



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

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November 2, 2015

Dr. Daniel E. Cates
Superintendent
Township High School District 211
1750 South Roselle Road
Palatine, Illinois 60067

OCR Case No. 05-14-1055

Dear Dr. Cates:

The U.S. Department of Education's Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint, filed in December 2013, against Township High School District 211 (District). The District is composed of five high schools. The complaint alleged that the District discriminated against Student A, a transgender high school student, on the basis of sex. Specifically, the complaint alleged that the District denied Student A access to the girls' locker rooms because of her gender identity and gender nonconformity.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681–1688, and its implementing regulation at 34 C.F.R. Part 106. Title IX prohibits discrimination on the basis of sex in any education program or activity operated by recipients of Federal financial assistance. As a recipient of Federal financial assistance from the Department, the District is subject to Title IX. Therefore, OCR has jurisdiction over this complaint.

During its investigation, OCR interviewed Student A and her mother, toured her high school (School), interviewed District administrators and staff members, and reviewed documents provided on behalf of Student A and by the District. For the reasons set out below, OCR finds by a preponderance of the evidence that the District is in violation of Title IX for excluding Student A from participation in and denying her the benefits of its education program, providing services to her in a different manner, subjecting her to different rules of behavior, and subjecting her to different treatment on the basis of sex.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

District Policies

The District maintains an annual notice of nondiscrimination that prohibits discrimination, including discrimination on the basis of gender, and posts the notice prominently on its website.¹ The District also maintains a Board Policy that prohibits discrimination, including discrimination on the basis of gender and sexual orientation.² The name and contact information for the District's Title IX Coordinator are available on the District's website,³ as are the District's Title IX grievance procedures.⁴

Statement of Facts

Student A was born male and from a young age has identified as female. During her middle school years, Student A transitioned to living full-time as a young woman. Since then, she has presented a female appearance, completed a legal name change, obtained a passport reflecting a gender change, received a diagnosis of and treatment for gender dysphoria, and taken an ongoing course of hormone therapy.

Student A's parents contacted the School during her eighth-grade year to begin planning her transition to high school. The family and the School communicated extensively about issues such as Student A's name change, registration as a female, access to girls' restrooms and locker rooms, and eligibility for girls' athletics. The family also informed the School that Student A had been subjected to harassing comments in middle school when she used the boys' locker rooms.

The District has honored Student A's request to be treated as female in all respects except her request to be provided access to the girls' locker rooms at the School. The District identifies Student A by her female name and uses female pronouns. Its computer system designates Student A as female. The District has given Student A unlimited access to all girls' restrooms in the School, and, after obtaining permission from the Illinois High School Association, allows her to participate in girls' athletics. Student A informed OCR that many students are aware of her transgender status, and that several students and staff members at the School have been particularly supportive and encouraging towards her.

Locker Room Access

Student A, her family, and/or their counsel have held a series of meetings with District and School administrators, including the Principal and the former Superintendent, to discuss the issue of locker room access for Student A.⁵ Student A requested an opportunity to change clothes privately within the girls' locker rooms, in an area such as a restroom stall. After touring the

¹ <http://adc.d211.org/information/annual-notice-of-nondiscrimination/>.

² Board Policy JCFM/GBCBA, "Non-discrimination of Students and Staff," located at <http://www.boarddocs.com/il/thsd211/Board.nsf/Public#>.

³ <http://adc.d211.org/administration/augustino-fontanetta/>.

⁴ Board Policy JA/KAA/GAC, "Uniform Grievance Policy," located at <http://www.boarddocs.com/il/thsd211/Board.nsf/Public>.

⁵ The former Superintendent retired after the 2013-2014 school year.

School facilities, the Superintendent verbally informed Student A that the District would not allow her to access the girls' locker rooms at the School. The District said it would not be practicable to grant her request to change privately in the locker rooms because there were too few stalls and too many students.

