

December 22, 2015

Stephen M. Tomlinson
Superintendent
Broadalbin-Perth Central School District
20 Pine Street
Broadalbin, New York 12025

Re: Case No. 02-13-1220
Broadalbin-Perth Central School District

Dear Superintendent Tomlinson:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) with respect to the above-referenced complaint filed against the Broadalbin-Perth Central School District (the District). The complainant alleged that the District discriminated against a transgender student (the Student), on the basis of sex, by requiring the Student to use a gender-neutral restroom.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). The District is a recipient of financial assistance from the Department. Therefore, OCR has jurisdictional authority to investigate this complaint under Title IX.

The regulation implementing Title IX, at 34 C.F.R. § 106.8(a), requires a recipient to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the Title IX regulation, including any investigation of any complaint communicated to such recipient alleging its noncompliance or alleging any actions that would be prohibited by the regulation implementing Title IX. The regulation implementing Title IX, at 34 C.F.R. § 106.8(b), requires that a recipient adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action prohibited by the regulation implementing Title IX. The regulation implementing Title IX, at 34 C.F.R. § 106.9, requires each recipient to implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational program or activity

which it operates, and that it is required by Title IX and its implementing regulation not to discriminate in such a manner.

The regulation implementing Title IX, at 34 C.F.R. § 106.31(a), provides, in relevant part, that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, or other education program or activity operated by a recipient that receives Federal financial assistance. The regulation implementing Title IX, at 34 C.F.R. § 106.31(b), further provides that a recipient may not, on the basis of sex, deny any person such aid, benefit or services; treat an individual differently from another in determining whether the individual satisfies any requirement or condition for the provision of such aid, benefit, or service; provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; subject any person to separate or different rules of behavior; or otherwise limit any person in the enjoyment of any right, privilege or opportunity. The regulation implementing Title IX, at 34 C.F.R. § 106.33, provides that a recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex. All students, including transgender students, are protected from sex-based discrimination under Title IX.

In determining whether a recipient has subjected an individual to discrimination, OCR examines whether there were any apparent differences in the treatment of similarly situated individuals. If different treatment is established, OCR then considers whether the recipient had a legitimate, non-discriminatory reason for the apparent difference in treatment, and whether the reason provided by the recipient was a pretext for discrimination. Additionally, OCR examines whether the recipient treated the individual in a manner that was consistent with established policies and procedures, and whether there is any other evidence of discrimination based on sex.

In its investigation, OCR interviewed the complainant and District staff. OCR also reviewed documentation that the complainant and the District submitted, and documentation available on the District's website, including the District's notice of nondiscrimination, Title IX policies, and grievance procedure. OCR made the following determinations.

Title IX Coordinator:

The District identified the Superintendent as the District's Title IX Coordinator, the individual designated to coordinate its efforts to comply with the regulation implementing Title IX. Accordingly, OCR determined that the District met the requirement of the regulation implementing Title IX, at 34 C.F.R. § 106.8(a).

Notice of Nondiscrimination:

The District maintains a notice of nondiscrimination, and posts the notice prominently on its website.¹ This notice includes a prohibition against discrimination on the basis of gender and other bases, and the contact information for the District's Title IX Coordinator; however, this notice does not state that the District prohibits discrimination on the basis of sex. Accordingly,

¹ http://www.bpcsd.org/wp-content/uploads/2015/04/Policy_2-8-2.pdf

OCR determined that the District did not meet the requirement of the regulation implementing Title IX, at 34 C.F.R. § 106.9.

Grievance Procedures:

OCR has identified a number of elements in determining if grievance procedures are prompt and equitable, including whether the procedures provide for: (a) notice to students and employees of the procedures, including where complaints may be filed, that is easily understood, easily located, and widely distributed; (b) application of the procedures to complaints alleging discrimination or harassment carried out by employees, students, and third parties; (c) adequate, reliable, and impartial investigation, including an opportunity to present witnesses and evidence; (d) designated and reasonably prompt timeframes for major stages of the grievance process; (e) written notice to the parties of the outcome and any appeal; and (f) an assurance that the institution will take steps to prevent further harassment and to correct its discriminatory effects on the complainant, if appropriate. Title IX also prohibits districts and others, including students, from retaliating against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because that individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title IX.

