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***ATTORNEYS AND COUNSELORS FOR TEXAS PUBLIC SCHOOLS AND LOCAL GOVERNMENT***

The changing landscape of transgender rights in the U.S. is a topic of conversation on multiple platforms. The education system is certainly hallowed ground upon which these battles are being fought. As younger generations become involved in gender identity practices and debates, schools across the country are facing a number of complicated and novel accommodation issues.

There is no question that a student's gender identity and the expression of that identity plays a significant role in the student's interactions within their school environment. Therefore, schools are best served establishing a coherent policy regarding transgender and gender nonconforming students. These policies will not, however, anticipate every situation, so the needs of each student and each set of circumstances must be assessed on a case-by-case basis. The goal should be threefold: (1) ensuring the safety, comfort, and healthy development of the transgender or gender nonconforming student, (2) minimizing stigmatization in favor of social integration, and all the while (3) minimizing disruption to the learning environment.

Title IX of the Education Amendments of 1972 ("Title IX") specifically prohibits discrimination on the basis of sex in educational programs and activities operated by institutions which are recipients of Federal funding.<sup>1</sup> However, the language of Title IX leaves open to interpretation the implications of identified gender on the legally permissible separation of sexes in several preconceived scenarios.<sup>2</sup> Thus, in recent years, the U.S. Department of Education (DOE) and the U.S. Department of Justice (DOJ) have received an increasing number of inquiries from parents and school representatives concerning the civil rights protections for transgender students. On May 13, 2016, the DOE and DOJ jointly released a formal interpretation of Title IX within the context of permissibly sex-segregated activities stating "[t]his prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status."<sup>3</sup>

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<sup>1</sup> Title IX, 20 U.S.C. §1681(a): "[N]o 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 receiving Federal financial assistance."

<sup>2</sup> 34 C.F.R §106.33 ("[S]eparate toilet, locker room, and shower facilities on the basis of sex" are permissible, so long as "such facilities provided for students of one sex [are] comparable to such facilities for student of the other sex.")

<sup>3</sup> See Appendix 1, May 13, 2016 U.S. Department of Education Dear Colleagues Letter.

While the interpretation did not promulgate new or altered law on the matter, it did provide significant and clarifying guidance to school boards regarding their obligations under Title IX with respect to transgender students. Last year, Texas sued the federal government in an attempt to block these proposed guidelines. In December 2016, U.S. District Court Judge Reed O'Connor placed the interpretations on hold while considering the issue.<sup>4</sup> As a result, school districts have been left to set their own individual policies concerning transgender students.

With the Trump administration taking power, the future of transgender rights seems to be following the Texas stance on the matter. On February 22, 2017, the current administration dismissed the federal guidelines for transgender students which had been introduced in May. Though Attorney General Jeff Sessions has ensured that federal laws will continue to protect lesbian, gay, bisexual, and transgender students from discrimination, schools which do not guarantee students the right to use the bathroom which aligns with their gender identity are no longer in jeopardy of losing their federal funding.<sup>5</sup>

This advisory correspondence seeks to facilitate federal compliance in the drafting of transgender-centric policies. While we understand the tumultuous and complex social status of this particular issue, our aim is to provide clients with a strictly legal summation of their responsibilities under existing law.

### ***Pertinent Terminology***

- **Gender Identity**: an individual's internal sense of gender. A person's gender identity may be incongruent with or the same as the person's biologically assigned sex;
- **Sex Assigned at Birth**: the sex designation recorded on a person's birth certificate, should such a record be provided upon birth;
- **Transgender**: an individual whose gender identity differs from the sex they were assigned at birth;
- **Transgender Female**: an individual who identifies as a female, but whose sex assigned at birth is male;
- **Transgender Male**: an individual who identifies as a male, but whose sex assigned at birth is female;
- **Transsexual**: an individual who has undergone the medical process of altering the genitalia they were assigned at birth to the alternative genitalia;

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<sup>4</sup> "This case presents the difficult issue of balancing the protection of students' rights and that of personal privacy while 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 Defendant's actions apply to the youngest child attending school and continues every year throughout each child's educational career." U.S. District Court Judge Reed O'Connor of Fort Worth.

<sup>5</sup> McGaughy, Lauren, *Texas Bathroom Bill is Still in Play as White House Rescinds Guidelines for Transgender Students*, THE DALLAS MORNING NEWS, Feb. 22, 2017, <http://www.dallasnews.com/news/lgbt/2017/02/22/white-house-rescinds-transgender-bathroom-guidelines>. ("The Department of Justice has a duty to enforce the law. The prior guidance did not contain sufficient legal analysis or explain how the interpretation was consistent with federal law, Sessions said in a written statement. 'The Department of Education and the Department of Justice therefore have withdrawn the guidance.'")

- **Gender Transitioning:** the process by which a transgender individual begins to assert the sex that corresponds to their gender identity, rather than their sex assigned at birth. This process may include sexual reassignment surgery, in which case, the individual is properly referred to as a transsexual. However, gender transitioning may include only an aesthetic shift in stereotypical characteristics associated with an individual's sex assigned at birth to those associated with the alternative sex, such as clothing, naming, and use of pronouns. In the latter instance, individuals are properly referred to as transgendered. Gender transition may occur at any stage of an individual's life, and may occur swiftly or evolve over a long duration of time.

### **Case Law**

Current Texas law does not clearly address the rights of transgender students in our schools. However, federal law has provided guidance on the matter. On April 19, 2016, the U.S. Court of Appeal for the Fourth Circuit rendered a decision in *G.G. v. Gloucester County School Board* that settled the issue of restroom accommodation for transgender students. The Court assessed the issue of whether Title IX mandates a school's requirements in providing separate restroom facilities on the basis of sex with respect to transgender students. The Court found that the a school board's enactment of a policy which denied transgender students the right to utilize the restroom which corresponded to their asserted gender identity ran afoul to Title IX.<sup>6</sup> Specifically, given the ambiguity with regard to the meaning of "sex," the case set the precedent for deferring to the Obama administration DOE's interpretation of Title IX in this context which, as stated above, equated to gender identity. Hence, the Court explicitly found that, in accordance with the DOE and DOJ interpretation, Title IX does, in fact, prohibit the discrimination of transgender students on the basis of their gender identity.

