

CLARK HILL

April 28, 2023

Board of Education Members
Fremont Public Schools
450 E Pine Street
Fremont, Michigan 49412

Re: Legal Requirements for Restroom Use of Transgender Students

Dear Board Members:

This letter is in response to a request from the Board of Education of Fremont Public Schools (the “District” or the “Board”) for legal guidance regarding restroom use of students who are transgender. Based on the following legal authority, students who are transgender are legally entitled to use a restroom that aligns with their gender identity. We have provided responses to each of your questions below.

Q: What does “transgender” mean?

A: “Transgender” is an adjective describing a person whose gender identity or expression is different from their biological sex assigned at birth. A person’s “gender identity” is a deeply-held internal sense or psychological knowledge of their own gender, regardless of the biological sex they were assigned at birth. A person who is transgender may also experience gender dysphoria, which includes clinically significant distress or impairment when a person’s biological sex does not match their gender identity. During a gender transition, a person genuinely and sincerely begins to live and identify as the sex consistent with their gender identity. **Transgender is not a temporary or spontaneous phenomenon.**

See Michigan Department of Education’s “State Board of Education Statement and Guidance on Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Students,” September 14, 2016.

Q: Are persons who are transgender protected from discrimination?

A: Yes. Title VII of the Civil Rights Act of 1964 prohibits discrimination against individuals based on their gender identity. *Bostock v Clayton County*, 140 S Ct 1731 (2020). In addition, Title IX of the Education Amendments of 1972 prohibits discrimination based on transgender status in education programs and activities. 20 USC 1681(a). *See Dodds v United States Dep’t of Education*, 845 F3d 217 (CA 6, 2016) (Title IX prohibits discrimination against students who are transgender).

On January 20, 2021, and on March 8, 2021, President Biden issued executive orders stating that laws prohibiting sex discrimination also prohibit discrimination based on sexual orientation or gender identity and directed the US Department of Education to ensure that all students are guaranteed an educational environment free from discrimination on the basis of sexual orientation or gender identity.

Michigan law also prohibits discrimination against individuals based on transgender status. In March 2023, the Michigan Legislature amended the ELCRA to expressly prohibit discrimination, including discrimination in employment and education, based on an individual's gender identity or expression. *See* MCL 37.2402; MCL 37.2202. (The sexual orientation and gender amendments take effect March 20, 2024.)

Q: Are students who are transgender legally entitled to use a restroom that aligns with their gender identity?

A: Yes. In 2016, the United States Court of Appeals for the Sixth Circuit, which is binding on Michigan public schools, ruled that students who are transgender are entitled to access restrooms of their identified gender rather than their biological gender at birth. *Dodds v United States Dep't of Education*, 845 F3d 217 (CA 6, 2016). In that case, the Sixth Circuit upheld a preliminary injunction ordering a local school district to allow an eleven-year-old transgender girl to use the girls' restroom.

Other federal courts have also held that Title IX requires public schools to allow students to use restrooms based on their gender identity. *See, e.g., Grimm v Gloucester County School Board*, 972 F3d 586 (CA 4, 2020); *cert denied*, 141 S Ct 2878 (2021) (policy requiring students to use bathrooms based on their biological sex unlawfully discriminated against them in violation of Title IX); *JAW v Evansville Vanderburgh School Corporation*, 396 F Supp 3d 833 (SD IN, 2019) (school district's practice of requiring transgender students to use a bathroom that did not conform with their gender identity violated Title IX); *AH v Minersville Area School District*, 408 F Supp. 3d 536 (MD PA, 2019) (school district violated Title IX when it prohibited a student from using a bathroom that corresponded with her gender identity); *Carcano v McCrory*, 203 F Supp 3d 615 (MD NC, 2016) (prohibiting university students from using a bathroom that conforms with their gender identity violates Title IX).

A student who is subjected to harassment or discrimination based on their transgender status may file an Office for Civil Rights discrimination complaint and/or bring a private right of action in federal court under Title IX, subjecting the school district to damages, including compensatory damages, and injunctive relief. After March 20, 2024, a student may file a complaint with the Michigan Department of Civil Rights and a lawsuit in state court under Michigan Civil Rights Act as amended.

If you have any questions regarding this letter, please do not hesitate to contact me.

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