In school year 2015-2016, the District maintained a Board policy entitled, *Project Save, Code of Conduct Policy 7.2.2* (Policy 1) that prohibits discrimination, including harassment, on the basis of sex and gender (including gender identity or expression).² Policy 1 is located on the District's website, outlines prohibited student conduct, and notifies students that they may report violations of Policy 1 to a teacher, school counselor or the principal, as well as his/her designee; however, it only applies to conduct by students, not by employees or third parties. Additionally, Policy 1 states that the District will take prompt and effective steps to end the harassment or discrimination, provides for the application of remedial measures, prohibits retaliation, and states that complainants have the right to file a complaint with OCR. Policy 1, however, does not specifically state that parties have an opportunity to present witnesses and evidence; contain designated and reasonably prompt timeframes for major stages of the grievance process; or state that written notice of the outcome and any appeal will be provided to the parties. Accordingly, OCR determined that Policy 1 did not meet the requirement of the regulation implementing Title IX, at 34 C.F.R. § 106.8(b).

The District also maintained a policy to address complaints of sexual harassment filed by students and employees entitled, *Sexual Harassment Policy 3.5* (Policy 2), but Policy 2 does not apply to other forms of discrimination based on sex.³ The procedure by which Policy 2 was implemented is entitled, *Sexual Harassment, Administrative Regulation 3.5A* (Procedure).⁴ Both Policy 2 and the Procedure were located on the District's website; however, Policy 2 and the Procedure were not readily locatable, because these were listed under the heading "Employee Relations" and titled "Sexual Harassment of Employees" and "Sexual Harassment of Employees Regulation," although Policy 2 and the Procedure apply to students as well. The Procedure notifies students and employees that they may report violations of Policy 2 to the principal or

² http://www.bpcsd.org/wp-content/uploads/2015/04/Policy_7-2-2.pdf

³ http://www.bpcsd.org/wp-content/uploads/2015/04/Policy_3-5.pdf

⁴ http://www.bpcsd.org/wp-content/uploads/2015/04/AR_3-5A.pdf

superintendent; however, Policy 2 only applies to conduct by students and employees, not by third parties. Policy 2 includes a statement that written notice will be provided to the parties of the outcome and any appeal, a prohibition against retaliation, and the right to file a complaint with OCR; however, neither it nor the Procedure specifically provide for an opportunity for parties to present witnesses and evidence; and, do not include reasonably prompt timeframes for major stages of the grievance process. Accordingly, OCR determined that Policy 2 and the Procedure did not meet the requirement of the regulation implementing Title IX, at 34 C.F.R. § 106.8(b).

The Complainant's Allegation:

OCR determined that the Student's gender identity is different than the sex the Student was assigned at birth. The District and the parent concur that the Student acts, dresses, uses the pronouns and participates in the District's programs in a manner consistent with the Student's gender identity. Before the start of school year 2012-2013, the District's Superintendent met with the Student's mother to discuss the Student's needs as a transgender student. The mother requested permission for the Student to use the bathroom consistent with the Student's gender identity. The Superintendent explained that the District's practice has been to offer students at the School bathrooms on the basis of their anatomical sex (i.e., anatomical males use the boys' restroom and anatomical females use the girls' restroom). The Superintendent explained to the mother that for transgender students, such as the Student, the District would offer gender-neutral bathrooms such as the unisex bathroom located in the nurse's office. The mother agreed that the Student would use the nurse's office bathroom.

On more than one occasion during September 2012, the Student used the restroom consistent with the Student's gender identity and was observed by a teacher or teacher assistant after exiting the restroom. Although the mother asserted that the Student was singled out for reprimand and/or discipline after using a non-gender-neutral restroom, the School's principal countered that no disciplinary action was taken. The mother again requested that the Student be permitted to use the restroom that was consistent with the Student's gender identity. On October 3, 2012, the Superintendent met with the Student's mother to discuss the Student's use of restrooms while at School, and advised her that the Student should not use the restroom consistent with the Student's gender identity until further notice. This decision was confirmed on or about October 9, 2012. On November 9, 2012, the District converted a staff restroom into a family restroom that could be used by any student who wanted privacy, and this restroom was made available to the Student as well.