Further, rights of transgender students have been considered in the light of First Amendment freedom of expression. We know from prior court decisions that the First Amendment freedom of expression generally extends to a student's expression of gender, which may be achieved through hair, makeup, clothing, and behavior.<sup>7</sup> We also learn from those decisions that a school may curtail expressive student behavior only if it "would materially and substantially disrupt the work and discipline of the school," a significantly high standard.<sup>8</sup> The possibility that allowing certain expressive conduct of transgendered students to go unchecked *might* cause virulent controversy, that *could* result in a substantial disruption, has been viewed as speculative. Thus, the argument has generally been insufficient to meet legal standards. While a school may

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<sup>6</sup> *G.G., by his next friend and mother, Deirdre Grimm, v. Gloucester County Schools*, WL 1567467, Apr. 19, 2016.

<sup>7</sup> See *Doe ex rel. Doe v. Yunits*, 001060A, 2000 WL 33162199, at \*3 (Mass. Super. Oct. 11, 2000), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) (finding that a transgender student's expression of her identification with the female gender by dressing in female clothing and accessories was protected speech); *McMillen v. Itawamba County Sch. Dist.*, 702 F. Supp. 2d 699, at 704-5 (N.D. Miss. 2010) (finding that a female student demonstrated her likelihood of success on the merits of a First Amendment claim when school denied her permission to wear a tuxedo or other masculine attire to prom).

<sup>8</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 509, 513 (1969) (finding students protesting the Vietnam War by wearing black armbands did not meet that standard).

maintain order, the First Amendment is not trumped by a “heckler’s veto” in regards to transgender expression.<sup>9</sup>

Given the current stance that the Trump administration has taken on the matter, however, it would appear that prior case law has been altered. In August 2016, the Gloucester County School Board appealed the decision, putting the Appellate Court ruling on hold.<sup>10</sup> *G.G. Grimm v. Gloucester County Schools* was set to be heard by the U.S. Supreme Court on March 28, 2017. However, on March 6, 2017, in a one-sentence order, the Supreme Court vacated the ruling of the Appellate Court, and sent the case back for further consideration in light of the new guidance from the administration.

### ***Compliance***

Late in 2016, our office disseminated a client advisory which guided school districts on compliance with the former DOE and DOJ interpretations. However, as the prior DOE and DOJ interpretations have been temporarily set aside by Judge O’Connor, and potentially permanently rescinded by the Trump administration, school districts within Texas have been given the liberty to set transgender policies as they deem appropriate.

However, it is still entirely possible that the U.S. Court of Appeal for the Fourth Circuit will uphold their prior decision in *G.G. v. Gloucester County Schools*, which equates gender identity to “sex” within the context of the Fourteenth Amendment’s equal protections clause. In this event, school districts would be legally required to afford transgendered students the same protections as those outlined by the DOE and DOJ in the May 13, 2016 Dear Colleagues letter.<sup>11</sup> As such, we advise our clients to thoroughly read our previous correspondence to familiarize themselves with transgender student policies which comply with the rescinded DOE and DOJ interpretations.<sup>12</sup> Likewise, a mock set of Transgender Student Guidelines which is consistent with former federal promulgations has been attached to this correspondence for reference.<sup>13</sup>

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<sup>9</sup> See *Beckerman v. Tupelo*, 664 F.2d 502, 510 (former 5th Cir. 1981); *contra, e.g., A.M. ex rel. McAllum v. Cash*, 585 F.3d 214 (5th Cir. 2009) (Confederate flag may be banned by school administrators due to danger of violence).

<sup>10</sup> Ring, Trudy, *Supreme Court to Hear Gavin Grimm Case; Huge Implications for Trans Students*, THE ADVOCATE, Feb. 4, 2017, <http://www.advocate.com/transgender/2016/10/27/gavin-grimm-case-has-major-implications-transgender-students>.

<sup>11</sup> See Appendix 1.

<sup>12</sup> See Appendix 2, May 16, 2016 Advisory Correspondence.

<sup>13</sup> See Appendix 3, Transgender Student Guidelines.

## Appendix 1



U.S. Department of Justice  
Civil Rights Division



U.S. Department of Education  
Office for Civil Rights

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May 13, 2016

Dear Colleague:

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance.<sup>1</sup> 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*.<sup>2</sup> 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](mailto:ocr@ed.gov) or 800-421-3481 (TDD 800-877-8339); or DOJ at [education@usdoj.gov](mailto: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.<sup>3</sup>

### **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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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),<sup>7</sup> 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.<sup>8</sup>

### **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.<sup>9</sup> 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.<sup>10</sup>

### **2. Identification Documents, Names, and Pronouns**

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

### **3. Sex-Segregated Activities and Facilities**

Title IX's implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances.<sup>12</sup> 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.<sup>13</sup>

- 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.<sup>14</sup> 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.<sup>15</sup>
- 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>
- 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

- **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).<sup>24</sup>

#### 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.<sup>25</sup> 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).<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> Directory information may include a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance.<sup>29</sup> School officials may not designate students' sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy.<sup>30</sup> 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.<sup>31</sup>
- **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.<sup>32</sup> 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.<sup>33</sup>
- 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.<sup>34</sup> 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.<sup>35</sup>

\* \* \*

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

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

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

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

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

5 See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998); *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at \*8 (4th Cir. Apr. 19, 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008); *Macy v. Dep't of Justice*, Appeal No. 012012082 (U.S. Equal Emp't Opportunity Comm'n Apr. 20, 2012). See also U.S. Dep't of Labor (USDOL), Training and Employment Guidance Letter No. 37-14, *Update on Complying with Nondiscrimination Requirements: Discrimination Based on Gender Identity, Gender Expression and Sex Stereotyping are Prohibited Forms of Sex Discrimination in the Workforce Development System* (2015), [wdr.doleta.gov/directives/attach/TEGL/TEGL\\_37-14.pdf](http://wdr.doleta.gov/directives/attach/TEGL/TEGL_37-14.pdf); USDOL, Job Corps, Directive: Job Corps Program Instruction Notice No. 14-31, *Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program* (May 1, 2015), [https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi\\_14\\_31.pdf](https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi_14_31.pdf); DOJ, Memorandum from the Attorney General, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (2014), [www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title\\_vii\\_memo.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf); USDOL, Office of Federal Contract Compliance Programs, Directive 2014-02, *Gender Identity and Sex Discrimination* (2014), [www.dol.gov/ofccp/regs/compliance/directives/dir2014\\_02.html](http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html).

