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LEGAL UPDATE

March 9, 2017

To: Superintendents, Member School Districts (K-12)

From: Ellie R. Austin *ERA*
Schools Legal Counsel

Subject: U.S. Department of Education and U.S. Department of Justice
Withdraw Guidance on Transgender Students
Memo No. 08-2017

On February 22, 2017, the U.S. Department of Education, Office for Civil Rights (“OCR”) and the U.S. Department of Justice, Civil Rights Division (“CRD”) jointly issued a *Dear Colleague Letter* withdrawing two guidance documents relative to Title IX protections for transgender students. Specifically, the letter withdrew and rescinded guidance contained in the *Letter to Emily Prince* dated January 7, 2015¹ and the *Dear Colleague Letter on Transgender Students* dated May 13, 2016.²

Both documents took the position that Title IX of the Education Amendments of 1972 (“Title IX”),³ which prohibits discrimination on the basis of sex in educational programs and activities, required transgender students to be able to access sex-segregated facilities, including restrooms and locker rooms, based on their gender identity.⁴ The February 22, 2017, *Dear Colleague Letter* is attached.⁵

The letter provided that the withdrawal of this interpretation “does not leave students without protections from discrimination, bullying, or harassment,” and that “schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment.”

¹ Available at http://www.emily-esque.com/wp/wp-content/uploads/2016/04/DOED-Reply-re-Transgender-Student-Restroom-Access_Redacted.pdf.

² Available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

³ 20 U.S.C. § 1681 *et seq.*

⁴ See 34 C.F.R. § 106.33.

⁵ It is also available for download at <https://www.justice.gov/opa/press-release/file/941551/download>.



Notwithstanding this federal action, California law permits transgender students to participate in school programs and activities and use facilities according to their gender identity. Section 221.5(f) of the Education Code provides:

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.

California law⁶ also prohibits discrimination in public schools on the basis of gender, gender identity, and gender expression.⁷

Superintendent of Public Instruction Tom Torlakson stated his strong support for the rights of transgender students in a News Release issued by the California Department of Education on February 22, 2017.⁸ He also clarified that California laws protecting transgender students remain intact.

Meanwhile, the *Gloucester County School Board v. G.G.* case previously pending before the Supreme Court has been thrown into legal limbo. The *G.G.* case addresses whether a transgender high school student can use the boys' restroom consistent with his gender identity. On March 6, 2017, the Supreme Court issued a one-sentence order vacating the Fourth Circuit Court of Appeal's ruling in favor of the transgender teen and remanding the case back to the Fourth Circuit. The Court of Appeals must now decide whether Title IX's prohibition on sex discrimination extends to gender identity in the absence of federal guidance on the issue.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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⁶ Education Code § 200.

⁷ "Gender" means sex, and includes a person's 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 sex assigned at birth. Education Code § 210.7.

⁸ Available at <http://www.cde.ca.gov/nr/ne/yr17/yr17rel17.asp>.



U.S. Department of Justice
Civil Rights Division



U.S. Department of Education
Office for Civil Rights

February 22, 2017

Dear Colleague:

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

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

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

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

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

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

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

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

Sincerely,

/s/

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

/s/

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