The District outlined Student A's alternative options for changing for physical education (PE) class and athletics. The former Superintendent stated to OCR that she based her decision not only on Student A's rights and needs, but on the privacy concerns of all students. The Superintendent told OCR that Student A explained that she wanted equal access to the girls' locker rooms because "she wanted to be a girl like every other girl." The Principal's notes from the meeting indicate that Student A said she was "crushed" by the District's decision, which she said indicated that the School did not accept her as female.

Student A told OCR during an interview in February 2014 that she has her own sense of privacy, and, if granted access to the girls' locker rooms, would seek out an unobserved area for changing, such as a restroom stall, which she said is a common practice among some girls. In September and October 2015, Student A informed OCR that she would use privacy curtains in the girls' locker rooms if the School made them available.

The District's decision denied Student A's access to the three girls' locker rooms: the regular PE locker room (PE locker room); the locker room near the pool, used for the swimming unit of PE (swimming locker room); and a locker room used for the girls' athletics teams (athletics locker room). Each is discussed in detail below.

PE Class

Students at the School are required to take mandatory PE each year. It is a daily course that is required for graduation. The District requires completion of a certain number of credits in traditional PE, with units on tennis, volleyball, basketball, swimming, and other sports. Thereafter, students may satisfy the PE requirement with various electives. PE students wear a required uniform, issued by the School, of shorts and a t-shirt. If a student forgets his or her uniform on a given day, he or she may obtain a rental uniform, which is available in the boys' and girls' locker rooms. In addition, rental uniforms are available in the PE teacher's office.

The required PE class consists of 35 minutes of instruction. Students have approximately five minutes to change before class, and five minutes to change after class, in addition to five-minute passing periods. Students assemble in the gymnasium at the beginning of class for attendance.

OCR toured the girls' PE locker room, which is accessed through a door in the main gymnasium. The door leads to an entryway and stairwell that is accessible to boys and girls. The girls' PE locker room contains lockers on the periphery walls as well as several banks of lockers in center aisles approximately seven feet high. There is a sizable open shower area. The girls' restroom facilities for PE are located in Restroom A, which contains two doors: one to the entryway and stairwell mentioned above, and one to the locker room. Thus, it is possible to enter and exit Restroom A without entering the PE girls' locker room. Restroom A contains five private toilet

stalls. The District informed OCR that the PE girls’ locker room and Restroom A are both busy and crowded on school days, as multiple gym classes, with about 130 students, meet at the same time.

In its response to this complaint, the District told OCR that, while female students change for PE class in a “modest” manner, students do expose their bodies while changing in the locker room. The PE Teacher told OCR that girls change bras (from a traditional bra to a sports bra) for the PE classes and, for the swimming unit, change into their swimming suits. She stated that students do not shower after PE class, with the exception of the swimming unit, which is discussed below.

The District offered Student A changing facilities in a private restroom (Restroom C) down a hallway from the gymnasium. Restroom C is approximately 75 feet from the gymnasium entrance. Between the gymnasium and the restroom are the wrestling room on one side, and the weight room and fitness room on the other side. During an OCR visit, many male students were in the hallway and in the weight room. Student A must travel through this hallway in order to get from Restroom C to the gymnasium.

Restroom C is a single occupancy facility that is kept locked during the school day. The Principal explained that Student A does not have a key to the restroom and that a staff member who monitors the hallways carries the key and must unlock the door for her. The Principal said the staff member opens Restroom C several minutes before Student A requires access, leaves it unlocked during Student A’s PE class, and then locks it several minutes after Student A leaves it following PE class. The restroom contains a single stall and toilet, a mirror and sink, and a tall locker that the School installed for Student A.

Student A expressed dissatisfaction with Restroom C, and the District offered an alternative location to her for changing before and after PE. It offered to let her change in Restroom A—the restroom that is adjacent to the girls’ PE locker room but separated from it by a door. This would have allowed her to change near to the gym, like other girls. The District offered to install—and in fact did install—a bank of lockers there, and to let Student A choose several female friends who would be comfortable changing alongside her. However, Student A told OCR that she felt this arrangement would “ostracize” her even more than Restroom C. She said it would draw attention to the fact that she must change separately: other girls using the restroom would see the lockers and know that she changed there, whereas some girls did not presently know that she had a separate changing arrangement. Student A also noted that she spoke with several friends from PE class, who expressed reluctance to move to lockers in Restroom A. The District told OCR that their lockers could easily be reassigned, but Student A suggested to OCR that her friends did not seem to want to move.⁶