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

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

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

9 See, e.g., Resolution Agreement, *In re Downey Unified Sch. Dist., CA*, OCR Case No. 09-12-1095, (Oct. 8, 2014), [www.ed.gov/documents/press-releases/downey-school-district-agreement.pdf](http://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](http://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](http://www.ed.gov/ocr/docs/investigations/09111031-b.pdf) (agreement to address sexual and gender-based harassment, including harassment based on nonconformity with gender stereotypes). See also *Lusardi*, Appeal No. 0120133395, at \*15 ("Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment").

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

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

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

13 See 34 C.F.R. § 106.31.

14 34 C.F.R. § 106.33.

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

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

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

18 The National Collegiate Athletic Association (NCAA), for example, reported that in developing its policy for participation by transgender students in college athletics, it consulted with medical experts, athletics officials, affected students, and a consensus report entitled *On the Team: Equal Opportunity for Transgender Student Athletes* (2010) by Dr. Pat Griffin & Helen J. Carroll (*On the Team*), [https://www.ncaa.org/sites/default/files/NCLR\\_TransStudentAthlete%2B\(2\).pdf](https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf). See NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes 2*, 30-31 (2011), [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf) (citing *On the Team*). The *On the Team* report noted that policies that may be appropriate at the college level may “be unfair and too complicated for [the high school] level of competition.” *On the Team* at 26. After engaging in similar processes, some state interscholastic athletics associations have adopted policies for participation by transgender students in high school athletics that they determined were age-appropriate.

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

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

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

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

23 See, e.g., Resolution Agreement, *In re Arcadia Unified Sch. Dist., CA*, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70 (July 24, 2013), [www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf](http://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 B4 C.F.R. §§ 106.31(a), 106.31(b)(4). See also, *In re Downey Unified Sch. Dist., CA*, supra n. 9; *In re Cent. Piedmont Cmty. Coll., NC*, supra n. 11.

25 34 C.F.R. § 106.31(b)(7).

26 20 U.S.C. §1232g; 34 C.F.R. Part 99. FERPA is administered by ED’s Family Policy Compliance Office (FPCO).

Additional information about FERPA and FPCO is available t [www.ed.gov/fpco](http://www.ed.gov/fpco).

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

28 34 C.F.R. § 99.31(a)(11), 99.37.

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

30 Letter from FPCO to institutions of Postsecondary Education 3 (Sept. 2009), [www.ed.gov/policy/gen/guid/fpco/doc/censusletterohighered091609.pdf](http://www.ed.gov/policy/gen/guid/fpco/doc/censusletterohighered091609.pdf).

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

32 34 C.F.R. § 99.20.

33 34 C.F.R. §§ 99.20-99.22.

34 See 34 C.F.R. §106.31(b)(4).

35 34 C.F.R. § 106.8(b).

## Appendix 2



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### *ATTORNEYS AND COUNSELORS FOR TEXAS PUBLIC SCHOOLS AND LOCAL GOVERNMENT*

May 16, 2016

With the rapidly growing emergence of transgender advocacy and condemnation alike penetrating national news outlets, the social and political intricacies surrounding the topic have begun to play out in an overabundance of facets of society. One such stage that has hosted a slew of concerns surrounding gender identity is the education system. As younger generations become involved in gender identity practices and debates, schools across the country are facing a number of complicated and novel accommodation issues which generally leave no common ground upon which adversarial parties may meet.

There is no question that a student's gender identity and the expression of that identity plays a significant role in the student's interactions within the school environment. Therefore, schools are best served by establishing a coherent policy regarding transgender and gender nonconforming students. These policies will not, however, anticipate every situation, so the needs of each student and each set of circumstances must be assessed on a case-by-case basis. The goal should be threefold: (1) ensuring the safety, comfort, and healthy development of the transgender or gender nonconforming student, (2) minimizing stigmatization in favor of social integration, and all the while (3) minimizing disruption to the learning environment.

Title IX of the Education Amendments of 1972 ("Title IX") specifically prohibits discrimination on the basis of sex in educational programs and activities operated by institutions which are recipients of Federal funding.<sup>14</sup> However, the language of Title IX leaves open to interpretation the implications of identified gender on the legally permissible separation of sexes in several preconceived scenarios.<sup>15</sup> Thus, in recent years, the U.S. Department of Education (DOE) and the U.S. Department of Justice (DOJ) have received an increasing number of inquiries from parents and school representatives concerning the civil rights protections for transgender

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<sup>14</sup> Title IX, 20 U.S.C. §1681(a): "[N]o 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 receiving Federal financial assistance."

<sup>15</sup> 34 C.F.R §106.33 ("[S]eparate toilet, locker room, and shower facilities on the basis of sex" are permissible, so long as "such facilities provided for students of one sex [are] comparable to such facilities for student of the other sex.")

students. On May 13, 2016, the DOE and DOJ jointly released a formal interpretation of Title IX within the context of permissibly sex-segregated activities stating “[t]his prohibition encompasses discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status.”

While the interpretation does not promulgate new or altered law on the matter, it does provide significant and clarifying guidance to school boards regarding their obligations under Title IX with respect to transgender students. This advisory correspondence seeks to provide our clients with the same guidance as the joint interpretation in order to facilitate federal compliance in the drafting of transgender-centric policies. While we understand the tumultuous and complex social status of this particular issue, our aim is to provide clients with a strictly legal summation of their responsibilities under existing law.

### ***Pertinent Terminology***

- **Gender Identity**: an individual’s internal sense of gender. A person’s gender identity may be incongruent with or the same as the person’s biologically assigned sex;
- **Sex Assigned at Birth**: the sex designation recorded on a person’s birth certificate, should such a record be provided upon birth;
- **Transgender**: an individual whose gender identity differs from the sex they were assigned at birth;
- **Transgender Female**: an individual who identifies as a female, but whose sex assigned at birth is male;
- **Transgender Male**: an individual who identifies as a male, but whose sex assigned at birth is female;
- **Transsexual**: an individual who has undergone the medical process of altering the genitalia they were assigned at birth to the alternative genitalia;
- **Gender Transitioning**: the process by which a transgender individual begins to assert the sex that corresponds to their gender identity, rather than their sex assigned at birth. This process may include sexual reassignment surgery, in which case, the individual is properly referred to as a transsexual. However, gender transitioning may include only an aesthetic shift in stereotypical characteristics associated with an individual’s sex assigned at birth to those associated with the alternative sex, such as clothing, naming, and use of pronouns. In the latter instance, individuals are properly referred to as transgendered. Gender transition may occur at any stage of an individual’s life, and may occur swiftly or evolve over a long duration of time.

