F.7.), counseling or training.

   (2) Interventions for the targeted individual, such as counseling, academic support and information on how to report further incidents of discrimination.

   (3) Separating the targeted individual and the individual who engaged in the discrimination, provided the separation does not penalize the targeted student.

   (4) Follow-up inquiries with the targeted individual and witnesses to ensure that the discriminatory conduct has stopped and that he or she has not experienced any retaliation.

   (5) Training or other interventions for the larger school community to ensure that students, staff and parents/guardians understand the types of behavior that constitute discrimination, that the district does not tolerate, and how to report it.

¹Sanctions that relate to the complainant include, but are not limited to, requiring that the individual found to have engaged in the discrimination stay away from the complainant, prohibiting the individual from attending school for a period of time, or transferring the individual to other classes or another school. Steps the school has taken to eliminate a hostile environment and prevent recurrence may include counseling and academic support services for other affected students, training for faculty and staff, revisions to the school’s policies, and campus climate surveys.
b. The district’s ADA/504/Title IX Coordinator shall ensure that the individual who was the target of discrimination and, when appropriate, his/her parent/guardian, are informed of the procedures for reporting any subsequent problems. The district’s ADA/504/Title IX Coordinator shall make follow-up inquiries to determine if any new incidents or retaliation has occurred and shall keep a record of this information.


a. Students who are found to have engaged in discriminatory conduct may be subject to disciplinary action up to and including expulsion. Disciplinary action may include oral warnings, written warnings, mandatory training, counseling, suspension, transfer, or expulsion for students. Such disciplinary action shall be in accordance with Board policy and state law. Suspension and recommendations for expulsion must follow applicable law.

b. Staff members who are found to have engaged in discriminatory conduct toward students shall be subject to discipline up to and including dismissal. Disciplinary action may include oral warnings, written warnings, mandatory training, counseling, suspension, transfer, demotion, or termination. Such disciplinary action shall be determined by site and district administration in accordance with applicable policies, laws, and/or collective bargaining agreements.

c. In identifying appropriate disciplinary action, repeated incidents and/or multiple victims will result in more severe penalties.

8. Appeals Procedures.

a. Appeals to the California Department of Education (CDE).

(1) If dissatisfied with the district’s decision under this procedure, the complainant may appeal in writing to the CDE. (Education Code §49013; 5 CCR §4632)

(2) The complainant shall file his/her appeal within 15 calendar days of receiving the district’s decision and the appeal shall specify the basis for the appeal of the decision and whether the facts are incorrect and/or the law has been misapplied. A copy of the locally filed complaint and a copy of the district’s decision shall accompany the appeal. (5 CCR §4632)

(3) Upon notification by the CDE that the complainant has appealed the district’s decision, the Superintendent or designee shall forward the following documents to the CDE: (5 CCR §4633)

(a) A copy of the original complaint
(b) A copy of the decision
(c) A summary of the nature and extent of the investigation conducted by the district, if not covered by the decision
(d) A copy of the investigation file, including but not limited to all notes, interviews, and documents submitted by the parties and gathered by the investigator
(e) A report of any action taken to resolve the complaint
(f) A copy of the district’s Uniform Complaint Procedure
(g) Other relevant information requested by the CDE

(4) The CDE may directly intervene in the complaint without waiting for action by the district when one of the conditions listed in 5 CCR §4650 exists, including cases in which the district has not taken action within 60 calendar days of the date the complaint was filed with the district.

b. **Civil Law Remedies.**

(1) A complainant may pursue available civil law remedies outside of the district’s complaint procedures. Complainants may seek assistance from mediation centers or public/private interest attorneys. Civil law remedies that may be imposed by a court include, but are not limited to, injunctions and restraining orders.

(2) For complaints alleging discrimination, including discriminatory harassment, intimidation, bullying or sexual harassment based on state law, a complainant shall wait until 60 calendars days have elapsed from the filing of an appeal with the CDE before pursuing civil law remedies, provided the district has appropriately and in a timely manner apprised the complainant of his/her right to file a complaint in accordance with 5 CCR §4622. The moratorium does not apply to injunctive relief and to discrimination complaints based on federal law.

(3) Complaints alleging discrimination based on race, color, national origin, sex/gender, disability or age may also be filed with the US Department of Education, Office for Civil Rights (www.ed.gov/ocr). Such complaints must generally be filed within 180 days of the alleged discrimination.

G. **APPROVED BY**

[Signature]

General Counsel, Legal Services
As to form and legality

H. **ISSUED BY**

[Signature]

Chief of Staff