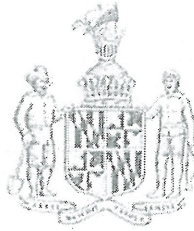


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OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 25, 2016

The Honorable Aruna Miller
14074 Berryville Road
Darnestown, Maryland 20874

Dear Delegate Miller:

You have asked for advice concerning the responsibilities of the local school boards with respect to the recent directive from the Department of Justice ("DOJ") and the Department of Education ("ED") on transgender students in the schools. It is my view that the local school boards should comply with the recent directive, both because failure to comply places them at the risk of liability or loss of federal funds under Title IX of the Education Amendments of 1972 ("Title IX"), and because the suggestions in the directive are not substantially different from the suggestions in the guidelines of the Maryland State Department of Education ("MSDE").

The directives in question are in the form of a "Dear Colleague" letter issued by DOJ and ED dated May 13, 2016 and a publication entitled *Examples of Policies and Emerging Practices for Supporting Transgender Students*, U.S. Department of Education, Office of Elementary and Secondary Students, Office of Safe and Healthy Students (May 2016).¹ The letter is designed to summarize a school's Title IX obligations regarding transgender students and explain how DOJ and ED evaluate a school's compliance with these obligations. Under Title IX a school receiving federal funds agrees that it will not exclude, separate, deny benefits to, or otherwise discriminate against any person on the basis of sex. The letter notes that DOJ and ED treat a student's gender identity as the student's sex for purposes of Title IX and its implementation, and that, as a result, a school must not treat a transgender student differently from the way it treats other students of the same gender identity. This is not a new interpretation, but reflects the positions that the Departments have previously taken.

The letter gives some guidance with respect to treatment of transgender students in different situations. Most controversial are those related to restrooms and locker rooms. The letter says that:

¹ Both documents are linked from <https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights>

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. 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.

It further explains:

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. 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.²

The other guidance, *Examples of Policies and Emerging Practices for Supporting Transgender Students*, U.S. Department of Education, Office of Elementary and Secondary Students, Office of Safe and Healthy Students (May 2016), provides examples of policies and emerging practices that some schools are already using to support transgender students. Among these are policies that some states have that are designed to "ensure transgender students have access to facilities consistent with their gender identity," and "protect the privacy rights of all students in restrooms or locker rooms." Pages 7 and 8.

MSDE has also issued guidelines with respect to discrimination on the basis of gender identity. *Providing Safe Spaces for Transgender and Gender Nonconforming Youth: Guidelines for Gender Identity Nondiscrimination*, MSDE (October 2015) ("the Guidelines") reflects that "[a] safe and supportive school environment minimizes stigmatization, protects all students from harassment and bullying, and does not single out students by gender. It may help to create a gender neutral

² Similar guidance was given in a letter to Emily T. Price, Esquire dated January 7, 2015 ("the Opinion Letter"), which in turn cited the Office of Civil Rights December 2014 *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* and cases that had been brought on behalf of transgender students under Title IX in Arcadia Unified School District, 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). and Downey Unified School District, 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).

The Honorable Aruna Miller

May 25, 2016

Page 3

environment.” Page 9. Among the suggestions are that school systems and administrators consider selection of a restroom in the school that is designated for only one user at a time as a gender neutral/unisex restroom, that access be provided to a single use/gender neutral restroom for any student who has a need or desire for increased privacy, regardless of the underlying reason, and that transgender and gender non-conforming students whose gender identity is not exclusively male or female be permitted to use facilities they believe are the most consistent with their safety and gender identity. Pages 10 and 13.

The Guidelines note that while several cases have found it discriminatory to mandate that a transgender student use a particular bathroom or locker room, others had not, instead rejecting the the DOJ and ED position. Thus, the Guidelines conclude that the case law interpreting Title IX as it applies to transgender students is not settled. Page 16. It is presumably for this reason that the State guidelines ask schools and administrators to consider these actions, rather than requiring specific actions.

One of the cases cited in the guidelines as in disagreement with the DOJ and ED position is *G.G. ex rel. Grimm v. Gloucester County School Board*, 132 F. Supp. 2d 736 (E.D. Va. 2015). In that case, the court held that ED regulations permitted sex segregated restrooms in schools and held that it need not defer to ED’s interpretation of Title IX in the Opinion Letter, because the regulation was not ambiguous, and that it “does not . . . require that sex-segregated bathrooms be separated on the basis of gender, rather than on the basis of birth or biological sex.” *Id.* at 746. That case, however, has since been overruled. In *G.G. v. Gloucester County School Board*, ___ F.3d ___, 2016 WL 1567467 (4th Cir. April 19, 2016), the Fourth Circuit Court of Appeals found that the regulation was ambiguous because it is silent on this issue of how a school is to determine whether a transgender individual is male or female for the purpose of access to sex-segregated restrooms. *Id.* at *6. The court further concluded that the interpretation in the Opinion Letter was neither plainly erroneous nor inconsistent with the regulation and was the result of the agency’s fair and considered judgment. *Id.* at 6-7. As a result, the court concluded that the interpretation in the Opinion Letter was entitled to deference and is to be accorded controlling weight in the case. *Id.* at 8. It reversed the district court’s contrary conclusion and its dismissal of the Title IX claim and remanded the case to the district court. A petition for rehearing by the en banc Fourth Circuit is currently pending. *See* Pet. for Reh’g En Banc, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. May 3, 2016), ECF No. 76.

While the April 19 decision of the Fourth Circuit is not a final decision in the case, it gives some indication that the court would follow the ED interpretation of Title IX and the implementing regulation. Because Maryland is in the Fourth Circuit, a case brought against a school with respect to the use of restrooms by transgender students would come before that same court. That fact, combined with the potential loss of federal funding that could result from failure to follow the federal guidance, suggests that it would be advisable that the local school systems follow the recent directive.

The Honorable Aruna Miller
May 25, 2016
Page 4

Sincerely,

A handwritten signature in black ink, appearing to read 'KMR', with a long horizontal line extending to the right.

Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
millera04.wpd