### ***Case Law***

The first step in developing an appropriate transgender policy is understanding a transgender student’s legal rights and the school’s responsibilities towards these students. Current Texas law does not clearly address the rights of transgender students in our schools. However, federal law provides ample guidance on the matter. On April 19, 2016, the U.S. Court of Appeal for the Fourth Circuit rendered a decision in *G.G. v. Gloucester County School Board* that directly settled the issue of restroom accommodation for transgender students. The Court assessed the issue of

whether Title IX mandates a school's requirements in providing separate restroom facilities on the basis of sex with respect to transgender students. The Court found that the a school board's enactment of a policy which denied transgender students the right to utilize the restroom which corresponded to their asserted gender identity ran afoul to Title IX.<sup>16</sup> Specifically, given the ambiguity with regard to the meaning of "sex," the case set the precedent for deferring to DOE's interpretation of Title IX in this context which, as stated above, is equated to gender identity. Hence, the Court explicitly found that, in accordance with the DOE and DOJ interpretation, Title IX does, in fact, prohibit the discrimination of transgender students on the basis of their gender identity.

Further, the rights of transgender students must also be considered in the light of First Amendment freedom of expression. We know from prior court decisions that the First Amendment freedom of expression generally extends to a student's expression of gender, which may be achieved through hair, makeup, clothing, and behavior.<sup>17</sup> We also learn from those decisions that a school may curtail expressive student behavior, but only if it "would materially and substantially disrupt the work and discipline of the school," a significantly high standard.<sup>18</sup> Thus, the possibility that allowing certain expressive conduct of transgendered students to go unchecked *might* cause virulent controversy, that *could* result in a substantial disruption, is viewed as speculative and thus, generally insufficient to meet this standard. While a school may maintain order, the First Amendment is not trumped by a "heckler's veto" in regards to transgender expression.<sup>19</sup>

### **Compliance**

When a student or the student's parent or guardian, as appropriate, notifies school administration that the student will assert a gender identity that differs from previous representations or records, the school must begin treating the student consistent with the student's gender identity. While *G.G.* squarely settles the issue of transgender restroom accommodation, the DOE and DOJ's Title IX interpretation reaches far beyond this single issue.

#### *a. Restrooms, Locker Rooms, and Shower Facilities*

The DOE and DOJ treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. Thus, a school is obligated to treat transgender students the same as it treats other students of the same gender identity. As a result of *G.G. v. Gloucester's* affirmation of the DOE and DOJ's interpretation of Title IX, schools which receive Federal financial

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<sup>16</sup> *G.G., by his next friend and mother, Deirdre Grimm, v. Gloucester County Schools*, WL 1567467, Apr. 19, 2016.

<sup>17</sup> See *Doe ex rel. Doe v. Yunits*, 001060A, 2000 WL 33162199, at \*3 (Mass. Super. Oct. 11, 2000), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) (finding that a transgender student's expression of her identification with the female gender by dressing in female clothing and accessories was protected speech); *McMillen v. Itawamba County Sch. Dist.*, 702 F. Supp. 2d 699, at 704-5 (N.D. Miss. 2010) (finding that a female student demonstrated her likelihood of success on the merits of a First Amendment claim when school denied her permission to wear a tuxedo or other masculine attire to prom).

<sup>18</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 509, 513 (1969) (finding students protesting the Vietnam War by wearing black armbands did not meet that standard).

<sup>19</sup> See *Beckerman v. Tupelo*, 664 F.2d 502, 510 (former 5th Cir. 1981); *contra, e.g., A.M. ex rel. McAllum v. Cash*, 585 F.3d 214 (5th Cir. 2009) (Confederate flag may be banned by school administrators due to danger of violence).

assistance are prohibited from excluding transgender students from restrooms, locker rooms, and shower facilities which correspond to their proffered gender identity. Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to receiving this equal protection.

However, with respect to the recognized distress that this requirement may place on other students, schools are given two options of accommodation which revolve around the preferences of the transgender student. If the transgender student is comfortable utilizing an individual facility, separate from other students of either sex, such accommodation will comply with Title IX. However, if a transgender student rejects the separate facility as stigmatizing, then those students objecting to the common use of facilities with a transgender student may be accommodated by a separate facility themselves. If both students object to the use of individual facilities, a possible third solution is to add privacy stalls to common use facilities.

#### *b. Athletics*

Texas law and practice provides little guidance in transgender students' participation in competitive sports. However, guidance can be derived from federal interpretation. Similar to sex-specific facilities, Title IX regulations do not prohibit a school from operating or sponsoring sex-specific athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.<sup>20</sup> Thus, a school may enforce athletic requirements which are founded on research-based medical knowledge concerning the impact of students' participation on the competitive fairness or physical safety of the sport. 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.<sup>21</sup>

#### *c. Single-Sex Classes*

Although separating students by sex in classes and activities is generally prohibited, non-vocational elementary and secondary schools may offer non-vocational, single-sex classes and extracurricular activities under certain circumstances.<sup>22</sup> When offering such classes and activities, a school must allow transgender students to participate consistent with their gender identity.

#### *d. Fraternities and Sororities*

Title IX does not apply to the membership practices of social fraternities and sororities.<sup>23</sup> Therefore, those organizations are permitted to set their own policies regarding the gender identity of their members. Nothing in Title IX prohibits a fraternity from admitting or excluding transgender men, or a sorority from admitting transgender women if it so chooses.

#### *e. Housing and Overnight Accommodations*

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<sup>20</sup> 34 C.F.R. § 106.41(b).

<sup>21</sup> 34 C.F.R. § 106.6(b), (c).

<sup>22</sup> 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).