Student A therefore continued to change for PE class in Restroom C. She told OCR that she does not take the most direct route from Restroom C to the gymnasium “because it’s embarrassing. Everyone would see me.” Instead of entering the gymnasium near the door to the girls’ locker

⁶ On an as-needed basis throughout her high school career, Student A also used a restroom inside the nurse’s office. Nurse A provided this access to Student A, and also offered her support and encouragement.

room—where female students would see her entering separately—Student A walks through several hallways and around to the other side of the gymnasium, where she enters. OCR observed during an onsite visit that the gymnasium was large and crowded with students; if the gymnasium was similarly crowded when Student A entered on the far side, her entrance might go unnoticed. The PE Teacher told OCR that she did not think students pay attention to who enters and from where. Student A said that she takes a circuitous route to avoid standing out.

The PE Teacher told OCR that Student A was frequently late to class during one of the school years in question. Student A gave various reasons for this. She contends that, on several occasions, Restroom C was locked and no one was available to open it for her; that she had trouble opening the locker the School installed for her in Restroom C; that she must take a longer route to class to go unnoticed; and that, on at least one occasion, she had to obtain a uniform rental. The District told OCR that it was unable to verify Student A's problems accessing her locker, and that in any event, it replaced the lock on the locker and resolved that problem. It also disputed that a staff member was unavailable to unlock Restroom C, except on one occasion. The District does not dispute that Student A takes a circuitous route to gym class, or that she has had to obtain rental uniforms and cannot do so in the PE girls' locker room like other students.

As noted, students requiring a rental uniform may request one in the locker room, or from the PE Teacher in her office. The PE Teacher told OCR that most students who require a rental obtain one in the locker room itself. The District concedes that, on one occasion, Student A needed a rental but could not find the PE Teacher to obtain one. Student A eventually found another teacher to provide a rental uniform. Student A told OCR that she was once reprimanded for entering the girls' PE locker room to obtain a rental uniform even though it was the middle of the period and the locker room was empty.

The District disputes that Student A has been late to PE class because she was unable to find an adult to unlock Restroom C. After Student A made this claim on several occasions, the District reviewed the previous two weeks of video records from a hallway camera that shows the door to Restroom C. The District said the video showed Student A arriving late to Restroom C on several occasions, and only once showed her unable to enter the restroom because it was locked. On that occasion, a substitute hall monitor reached the restroom shortly after Student A and unlocked it for her. The District contends that Student A's tardiness was a broader problem that was not limited to PE class, and said it addressed this with her by adjusting her class schedule. OCR's investigation confirmed that the class tardiness issue was addressed by altering Student A's classroom schedule, and that her tardiness has since decreased.

Student A also told OCR that one day, the PE Teacher told her classmates in the locker room they did not need to dress for class that day, but that since she had to change elsewhere, she did not receive the message. Student A told OCR that she was embarrassed when she showed up dressed in her gym uniform, while the other students were wearing street clothes. Student A returned to Restroom C and changed back into her street clothes.

PE Class – Swim Unit

The swim unit is required for the School’s mandatory PE class. Student A told OCR that she has completed her required PE credits that include a swim unit. Student A has informed OCR that she is not planning to take any more PE credits that include swimming.

The girls’ swimming locker room is immediately adjacent to the swimming pool; the locker room door leads onto the pool area.⁷ When entering the locker room, students pass through a hallway that ends in a “T.” To the left is a small, door-less restroom where Student A changed for swimming (Restroom G). To the right is a short hallway that leads around a corner and into to the girls’ swimming locker room. There are no doors separating Restroom G from the locker room; however, it is not possible to see around the corner into the locker room from Restroom G, or vice versa.