The Student was reluctant to use the nurse's office or family restroom, because the Student felt stigmatized and "like a freak." The District arranged for the Student's teachers to send the Student out of class on errands, such as picking up the mail, in order that the Student could use the nurse's office restroom. Despite the additional restroom provided to the Student, and staff members offering support to the Student to use the discrete restrooms, the mother reported that the Student had limited trips to the restroom and on some school days did not even visit the restroom at all, in order to avoid feelings of isolation and otherness. On December 17, 2013, the Board of Education met with the mother at her request to revisit this issue, but the Board confirmed its original decision. The District's prohibition continued to the end of academic year 2014-2015.

While the District asserted that all other students were permitted access to the gender-neutral restroom and the nurse's office restroom, the evidence indicated that the District created and enforced a gender-neutral restroom requirement only on the Student. The evidence established that from school year 2012-2013 through the end of school year 2014-2015, the District denied the Student access to the restroom consistent with the Student's gender identity.

District staff defended their actions by expressing concern that other students would observe the Student's anatomy and feel "tricked." The District also asserted that the bathroom restrictions were intended to protect the Student's privacy; however, District representatives did not articulate how they believed restrictions on access to student restrooms would protect the Student's privacy. In fact, any threat to the Student's privacy in the sex-segregated School facilities was virtually non-existent because students could use private, locking stalls, rendering the possibility of inadvertent or involuntary exposure to other students to be negligible. In contrast, the restrictions on access to facilities actually increased the likelihood that the Student's privacy about the Student's gender identity could be violated, by exposing the Student to questions from other students about the inability to use the restroom consistent with the Student's gender identity. In addition, in the absence of a request or expression of concern about the Student's privacy from the Student, District concern for the Student's privacy was not a legitimate reason for treating the Student differently. Although protecting the Student's privacy is a legitimate interest, there was no evidence that the restrictions imposed on the Student were necessary to protect the Student's privacy and, in practice, conflicted with that interest.

OCR determined that the District excluded the Student, on the basis of sex, from participation in and denied the Student the benefits of its education program; provided different benefits or benefits in a different manner; subjected the Student to different rules of behavior; and to different treatment, in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.31.

On August 11, 2015, the Student, the Student's mother and the District entered into an agreement whereby the District agreed to permit the Student to access the bathrooms and the locker rooms consistent with the Student's gender identity. According to the District, the Student has had access and the opportunity to participate in all of the District's programs and activities consistent with the Student's gender identity, is referred to by the proper pronouns that are consistent with the Student's gender identity, and has records maintained to reflect the Student's gender identity and privacy. Moreover, the District advises that it has provided and will continue to provide the Student with any individualized support the Student requests. Therefore, OCR determined that the complainant's allegation that the District discriminated against the Student, on the basis of sex, by prohibiting the Student from using the restroom consistent with the Student's gender identity, is resolved.

The District has counselors available to provide support and counseling to all students, and the Student is able to access such counseling as any other District student. The District also advised that it has conducted anti-discrimination and anti-harassment training for its employees, including board members and administrators, specifically focused on transgender issues. In fall 2015, the District shared with staff the New York State Education Department's *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students*; the District represented that it will adhere to this guidance. Furthermore, the District stated that it has integrated anti-bullying, anti-harassment and tolerance

education programs for its students throughout its schools. The Student has not raised any concerns or complaints of gender-based harassment or discrimination, apart from the restroom usage claim that was resolved.

On December 21, 2015, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified with respect to the District's nondiscrimination statement and grievance procedures. OCR will monitor implementation of the resolution agreement. If the District fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

This letter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions about OCR's determination, please contact Janet Pfeffer, Compliance Team Investigator, at (646) 438-3833 or janet.pfeffer@ed.gov; or Anna Moretto Cramer, Compliance Team Attorney, at (646) 428-3826 or anna.moretto.cramer@ed.gov.

Sincerely,

Timothy C.J. Blanchard

cc: XXXX, Esq.

Enc.