<sup>23</sup> 20 U.S.C. § 1681(a)(6)(A); 34 C.F.R. § 106.14(a).

The separation of sexes in regards to housing and overnight accommodations is permissible under Title IX.<sup>24</sup> However, similar to restroom, locker room, and shower facility accommodations, 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. Thus, schools must make available single-occupancy residential facilities for either transgender students who voluntarily wish to utilize such, or non-transgender students who object to sharing housing with a transgender student.

*f. Dress Codes*

Dress codes are another transgender student issue. The stance held by most courts is that a school may not force a transgender student to dress against that student's gender identity.<sup>25</sup> Nonetheless, the transgender student must comply with the dress code governing that student's chosen identity. Although many Texas schools may have chosen to adopt informal, flexible practices in lieu of formal policies, despite the frequency of court decisions in other jurisdictions supporting transgender students, research to date suggests that only two Texas schools have adopted policy where transgender students are expressly permitted to dress in conformity with their gender identity.<sup>26</sup>

*g. Harassment*

It goes without saying that schools have a responsibility to provide a safe and nondiscriminatory environment for all students, including those that identify as transgender. As the DOE and DOJ equate gender identity with sex, harassment that is based on a student's gender identity, transgender status, behavior which does not conform to gender stereotypes, or gender transition is harassment based on sex. If sex-based harassment creates a hostile environment, the school must take prompt and effective steps to curtail those activities found to be a violation of Title IX, prevent recurrence, and, as appropriate, remedy their effects. The sex or gender identity of the harasser and/or the harassed student does not matter in such cases.<sup>27</sup>

*h. Student Identification*

Under Title IX, a school must treat students consistent with their gender identity. Thus, school staff and contractors must use pronouns and names consistent with a transgender student's

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<sup>24</sup> 20 U.S.C. § 1686; 34 C.F.R. § 106.32.

<sup>25</sup> See *Doe ex rel. Doe v. Yunits*, 001060A, 2000 WL 33162199, at \*4-6 (Mass. Super. Oct. 11, 2000) (finding that a transgender student's expression of her identification with the female gender by dressing in female clothing and accessories was protected speech); *McMillen v. Itawamba County Sch. Dist.*, 702 F. Supp. 2d 699, at 704-5 (N.D. Miss. 2010) (finding that a female student demonstrated her likelihood of success on the merits of a First Amendment claim when school denied her permission to wear a tuxedo or other masculine attire to prom).

<sup>26</sup> C.B.S. News, *Jeydon Loredo Texas Transgender Student Gets Approval for Tuxedo Yearbook Photo* (Nov. 16, 2013), available at: <http://www.cbsnews.com/news/jeydon-loredo-texas-transgender-student-gets-approval-for-tuxedo-yearbook-photo/>; Houston Chronicle, *Transgender Spring Student Wins Bid to Wear Dress* (Apr. 5, 2013), available at <http://www.chron.com/news/houston-texas/houston/article/Transgender-Spring-student-wins-bid-to-wear-dress-4409653.php>.

<sup>27</sup> OCR, *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>, at 5 (stating that Title IX protects against sex discrimination regardless of the sexes of perpetrator and complainant).

gender identity as indicated to school administration. Further, the Texas Association of School Boards (TASB) has provided specific guidance on this issue, stating that a student's preferred name and gender identity is to be used, except for permanent records and other usages requiring a legal name and/or gender, unless a request for record alteration is granted, consistent with paragraph i(ii) below.<sup>28</sup>

*i. Privacy*

The Family Educational Rights and Privacy Act (FERPA) prohibits schools from releasing a student's personally identifiable information ("PII"), which does include a student's status as a transgender. The DOE and DOJ may find a violation of Title IX when a school limits a student's educational rights or opportunities by failing to take reasonable steps to protect students' privacy related to their transgender status. This includes the non-consensual release of a student's birth name and/or sex assigned at birth.

One exception to FERPA confidentiality is the release of PII to individual school personnel, provided that the disclosure is for "a legitimate educational purpose."<sup>29</sup> 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 to the school community may violate FERPA and interfere with transgender students' right under Title IX to be treated consistent with their gender identity. Thus, schools may maintain records with information identifying a student as transgendered, but must take steps to maintain the confidentiality of such information, even as to certain teachers and staff, as well as other students.<sup>30</sup>

*i. Disclosure of Directory Information*

Under FERPA, 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.<sup>31</sup> Directory information may include a student's name (if such would not indicate a transgendered status), address, telephone number, date and place of birth, honors and awards, and dates of attendance.<sup>32</sup> Directory information does not include a student's sex, including transgender status, and disclosure of such will more than likely be viewed as an invasion of privacy. A school also must allow parents (or students who have reached 18 years of age or are attending a postsecondary institution) a reasonable amount of time to request that the school not disclose *any* of a student's directory information.

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<sup>28</sup> TASB, *Legal Issues Related to Transgender Students* (2015) available at [https://www.tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Students/documents/transgender\\_students\\_july15.pdf](https://www.tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Students/documents/transgender_students_july15.pdf), at 5-6.

<sup>29</sup> 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1).

<sup>30</sup> 34 C.F.R. §§ 99.3, 30, 31(a).

<sup>31</sup> 34 C.F.R. §§ 99.3, 99.31(a)(11), 99.37.

<sup>32</sup> 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.

*ii. Amendment or Correction of Education Records*

If a school receives a request to correct a student's education records to reflect a student's gender identity which differs from current records it must consider the request.<sup>33</sup> If the school does not amend the record, it must inform the student and/or parent who requested such an amendment of its decision and of their right to a hearing. If, after the hearing, the school does not amend the record, it must inform the student and/or parent who requested such an amendment of the right to insert a statement in the record with comments on the contested information, a statement that the requestor disagrees with the hearing decision, or both. This statement must be disclosed whenever the record to which the statement relates is disclosed.<sup>34</sup>

*j. Miscellaneous*

Unless expressly authorized by Title IX or its implementing regulations, the distinguishing of students on the basis of gender identity in any school activities or the application of any school rule is considered an inappropriate discrimination on the basis of sex by the DOE and DOJ. The disciplining or exclusion of students 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 is considered a violation of Title IX.

