



OKLAHOMA STATE
DEPARTMENT of EDUCATION

April 23, 2022

VIA E-MAIL w/CERTIFIED U.S. MAIL TO FOLLOW

The Honorable John O'Connor
Oklahoma Attorney General
c/o Opinion Coordinator
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
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Dear Mr. Attorney General:

Stillwater Public Schools (the "District") has recently requested the State Department of Education and/or the State Board of Education take action relating to usage of bathroom facilities within the District. More particularly, I understand the request to be for the promulgation of rules, applicable to all school districts in the state, concerning this subject.¹ As you are the State's Chief Law Officer -- whose opinions are binding -- and because you have previously engaged in this matter, I believe it appropriate to ask you for an official opinion. 74 O.S. § 18. As such, I respectfully request that you provide a formal written opinion on the following questions of law:

1. Does the Oklahoma Parents Bill of Rights, 25 O.S. §§ 2001-2005, provide a parent with the fundamental right to determine, without obstruction or interference from the state, the education of their minor child? If so, does this include through parental consent what programs, facilities or activities a student utilizes at a public school?

¹ It is my understanding that state agencies may only exercise the powers "expressly given by statute," but cannot expand those on its own *Marley v. Cannon*, 1980 OK 147, ¶ 10, 618 P.2d 401, 405; 2020 OK AG 13, ¶13. Further, agencies bear the burden of proving "that the rule is consistent with any statute authorizing or controlling its issuance and does not exceed statutory authority." 75 O.S.2011, § 306(C)(1)-(2). Based on established precedent and the 2020 Attorney General's Opinion referenced above, I do not believe the OSDE has the authority to draft and present to the State Board of Education an emergency rule on this topic. Furthermore, it is my understanding that there is not a dispute as to the District having *not* received any reports of incidents relating to its current use of restroom facilities policies since it was adopted by the District in 2015. As a result and not having an imminent danger of safety elsewhere in the state as a result of the District's policy or those that may be similar elsewhere, I do not believe this matter satisfies the threshold for "emergency" rulemaking.

2. Pursuant to federal regulations at 34 C.F.R. § 106.3 and 106.8, is it the responsibility of a local educational agency to adopt, evaluate and implement policies and practices regarding Title IX and its prohibition on discrimination on the basis of sex?
3. In an April 8, 2022, letter, you stated that there no “[n]o legal precedent that currently requires Oklahoma schools” to allow students from using the restroom facility that aligns with their gender identity.” What, if any, law requires local educational agencies to prohibit students from using the restroom facilities that align with their gender identity? Absent such a law, are Oklahoma local educational agencies (i.e., public school districts) to make local decisions through their elected boards of education and a policy that the board of education has adopted?
4. Do courts, including those with jurisdiction over Oklahoma, generally assess Title IX claims under the same analysis as Title VII claims?² *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Olmstead v. LC. Ex rel. Zimring*, 527 U.S. 581, 617 n. 1 (1999) (noting that the Supreme Court has looked to its Title VII interpretations of discrimination in illuminating Title IX of the Education Amendments of 1972); *Whitley v. Independent School Dist. No. 10 of Dewey Cnty., Okla.*, 2019 WL 7667329; *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston University*, 245 F.3d 1172, 1176 (10th Cir. 2001) (“Courts have generally assessed Title IX discrimination claims under the same legal analysis as Title VII claims). If so, do federal court opinions interpreting Title VII guide the interpretation of Title IX?
5. In 2017, the Secretary of the United States Department of Education (“USDE”), Betsy DeVos, provided guidance through the Office of Civil Rights (OCR) that OCR should rely on Title IX and its implementing regulations, as interpreted in decisions of federal courts and OCR guidance documents that are in effect when evaluating complaints of sex discrimination against individuals (regardless of) whether the individual is transgender.” See June, 2017, OCR “Guidance to the Field.” Based on Title IX and its implementing regulations, as interpreted in decisions of federal courts and OCR guidance documents that are in effect, does Oklahoma interpret that Title IX requires LEAs to provide access to restroom facilities based on a student’s gender identity?
6. Senate Bill 2 (2022) provides that school district “[a]thletic teams designated for ‘females,’ ‘women’ or ‘girls’ shall not be open to students of the male sex.” Does the mention of athletic teams but exclusion of other programs or areas of school district operations demonstrate legislative intent to not prohibit students from using the restroom facilities that align with their gender identity?

² Title IX prohibits discrimination “on the basis of sex” and Title VII prohibits discrimination “because of sex.” 20 U.S.C. § 1681; 42 U.S.C. § 2000e-2(a).

7. Pursuant to 74 O.S. § 18b or any other Oklahoma statute, will the Oklahoma Attorney General defend, at its expense, any lawsuit or enforcement action brought against a state agency or political subdivision regarding the usage its restroom facilities?

The answers to these questions will provide the crystal-clear guidance sought and will come in the form of a binding opinion on those in Oklahoma who have historically been charged with implementing and enforcing Title IX. Your attention and expeditious review of these matters are sincerely appreciated. As always if you have any questions or want to further discuss anything with me or other OSDE representatives, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "Joy Hofmeister". The signature is fluid and cursive, with a large initial "J" and "H".

Joy Hofmeister
State Superintendent of Public Instruction