

BEFORE THE
DEPARTMENT OF EDUCATION
OFFICE OF CIVIL RIGHTS

PETITION FOR INTERPRETATION
ACCESS TO SEX-SEGREGATED FACILITIES AND GENDER IDENTITY

SUBMITTED BY EMILY T. PRINCE, ESQ.

Pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq., Petitioner submits this petition for interpretation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq. (Title IX). Specifically, Petitioner requests that the Department of Education Office of Civil Rights (OCR) reissue its existing guidance in the form of a Federal Register notice to improve compliance with Title IX.

On January 7, 2015, OCR issued a letter (the Interpretation Letter) stating that

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

However, since the issuance of that letter, several state and local governments have taken steps to preclude transgender children from using sex-segregated facilities appropriate for their gender identity; i.e., requiring children to use restrooms consistent with their designated sex at birth. Accordingly, it is necessary for OCR to reissue its existing interpretation in a more public and formal setting. Doing so will serve the interest of increasing compliance among the regulated community.

OCR noted in its letter that it has resolved investigations involving transgender students in two school districts: Arcadia Unified School District¹ and

¹ OCR Case No. 09-12-1020 (July 24, 2013), <http://www.justice.gov/crt/about/edu/documents/arcadialetter.pdf> (resolution letter); and <http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf> (resolution agreement).

Downey Unified School District.² However, since the issuance of the Interpretation Letter, more school districts have considered instituting such policies. Litigation is ongoing in Gloucester County, Virginia.³ In a recent vote, Stafford County, Virginia adopted similar policies.⁴ Entire states have considered the policies that OCR has determined to violate Title IX, with the Kentucky Senate voting to approve a bill that would have precluded transgender and nonbinary students from using facilities appropriate for their gender identity.⁵ Comparable legislation is under consideration in Texas, with the Texas bill offering statutory damages of \$2,000 for any time a cisgender student shared a restroom with a transgender student.⁶ The Interpretation Letter is proving insufficient at communicating to the regulated community of educational institutions, and to state legislatures, that transgender and nonbinary students must have access to sex-segregated facilities that are consistent with their gender identity.

Rather than continue to attack the problem of anti-trans school policies on a case-by-case basis, issuing a notice of interpretation in the Federal Register will conserve the resources of both OCR and the Civil Rights Division of the Department of Justice (CRD). With a formal interpretation, state and local legislative bodies will be suitably apprised of the interpretation and warned of the consequences for noncompliance. Additionally, with a formal interpretation published, it will be easier for OCR and CRD to hold educational institutions accountable in

² OCR Case No. 09-12-1095 (October 14, 2014), <http://www2.ed.gov/documents/press-releases/downey-school-district-letter.pdf> (resolution letter); and <http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf> (resolution agreement).

³ American Civil Liberties Union, “ACLU Files Federal Discrimination Complaint against Va. School Board for Bathroom Policy,” Dec. 19, 2014, available at <https://www.aclu.org/lgbt-rights/aclu-files-federal-discrimination-complaint-against-va-school-board-bathroom-policy>.

⁴ Dominic Holden, BuzzFeed News, “Another Virginia School District Tests Federal Rules with Anti-Transgender Policy,” Mar. 25, 2015, available at <http://www.buzzfeed.com/dominicholden/another-virginia-school-district-tests-federal-rules>.

⁵ Sunnive Brydum, The Advocate, “Kentucky Senate Quietly Approves Bill Targeting Trans Students”, Feb. 27, 2015, available at <http://www.advocate.com/politics/transgender/2015/02/27/kentucky-senate-quietly-approves-bill-targeting-trans-students>; *but see* Mitch Kellaway, The Advocate, “Kentucky’s Transphobic Legislation Dies After ‘Last Ditch Effort,’” Mar. 25, 2015, available at <http://www.advocate.com/politics/transgender/2015/03/25/kentuckys-transphobic-legislation-dies-after-last-ditch-effort>.

⁶ Sunnive Brydum, The Advocate, “Texas Doubles Down on Transphobic Legislation, Adding \$2,000 Fine for ‘Wrong’ Bathroom Use,” Mar. 10, 2015, available at <http://www.advocate.com/politics/transgender/2015/03/10/texas-doubles-down-transphobic-legislation-adding-2000-fine-wrong-ba>.

circumstances where the interpretation is ignored in favor of discrimination against transgender students by making the law on the point clearly established.

Given that there does not seem to be any decrease in the frequency of anti-trans school policies, an escalation in formality of agency guidance is necessary. For the foregoing reasons, Petitioner asks that the Interpretation Letter be revised and reissued as a formal interim or final interpretation in the Federal Register.

Sincerely,

A handwritten signature in black ink, appearing to read 'E. Prince', with a long horizontal flourish extending to the right.

Emily T. Prince, Esq.

April 5, 2015



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

January 7, 2015

Emily T. Prince, Esq.
[REDACTED]

Dear Ms. Prince:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,



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