Again, while these accommodations may create certain levels of discomfort amongst the non-transgendered community, the desire to alleviate these discomforts alone cannot justify a policy that singles out transgendered students.<sup>35</sup>

***Failure to Comply***

A failure to comply with Title IX, as interpreted by the DOE and DOJ, with regards to transgender students may result in revocation of federal funding from a delinquent institution. Even in the event that federal financial assistance is not rescinded, subjecting transgender students to treatment which differs from other students who share the same gender identity may very well result in substantial damage awards and attorney's fees associated with causes of action brought forth by injured students.

***Conclusion and Recommendations***

The federal government has taken the position that transgender students should be treated according to their gender identities. That is, transgender males should be treated as males, and transgender females should be treated as females.

In contrast, Texas law is in flux regarding the rights of transgender students. There is no legal authority in Texas regarding students' right to use sex-specific facilities exclusively with non-transgendered students of the same sex as themselves. A law of this form, no matter its intent

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<sup>33</sup> 34 C.F.R. § 99.20.

<sup>34</sup> 34 C.F.R. §§ 99.20-99.22.

<sup>35</sup> 34 C.F.R. §106.31(b)(4).

and content, would likely face a constitutional challenge. Moreover, schools adopting a policy denying equal treatment according to gender identity would also be subject to constitutional challenge and, at a minimum, Office of Civil Rights (“OCR”) investigations. Were such investigations to occur, based on current law and federal interpretation, OCR would likely find civil rights violations and propose an agreed resolution requiring the school to treat transgender students according to their gender identities. See OCR Resolution Agreements between OCR and two California school districts, attached as Exhibits A and B.<sup>36</sup>

Currently, the practice and policy of accepting and treating transgender students according to their gender identities, while unpopular with certain students and parents, is, from a legal standpoint, the safest practice, avoiding federal investigations and lawsuits. Should a school accept this approach, it might adopt policies similar to the model policies promulgated by the Gay, Lesbian & Straight Education Network (Exhibit C), the California Safe Schools Coalition (Exhibit D), or the New York City Department of Education (Exhibit E).

As mentioned in the introductory paragraphs, even the best policy that is perfectly catered to the specific conditions of a school cannot anticipate all the issues that will arise. Therefore, in considering a transgender policy, we recommend that your school carefully read, analyze, and appropriately share with your governing board this confidential attorney-client advisory, along with the attached model policies, and identify policy statements and sections that may be most applicable to your school, directly or with modification. For further reference, a guide published jointly by the ACLU, Human Rights Campaign Foundation, and the National Center for Lesbian Rights and the legal issues Q & A on transgender students by the Texas Association of School Boards have been attached as Appendices A and B. Clearly, whether choosing to challenge the Federal standards or acknowledge them, schools cannot ignore this issue. We are prepared to work with your school and Board and help you prepare a policy and practices that meet your needs.

Sincerely,

**SCHULMAN, LOPEZ,  
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<sup>36</sup> *Resolution Agreement between Arcadia Unified Sch. Dist. And the U.S. Dep’t of Educ., Office of Civil Rights, and the U.S. Dep’t of Justice, Civil Rights Division*, OCR Case No. 09-12-1020 (July 24, 2013), available at [www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf](http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf); *Resolution Agreement Downey Unified Sch. Dist.*, OCR Case No. 09-12-1095 (Oct. 8, 2014), available at [www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf](http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf).

## **Appendix 3**

### **Transgender Student Guidelines**

\_\_\_\_\_ School District (hereafter, the “District”) seeks to ensure the mental, emotional, and physical health, as well as the safety of all students, prevent discrimination and bullying, foster a conducive learning environment for all students, and provide equal access and opportunity to participate in all programs and activities. As such, the District adopts these Transgender Student Guidelines (hereafter, the “Guidelines”), which are mandatory for the \_\_\_\_\_ school year and continuing thereafter unless and until revised or revoked. Failure to comply with these Guidelines may result in adverse employment action.

#### ***Pertinent Terminology***

The following definitions are not meant to label individuals, but to enhance understanding of transgender issues and guide actions and discussion of related topics:

- **Gender**: a person’s actual or perceived sex, which includes a person’s perceived identity, appearances, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with a person’s sex at birth;
- **Gender Identity**: an individual’s internal sense of identification as a female, male, or non-binary understanding of gender. A person’s gender identity may be incongruent with or the same as the person’s biologically assigned sex;
- **Gender Expression**: a person’s gender-related appearance and behavior, whether or not stereotypically associated with the person’s assigned sex at birth;
- **Gender Nonconforming**: displaying a gender identity or expression that may differ from that typically associated with one’s sex assigned at birth. Gender nonconforming is not synonymous with transgender. Some, but not all gender nonconforming persons, identify as transgender;
- **Gender-Based Discrimination**: a form of sexual discrimination which refers to the differential treatment or harassment of a student based on the student’s sex, including gender identity, gender expression, and nonconformity with gender stereotypes, that results in the denial or limitation of education services, benefits, or opportunities. Conduct may constitute gender-based discrimination regardless of the actual perceived sex, gender identity, or sexual orientation of the persons experiencing or engaging in the conduct;
- **Sex**: the biological condition or quality of being male or female;
- **Sex Assigned at Birth**: the sex designation recorded on a person’s birth certificate, should such a record be provided upon birth;
- **Transgender**: an individual who consistently and uniformly asserts a gender identity that differs from their assigned sex at birth;
- **Transgender Female**: an individual who identifies as a female, but whose sex assigned at birth is male;

- **Transgender Male:** an individual who identifies as a male, but whose sex assigned at birth is female;
- **Transsexual:** an individual who has undergone the medical process of altering the genitalia they were assigned at birth to the alternative genitalia;
- **Preferred Gender Pronouns:** the pronoun a person prefers to have used when referred to in conversation (e.g., a person with a traditionally male gender identity likely prefers use of the pronouns he, him, and his)
- **Gender Transitioning:** the process by which a transgender individual begins to assert the sex that corresponds to their gender identity, rather than their sex assigned at birth. This process may include sexual reassignment surgery, in which case, the individual is properly referred to as a transsexual. However, gender transitioning may include only an aesthetic shift in stereotypical characteristics associated with an individual's sex assigned at birth to those associated with the alternative sex, such as clothing, naming, and use of pronouns. In the latter instance, individuals are properly referred to as transgendered. Gender transition may occur at any stage of an individual's life, and may occur swiftly or evolve over a long duration of time.