The girls’ swimming locker room contains an open shower area. Beyond the showers is unused space that contains neither showerheads nor lockers. Beyond that area are banks of lockers. There are mirrors at eye level, and between the mirrors are hair dryers placed at eye level, as well as electrical outlets. The locker room also contains restroom stalls, sinks, and a coach’s office.

The PE Teacher told OCR that most students shower in their suits after swimming in order to rinse off the chlorine from the pool. She said she has not seen students shower fully naked, but that some do pull the top half of their bathing suits down, and are nude to the waist.⁸ The PE Teacher said that students changing after PE class during the swim unit cannot practicably change in the bathroom stalls, because there is so little time. Students have devised various methods of changing out of their swimsuits modestly. Some students use a “buddy system,” by having a friend hold up a towel to shield them while they change. Other students hold a towel in their mouths, which drapes over their fronts. “They’re naked, but to varying degrees,” said the PE Teacher.

Student A took PE courses that contained swimming units during two school years. Each swimming unit lasted approximately four weeks. She changed clothes for swimming in Restroom G. It is approximately 5’ by 7’, and contains restroom stalls, a sink, a mirror, and a locker for Student A, but does not contain a shower, electrical outlets or a hair dryer. Around the corner from Restroom G, in the hallway that students use to access the swimming locker room from the pool, is a showerhead. The floor contains a drain. The District described this to OCR as a “rinse” shower that is available for Student A’s use. Student A did not have to pass through the girls’ swimming locker room in order to access Restroom G or the rinse shower. Student A told OCR that using the Restroom G “sets me apart” from the other students. She noted that the School had to install a mirror for her, and that she is not able to dry her hair.

⁷ During an onsite visit to the School on October 28, 2015, OCR observed that the swimming pool and swimming locker room facilities described above were under renovation and not in use.

⁸ In an April 2014 letter to OCR, the District stated that some students shower fully naked after swimming. This assertion is not consistent with OCR’s interview of the PE Teacher.

The District offered Student A two other options to change for the swimming unit—Restroom E and Restroom H—which she declined. Restroom E is down a short (20’) hallway from the pool. It is not connected to the girls’ swimming locker room. It is a locked women’s restroom that must be unlocked by a staff member. It contains restroom stalls, sinks, and mirrors, but does not contain a shower, locker or hair dryer. Although the restroom contains an electrical outlet, it is far from the main restroom area, and would not be practical to use with a personal hair dryer.

The third option is Restroom H, the private restroom of the pool teaching assistant (TA). The Principal explained that the pool TA uses it to shower and change. It is accessible through the TA’s office, which is immediately off the pool area and adjacent to the girls locker room. The office is kept locked and would need to be opened by a key. The restroom contains a shower, a single restroom stall, a sink, mirror, and electrical outlet. During OCR’s visit, Restroom H contained the pool TA’s personal hair and beauty products in the shower and on a shelf below the mirror.

The PE Teacher described an incident in which she observed Student A using the girls’ locker room during the swim unit. She told Student A that she was not supposed to be there. Student A replied, “I know, but I asked if anyone was in there,” and that everybody called back to say they were dressed. Student A wanted to use the mirrors and do her hair, which she was unable to do in Restroom G. The PE Teacher said she told Student A that this was not part of the arrangement, and that she needed to stay in her changing area.

Athletics

Student A is a member of one of the School’s girls’ athletics teams. The team has approximately 30 members and its head coach is Coach A. The team uses the athletics locker room, which contains banks of lockers approximately eight feet high, partitioned restroom stalls, sinks with mirrors, an open shower area, and multiple hair dryers. There are no electrical outlets near the mirrors. Coach A told OCR that she does not spend time in the locker room and thus has not observed team members’ changing habits. However, she told OCR that team members do not shower after practices or competitions. Student A told OCR that it is her understanding that some team members change in restroom stalls in the locker room for privacy. Coach A said that students use the locker room only to change *into* their uniforms; she has observed that, after practices or competitions, students customarily depart in their uniforms.

