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Board Enters Settlement Agreement with OCR to Resolve Claims of Transgender Discrimination

Last month, we reported on the findings made by the U.S. Department of Education's Office for Civil Rights (OCR) in the closely-watched investigation into a suburban high school District's treatment of a transgender student (*Unsettled: Transgender Student Civil Rights*, <https://petrarcagleason.com/unsettled-transgender-student-civil-rights-2/>). The Student, a biological male, identifies as a female. The Student's OCR complaint alleged the District discriminated against her by denying her access to the girls' locker rooms because of her gender identity and gender nonconformity. Although the District treated her as a female in all other respects, it refused to allow her to change in the female locker rooms, instead providing a separate private area in which she could change. In its findings, OCR concluded that

the District violated the Student's rights under Title IX by requiring her to use separate, private locker rooms to change and shower. OCR's findings required the District to negotiate a settlement agreement with OCR within 30 days or risk formal enforcement action, which could include further litigation and the loss of approximately \$6 million in federal funding.

On Wednesday, the Board of Education of Township High School District 211 approved the terms of a resolution agreement with OCR. Under the resolution agreement, the District has agreed to take the following actions:

- Based on the Student's representation that she will change in a private changing station, the District will allow the Student access to the girls' locker rooms.
- The District will install and maintain sufficient privacy curtains in the locker rooms to accommodate the Student and other students who desire additional privacy.
- If any student using the girls' locker rooms requests additional privacy, the District will provide that student with access to a reasonable alternative, which may include the use of another private area, a separate schedule of use, or assignment of a locker near the office of a

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teacher or coach.

- The District will coordinate with hosts of off-campus, District-sponsored activities to ensure that the Student has access to female facilities in a manner consistent with the District's use of privacy curtains.
- The District will ensure that any school records containing the Student's birth name or assigned sex are treated as confidential, personally identifiable information and are maintained separately from the Student's current records.
- In order to assist the District in implementing the terms of the agreement, the District will hire a consultant with expertise in child and adolescent gender identity, including transgender and gender nonconforming youth.
- If requested by the Student and her parents, the District will establish a support team to ensure she has access and opportunity to participate in all programs and activities and is otherwise protected from gender-based discrimination at school.
- The District will revise its notice of nondiscrimination on the basis of sex to comply with the requirements of Title IX.

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- The District will provide OCR with a copy or detailed description of all gender-based discrimination or harassment complaints that occur during the reporting period. OCR anticipates closing its monitoring of the resolution agreement by June 30, 2017.

The full text of the *Agreement to Resolve* can be found at: <http://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf>.

As districts move forward and establish policies related to transgender students, it is important to keep in mind that this is an evolving area of the law which elicits strong opinions from the general public, parents, and students. U.S. Department of Education (DOE) guidance, OCR's findings in this investigation, and this settlement agreement all indicate a consistent DOE policy: transgender students must be treated consistent with their gender identity, and complaints of discrimination will be investigated under Title IX.

Notwithstanding this conclusion, the issue of the privacy of the general student body weighed against non-discriminatory transgender policies remains unsettled. The language of the

settlement agreement is open to differing interpretations. District 211 maintains the position that this Agreement provides that the Student may only have access to the girls' locker rooms *if she changes and showers behind a privacy curtain*. A logical extension of DOE policy, which is supported by civil rights organizations such as the American Civil Liberties Union (ACLU), leads to the opposite interpretation: that it would be discriminatory to *require* the Student to use a privacy curtain. OCR recognizes the privacy concerns of other students in these situations. Its findings indicated that the District could have initially resolved this issue in a non-discriminatory manner based on the Student's desire to change behind a privacy curtain. However, OCR's approval of the ambiguous terms of the Agreement leave us with no definitive answer to this issue. Thus, districts should proceed carefully, taking into account the concerns of individuals on both sides of this issue. A district cannot deny access to gender-specific areas, but it should take measures to protect the privacy of all individuals within these areas.

If you have questions regarding your district's policies toward transgender students, please contact one of our attorneys in Oak

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Brook (630-928-1200) or Flossmoor (708-799-6766).