It is important to note that not all individuals will fit a particular definition or pattern. Instead of focusing on definitions which may or may not define an individual, school personnel are required to show respect for the student's desires and wishes to the extent practical so as to foster a productive educational process for all.

### ***Purpose of Guidelines***

School support should be an integral part of educational and personal success. The District remains committed to the safety of all of its students. These Guidelines seek to ensure that no student experiences an unsafe or unwelcome learning environment.

The intended purpose of the Guidelines is:

- (1) To foster an educational environment that is safe and free from discrimination for all students, regardless of sex, sexual orientation, gender identity, or gender expression; and
- (2) To facilitate compliance with local, state and federal laws concerning gender accommodation, bullying, harassment, and discrimination.

### ***Scope***

This policy covers conduct that takes place within any of the schools covered by the District, on school property, at school-sponsored functions and activities, on school buses or vehicles, and at bus stops. This policy also pertains to usage of electronic technology and electronically transmitted communication that occurs in the school, on school property, at school-sponsored functions and activities, on school buses or vehicles, at bus stops, and on school computers, networks, forums, and mailing lists. This policy applies to the entire school community, including educators, school and District staff, students, parents, and volunteers.

## ***Governing Law***

Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.*, is a federal civil rights law that prohibits discrimination on the basis of sex in any federally funded education program or activity. The Office of Civil Rights (“OCR”) is the federal agency responsible for enforcing Title IX. OCR has provided written guidance that Title IX prohibits sex discrimination based not only on biological sex and sexual orientation, but also on the grounds of gender identity. Discrimination on the basis of sex, including sexual discrimination, sexual harassment, and sexual violence are prohibited by Title IX. School districts are subject to investigation and possible sanctions by OCR if a district knew or should have reasonably known about sexual harassment, violence, or discrimination.

## **Guidelines**

### ***General Guidelines***

The District requires all personnel to acknowledge the gender identity that each student consistently and uniformly asserts. No medical or mental health diagnosis or treatment is required in order to have a student’s gender identity recognized and respected.

The District expressly prohibits any personnel from engaging in, encouraging, or failing to report discrimination, bullying, or harassment based on sex, including, but not limited to, a student’s gender identity, gender expression, gender transition, transgender status, or gender nonconformity. The scope of this responsibility includes ensuring that any incident of discrimination, harassment, or bullying is given immediate and serious attention, including investigating the incident, taking age and developmentally appropriate corrective action, and providing students and staff with appropriate resources.

The campus counselor will serve as a designated ally for students who wish to discuss any transgender related issues. The counselor may help with questions and concerns voiced from students and school personnel regarding transgender or gender identity issues. Additionally, the counselor may offer extra support for transgender students as they navigate their experience at school.

School administrators shall make every effort to keep transgender and gender nonconforming students at their original school site. Transfers shall not be a school’s first or preferred response to harassment of transgender and gender nonconforming students and shall be considered only when necessary for the protection or personal welfare of the transferred student or when requested by the student or the student’s parent or guardian. The student or the student’s parent or guardian must consent to any such transfer.

## ***Names and Pronouns***

Except when otherwise required by law (see *Recordkeeping* below), school personnel must use the name and pronouns preferred by a student. A court-ordered name or gender change is not required for reference purposes, and the student need not change his or her official records. Continued, intentional misuse of a student's new name and pronouns, undermines the student's desires and is contrary to the District's goal of treating students with dignity and respect and is considered a violation of this provision.

If school personnel are unadvised as to a student's preferred name and reference pronouns in communications with a parent or guardian or in conferences with a parent or guardian, they should privately seek the desires of the student. It is always appropriate to ask a student his/her preferred name and gender pronoun. Until the student has indicated their preferred name and reference pronouns, school personnel shall refer to the student by his/her legal name and using pronouns which correspond to the student's sex assigned at birth when speaking with the student's parent or guardian.

## ***Recordkeeping***

**Official Records:** School personnel may only change a student's name on official records when the name of the student is changed by appropriate court action, such as by a name change proceeding. Upon the submission of evidence of the appropriate court action, school personnel must change the student's official name in all school records to reflect the legal name change.

School personnel must change a student's gender on official records when the gender of the student is changed on his/her birth certificate. Upon the submission of evidence of an amended birth certificate, school personnel must change the student's official gender in all school records to reflect the legal gender change. The name and gender which appears on school records at any given time is the official legal name and gender of the student for all purposes, including school registration.

Until a legal name or gender change occurs, school personnel may use an "also known as" description with the student's preferred name.

**Unofficial Records:** To the extent the school is not legally required to use a student's legal name or gender on school records or other documents, all personnel must use the name and gender preferred by the student.

## ***Privacy and Confidentiality***

All students have a right to privacy. Dissemination of a student's transgender status, legal name, gender assigned at birth, gender expression, or the fact that any information contained in the student's official records has been altered may constitute a violation of that student's right to privacy. Under the Family Education Rights and Privacy Act (FERPA), only those employees with a legitimate educational need should have access to a student's records or the information contained within those records. A name in a school's database is part of an official educational record and is, therefore, covered by FERPA. Private information about a student's gender identity may be provided to others without student or parental consent only if it is reasonably believed by personnel that providing this information would likely help to prevent anticipated harm to the student, whether such harm is anticipated to be brought by the student or by another. When assessing the necessity of information disclosure without the student's prior consent, if an employee believes a student is in danger of harm, the employee must contact the designated ally and/or the Office of Legal Counsel to assist in deciding to whom any disclosure might be appropriate.

Aside from a legitimate education purpose or fear of danger, school personnel may only share such information as the student directs. This includes sharing information with a student's parent or guardian, certain school personnel, and other students. When contacting the parent or guardian of student known by school personnel to be transgender, school personnel must use the student's legal name and the pronoun corresponding to the student's gender assigned at birth unless the student, parent or guardian specifies otherwise.

Transgender and gender nonconforming students have the right to discuss and express their gender identity openly and to decide when, with whom, and to what extent to share private information. The fact that a student chooses to disclose his/her transgender status to staff or other students does not authorize school staff to disclose other medical information about the student.