Student A changed for practices and competitions in a female restroom or used Restroom C—the same restroom she uses to change for PE. Student A told OCR that this arrangement separated her from her teammates. Student A said that team members informally “huddle” in the locker room before matches (without the coach) to do their hair, and that she missed these opportunities for bonding with her teammates. Coach A responded that team members also do their hair in the hallway, which is available to Student A. Coach A said, “[Student A] feels that locker room talk is where she feels she can be most a part of the team.” But Coach A believes Student A is mistaken, saying, “There’s really no girl talk going on in there.”

Coach A said that Student A entered the girls’ athletics locker room four times during one season. Four girls and one parent complained to Coach A about this. The students noted that Student A wanted to chat with her teammates as they prepared for practice or matches. On one occasion, she wanted to have a place to store her bag. On another occasion, an assistant coach (Coach B) told OCR, Student A actually changed clothes in the locker room, although it is unclear whether other students were present. Coach A reported that students told her that they felt uncomfortable undressing in front of Student A. Coach A and an assistant coach reprimanded Student A for her use of the locker room. Coach A indicated that, after one such reprimand, Student A was visibly upset and had what Coach A described as a tearful “breakdown.”

Coach A and Nurse A told OCR that on two separate occasions, Student A spoke privately with each of them and asked for their opinion as to whether she presented a female appearance in her sports uniform. Nurse A stated that she made positive and encouraging statements to Student A in response to her inquiries.

Student A said that, as a result of being denied access to the locker room, she has felt excluded from the team. She described to OCR two incidents in which her teammates excluded her from team activities. One of these activities was social in nature and occurred outside of school hours; the other resulted in disparaging treatment by members of her athletic team that appeared on social media. Student A’s mother informed OCR that Student A was very upset about the exclusion involved in the second incident, and opined that the District’s continued denial of access to the locker rooms for Student A from the locker room encouraged this type of behavior from students. The District responded to one of the incidents by speaking in general terms to the other athletes about the importance of inclusivity.⁹

During OCR’s investigation, after Student A requested a private area to change in the girls’ locker rooms, the District considered installing privacy curtains in unused space in its locker rooms for use by any student, including Student A. During the week of October 26, 2015, the District installed five privacy curtains in the girls’ PE locker room. The District has not installed privacy curtains in the girls’ athletics locker room or girls’ swimming locker room. (The swimming locker room is being renovated and not currently in use.) To date, the District has not provided access to Student A to any of the girls’ locker rooms at the School. The District has

⁹ Student A does not allege, and OCR’s investigation did not reveal, that she has been subjected to a hostile environment on the basis of sex, or discriminated against on the basis of sex in any other manner other than the District’s denial of access to the girls’ locker rooms at the School. The above-two incidents were the only two such incidents of harassment by peers that Student A reported to OCR. OCR considered whether the two incidents of peer harassment, as well as other instances of possible harassment of Student A reported by the District in its April 2014 letter, created a hostile environment prohibited by Title IX. OCR’s investigation also revealed that six female students have complained to the District that they are uncomfortable having Student A in the girls’ locker room; the complaints were not made directly to Student A or in her presence. She has also received online social media comments about her transgender status and attempts to gain access to the girls’ locker rooms as well. The information obtained by OCR indicates that the District did not take any steps in response to the online comments, but OCR’s investigation did not reveal any information that the online comments were made by other students. Based on the totality of the circumstances, OCR concluded that the harassment was not sufficiently serious to create a hostile environment based on sex for Student A.

maintained that it will not provide access to Student A unless she is required to change clothes behind a privacy curtain.¹⁰

OCR returned to the School on October 28, 2015, to inspect the new privacy curtains in the girls' PE locker room and to offer the District an opportunity to provide any additional information relevant to the investigation. The District did not provide any additional information at that time.

OCR observed that, in the girls' PE locker room, the District installed four privacy curtains in unused areas of the locker room, and one privacy curtain around a shower. The privacy stalls were in a central area of the locker room, and any student accessing them would necessarily have to travel into the locker room itself. OCR also observed two additional shower stalls, over which the District stated it could hang privacy curtains to create additional private changing stations. The District has not installed privacy curtains in its girls' athletics or swimming locker rooms, although it stated that it may be willing to if directed to do so by OCR. Thus, as of the date of this letter, a total of ten private changing areas are available in the girls' PE locker room, including the five shower areas with the new privacy curtains and the five restroom stalls, and the District indicated a willingness to install privacy curtains on two presently unused shower stalls to create a total of twelve private changing areas.

