

December 4, 2017

Susan K. Haberstroh
Delaware Department of Education
401 Federal Street, Suite 2
Dover, Delaware 19901

VIA EMAIL (DOEregulations.comment@doe.k12.de.us)

**Re: Proposed regulation – 14 DE Admin. Code 225:
Prohibition of Discrimination.**

Dear Ms. Haberstroh:

The ACLU supports the proposed amendments to Title 14 Section 225 of the Administrative Code concerning the prohibition of discrimination in schools. The amendments will improve the well-being and academic achievement of Delaware's students and help ensure that Delaware schools comply with existing prohibitions on discrimination.

The proposed regulations clarify and codify several existing protections for students, including a requirement that schools appropriately accommodate students' religious beliefs. We support the expanded language ensuring that the promise of accommodation and non-discrimination is upheld for all students. Additionally, the regulations add explicit protection from discrimination on the basis of gender and gender identity or expression. While the existing regulatory prohibition on sex discrimination should also be read to bar such discrimination, we welcome the more explicit inclusion of these protections.

Ending gender identity discrimination is essential for the health and success of transgender students

When schools fail to protect transgender students from discrimination and bullying, those students suffer from increased rates of depression and lower academic achievement. By contrast, when treated with dignity and fairness, transgender students' mental health outcomes are similar to their non-transgender peers.¹

One important aspect of dignity and an essential component of



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¹ A prominent critic of the proposed regulation has asserted that schools should not recognize students' gender identity because transgender students have higher suicide rates. This bizarre logic is exactly backwards. It is precisely the discrimination and bullying that this policy seeks to end that is responsible for those negative mental health outcomes. Delawareans concerned about the mental health of students should therefore embrace these protections.



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medical care for transgender individuals is being referred to by one's name and pronouns that align with a person's gender. Critics of this regulation have made much of the provision directing schools to consult with students before deciding to seek parental permission for use of a gender-affirming name. Unfortunately, not every transgender student has supportive parents. Revealing a student's transgender status and gender identity to a parent as a precondition of accommodation would force some students to choose between basic dignity and their personal safety at home. That is not choice a student should be forced to make and it is entirely appropriate that a school should consider the consequences of seeking parental permission before doing so.

Another important aspect of fair treatment involves restrooms and locker rooms. Without this regulation, some schools may continue to forbid transgender students from using gender-appropriate restrooms and locker room facilities. That treatment adds to the bullying and stigmatization many transgender students already face. Moreover, when transgender students are not permitted to use restrooms with their peers, they often avoid restrooms altogether. This can lead to significant health problems and interfere with their ability to learn and focus in class.

Some critics of the proposed amendments have stoked fears that these changes will somehow harm non-transgender students. The reality is that more than 18 million students attend public K-12 schools within the 13 states and District of Columbia that have these kinds of nondiscrimination rules. In those places, none of these problems have come to pass.

The proposed prohibition on discrimination is required by Title IX and the Equal Protection Clause

Courts across the country have recognized that discrimination on the basis of gender identity—including the exclusion of boys and girls who are transgender from the same restrooms as other boys and girls—constitutes discrimination on the basis of sex. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (Title IX and equal protection); *Evancho v. Pine-Richland Sch. Dist.*, No. 2:16–01537, 2017 WL 770619, at *14 (W.D. Pa. Feb. 27, 2017) (equal protection); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 865-77 (S.D. Ohio 2016) (Title IX and equal protection). Because sex discrimination is already prohibited by federal and state law, schools that fail to adopt gender identity nondiscrimination policies have been, and



will continue to be, successfully sued.²

Some critics of this proposed amendment have raised concerns that treating transgender students fairly creates legal risks for schools, citing instances in which students claiming some injury to their privacy have sued schools for allowing transgender boys and girls to use gender-appropriate facilities. These suits, however, have resulted in courts dismissing the claims of the non-transgender students who have alleged harm from sharing space with transgender students. *E.g.*, *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, No. CV 17-1249, 2017 WL 3675418, at *2 (E.D. Pa. Aug. 25, 2017) (finding the plaintiffs not entitled to preliminary injunctive relief because their claims lacked merit and they were not injured by the policy); *Students v. United States Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *1 (N.D. Ill. Oct. 18, 2016) (“The Court also finds Plaintiffs have not shown they have a likelihood of success on the merits of their claim that District 211 or the Federal Defendants are violating their right to privacy under the United States Constitution.”). Though there may be some costs to defending these meritless and losing lawsuits from non-transgender students, such costs are far less than the cost of defending the successful lawsuits by transgender students subject to unlawful discrimination.

The Delaware Department of Education deserves praise for this important clarification of Delaware law and for assisting schools with compliance. We urge you to make the small change referred to in this letter and then adopt it as a final regulation and robustly ensure its implementation.

Sincerely,

A handwritten signature in black ink that reads "Kathleen MacRae".

Kathleen MacRae
Executive Director

A handwritten signature in black ink that reads "Ryan Tack-Hooper".

Ryan Tack-Hooper
Legal Director

² We encourage you to further amend Section 8.0 addressing privacy to align with this precedent and to read as follows: “The school board of each School District and Charter School shall include a provision within its anti-discrimination policy that ensures that all students have equal access to locker rooms and bathrooms. School Districts and Charter Schools shall ensure that the privacy concerns of students are accommodated but under no circumstances shall students be subjected to unequal treatment solely based on gender identity or expression.” Without such language, some schools may mistakenly think it is appropriate to do things like require transgender students to use separate single-occupancy bathrooms or other inappropriate and stigmatizing options.