As set forth in the preceding section, official records may not be changed absent court order or other legal document. If a parent or guardian requests access to his/her student's educational records as defined by FERPA, access must be provided. A request by a parent or guardian for educational records under FERPA may include unofficial records directly related to the student, including records containing a student's actual or perceived gender identity. The Office of Legal Counsel should be advised when a request for student records is made and a transgender student's privacy may be of concern (e.g., when the student has not yet disclosed gender identity status to a parent or guardian).

When communicating to the media or community about issues related to gender identity, school personnel must contact or direct the person making the inquiry to the Communications Department (who will, in turn, consult with the designated ally before responding), rather than directly commenting on the issue. School personnel should direct inquiries from families or the immediate school community to the designated ally.

## ***Student Transition***

In most cases, transitioning is a very private matter. Students may choose whether or not to have their parents participate in this process. Notifying a parent or guardian, prior to consultation with the student, may carry risk for the student in some cases. School personnel must consider the health, well-being and safety of the transitioning student.

When appropriate, schools should work closely with a student and family in devising a plan regarding the confidentiality of the student's transgender status.

Prior to notifying any parent or guardian regarding the student's gender identity or any potential transition process, school personnel must work closely with the student to assess the degree to which, if any, the parent or guardian has been or will be involved in the process.

## ***Restrooms and Related Facilities***

Students must feel comfortable and safe in the use of restrooms and locker room facilities. Under no circumstances may a school require a student to use facilities that are potentially unsafe for the student, nor may it be required that a transgender student utilize facilities which do not correspond to that student's gender identity.

In any gender-segregated facility, any student, transgender, gender non conforming, or otherwise, who is uncomfortable using a shared facility, regardless of the reason, shall, upon the student's request, be provided with a safe and non-stigmatizing alternative. This may include, for example, a non-gender-specific, individual facility, or addition of a privacy partition or curtain.

Any student, transgender, gender nonconforming, or otherwise, who has a need or desire for increased security in a locker room facility may have access to a reasonable accommodation such as the following:

- a. Assignment of a student locker near the staff office or a supportive peer group;
- b. 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);
- c. Use of a nearby private area; or
- d. A separate changing schedule.

Transgender students must also be provided sex-specific facilities which correspond to their asserted gender identity at all District-sponsored activities, including overnight events and extracurricular activities on and off campus. However, students, transgender, gender nonconforming, or otherwise, may request access to private facilities based on privacy, safety, or other concerns.

### ***Dress Code and Appearance***

Schools may enforce dress codes pursuant to District policy. Students shall have the right to dress in accordance with their gender identity, within the constraints of the dress code adopted by the school. Gender expression may not be used as a basis for a student's failure to comply with a legitimate school dress code. School administration shall not adopt a dress code that is aimed at specifically limiting the expression of transgender or gender nonconforming students or that is consequentially disproportionately more cumbersome to transgender or gender nonconforming students. Further, school staff shall not enforce a legitimate dress code more strictly against transgender and gender nonconforming students than other students.

### ***Gender-Based Activities and Classes***

Participation in gender-based activities is a valuable part of the education experience for all students. Specifically, transgender students must have equal opportunities to participate in athletics and class offering which comply with their gender identity.

**Physical Education:** For physical education classes that are gender-based, transgender students shall participate in physical education in accordance with their gender identity asserted at school.

**Athletics:** The District supports the participation of transgender students in all athletic activities. All students should have the opportunity to participate in athletics in a manner that is consistent and uniform with their gender identity, irrespective of the gender listed on a student's records or identification documents. The District's Athletic Director, in conjunction with the Superintendent of Schools, shall render decisions regarding transgender students' participation in athletics in accordance with these Guidelines.

To determine whether participation of a transgender student athlete is appropriate, the District may consider the following:

- A written statement from the student affirming the consistent gender identity and expression to which the student self-relates;
- Documentation from individuals such as parents, friends, and/or teachers that affirm the student's gender identity; and
- University Interscholastic League ("UIL") regulations, if applicable.

Once a decision has been made by the District, the Athletic Director or other appointed school administrator shall communicate that decision to the appropriate athletics authority. Note, however, that the UIL or other

governing athletic body may have ultimate authority to determine the team on which a student can participate in league play.

**School Activities:** All students enjoy a right to equitable access to District sponsored activities, functions, and programs. Students may not be excluded from participation in, be denied the benefits of, or be subjected to harassment or other forms of discrimination on the basis of gender identity in any program or activity. These activities and programs may include, but are not limited to, homecoming, prom and other school dances, spirit day, student clubs and organizations, celebrations, sporting events and competitions, banquets and award ceremonies, assemblies, acknowledgments, after school activities/programs, and all other extra-curricular activities.

**Gender-Specific Classes:** In all circumstances, school personnel should attempt to eliminate gender divisions amongst students in all situations, to the extent most practicable. However, the District recognizes that certain courses and programs require gender separation, such as certain health courses. In the event it has been deemed necessary to facilitate gender-specific courses or programs, transgender students must be permitted to participate in those courses or programs which correspond to their gender identity.

### ***Training and Professional Development***

The District shall conduct staff training for all staff members on their responsibilities under applicable local, state, and federal laws and these Guidelines. This training includes educators, administrators, counselors, social workers, and health staff. Information regarding these Guidelines shall be incorporated into training for new school employees.

To the extent funding is available, the District shall implement ongoing professional development to build the skills of all staff members to prevent, identify, and respond to bullying, harassment, and discrimination. The content of such professional development shall include, but is not limited to:

- a. Terms, concepts, and current developmental understandings of gender identity, gender expression, and gender diversity in children and adolescents;
- b. Developmentally appropriate strategies for communication with students and parents about issue related to gender identity and gender expression that protect student privacy;
- c. Developmentally appropriate strategies for preventing and intervening in bullying incidents, including cyberbullying; and
- d. School and District policies regarding bullying, discrimination, and gender identity and expression issues and responsibilities of staff.

### ***Creating a Supportive Environment***

Administrators must affirmatively seek opportunities to be an example in abandoning gender references and stereotypes and creating an inclusive environment. School personnel must be role models of these Guidelines. Wherever arbitrary gender dividers can be avoided, they must be eliminated. Further, it is the responsibility of all school personnel to not only conduct themselves in a manner consistent with the provisions of these Guidelines, but to encourage others to do the same and report observed failures to do so.