Applicable Legal Standards

Under Title IX, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). 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 which 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.

¹⁰ The District Superintendent stated in a recent interview, “When it comes to locker rooms, District 211's position is that students should be able to use the locker rooms of the gender they identify with - but that once inside those locker rooms they would have to use private shower stalls and changing areas to avoid being naked in the company of the other students.” <http://www.dailyherald.com/article/20151015/news/151019300/>.

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, gender identity, or gender nonconformity.

Analysis

OCR's investigation revealed that, except with respect to locker room access, the District has treated Student A consistent with her gender identity as a girl. This includes identifying Student A by her female name and with female pronouns, providing her with full access to all girls' restrooms, and allowing her to participate in girls' interscholastic athletics. However, although Student A must change clothes for mandatory PE class and for her team's practices and competitions, the District has denied Student A access to its girls' locker rooms. Instead, the District has required Student A to use separate restroom facilities, including facilities that are not comparable to those provided other students; Student A has also used the nurse's office to change clothing. Student A has been observed entering or exiting girls' locker rooms several times, both for PE and athletics, in order to store her clothes, obtain a rental uniform, and change her clothes. The District reprimanded Student A on multiple occasions for this. The District has recently installed privacy curtains in the PE girls' locker room, but it has not installed privacy curtains in the two other girls' locker rooms or granted Student A access to the PE girls' locker room or any of the other girls' locker rooms.

With respect to the girls' locker rooms, the District has publicly stated that students should be able to use the locker rooms consistent with their gender identity, and Student A has stated her intention to use the private locker room areas when changing her clothes. Still, the District refuses to provide access to Student A to any part of the girls' locker rooms, unless it requires her to use the private changing areas. The evidence shows that, as a result of the District's denial of access to the girls' locker rooms, Student A has not only received an unequal opportunity to benefit from the District's educational program, but has also experienced an ongoing sense of isolation and ostracism throughout her high school enrollment at the School. In the context of athletics, the denial of access to the girls' locker room resulted in Student A missing opportunities to participate fully in the education experience afforded her teammates. The denial of access has also meant that, in order to satisfy her graduation requirements and receive a high school diploma, Student A has had no other option but to accept being treated differently than other students by the District. Student A changed separately from other students in a restroom down a 75-foot hallway and, in order to avoid drawing increased attention to her separate arrangement, Student A took a long and circuitous route daily in an attempt to enter the gymnasium unnoticed. On two different occasions, Student A was unable to access the restroom or her locker in the restroom. On another occasion, Student A did not receive information that students allowed in the locker room did receive, that students would not have to dress for gym

class, and was embarrassed when she arrived in her gym uniform while others wore their street clothes.

Student A has completed her required summing units for PE class and does not plan to take additional, elective swimming units; swimming therefore is no longer in active dispute for Student A. Nevertheless, OCR’s investigation revealed that in the PE class’s swim unit, the District’s separate changing arrangements (Restroom G) also singled out Student A for different treatment from that of her peers. Unlike the other female students, who had standard showering facilities and amenities within a locker room, Student A had access to a “rinse” shower and limited amenities. The rinse shower was located in a narrow hallway through which all students had to pass to enter or exit the girls’ swimming locker room.

The District does not dispute that it has denied access to Student A to use the girls’ locker rooms. The District proffered as its legitimate, nondiscriminatory justification that it “based its decision on the needs of all students,” balancing Student A’s rights and interests with the privacy concerns of other female students. The District raised two specific constitutional privacy concerns. First, the District contends that “permitting Student A to be present in the locker room would expose female students to being observed in a state of undress by a biologically male individual.” The District’s second stated privacy concern is that it would be inappropriate for young female students to view a naked male in the locker room in a state of undress. The District stated that “[g]ranting Student A the option to change her clothes in the girls’ locker room would expose female students as young as fifteen years of age to a biologically male body.”¹¹ OCR finds the concerns unavailing in this case.

The District also points out that it offered various alternative changing options for Student A. However, each of the alternatives provided or proposed for Student A continued or would continue to exclude Student A from the girls’ locker rooms and set her apart from her female classmates and teammates. Some proposed alternative facilities were not comparable to those provided for other girls, such as the proposed Restroom E for the swimming unit. In addition, the alternative options used by Student A have further subjected her to stigma and different treatment because, on at least some occasions, she has been late to class because she has had to seek out school staff members to provide her access to the alternative facilities, and, on another occasion, showed up to class dressed for gym because she alone was not told to remain in street clothes.

In late October 2015, the District installed five curtains in the girls’ PE locker room. However, the District continues to deny Student A access to the girls’ locker room and has maintained that it will continue to deny access unless Student A—and only Student A—is required to change

¹¹ As putative support for this privacy concern relating to Student A’s peer interactions in the locker rooms, the District cited Student A’s private conversations, on two occasions, with Coach A and Nurse A as to whether she presented a female appearance in her uniform. A student’s question to a medical professional and a coach about whether the student presents as a girl in clothes bears no relationship to student privacy concerns regarding nudity; OCR therefore takes this claim as pretext. Nonetheless, OCR analyzes the relevance of the asserted privacy concern for purposes of complete review.

behind a privacy curtain. As noted above, Student A requested an opportunity to change clothes in private in the locker rooms, and has stated that she would use privacy curtains if available.

Conclusion

The evidence establishes that, for more than two school years, the District has denied Student A access to the girls' locker rooms at the School, and offered only separate facilities to change clothes for her PE classes and athletics activities.

The District has asserted its interests in balancing the rights of all students, including the constitutional privacy interests of high school students. OCR recognizes that, in preventing and redressing discrimination, schools must formulate, interpret, and apply their rules in a manner that respects the legal rights of students, including constitutional rights relating to privacy. The civil rights laws that OCR enforces, including Title IX, must be interpreted in ways that are consistent with constitutionally protected rights.

Consistent with the Title IX regulations described above permitting school districts to have separate locker room facilities, the School's locker rooms are separated by sex, with restricted access to only members of the same sex. Thus, the School's students have a reasonable expectation of privacy in a locker room setting. Students engage in private activities in the locker rooms, such as changing clothes, using the bathroom, and showering.

To date, the District's position has been that it must deny Student A access to the girls' locker rooms in order to protect the privacy interests of all of its students. In fact, however, the District could satisfy its Title IX obligations as well as protect potential or actual student privacy interests. The District's installation and maintenance of privacy curtains in one locker room go a long distance toward achieving such a nondiscriminatory alternative because providing sufficient privacy curtain access to accommodate any students who wish to be assured of privacy while changing would allow for protection of all students' rights in this context. Those female students wishing to protect their own private bodies from exposure to being observed in a state of undress by other girls in the locker rooms, including transgender girls, could change behind a privacy curtain. Student A has consistently made clear that she would use the privacy curtains to change if allowed access to the girls' locker rooms. This addresses the privacy interest in not exposing young female students in the girls' locker rooms to the intimate body parts of Student A – a transitioning transgender girl – in a state of undress. The privacy curtains the District already has installed in one locker room could well be sufficient to protect all its students' rights, with respect to access to that locker room, if the District rescinded its discriminatory denial of access to the locker rooms for Student A. To date, the District has not taken any steps to provide any private changing areas in its athletics locker room or swimming locker room (although Student A no longer needs to use the swimming locker room). The District has indicated that it might be willing to install privacy curtains in its other girls' locker rooms, but it has not done so.

Thus, the evidence establishes that, given Student A's stated intention to change privately, the District could afford equal access to its locker rooms for all its students if it installed and maintained privacy curtains in its locker rooms in sufficient number to be reasonably available

for any student who wants privacy. Here the totality of the circumstances weighs in favor of the District granting Student A equal access to the girls' locker rooms, while protecting the privacy of its students.

Based on the specific facts and circumstances in this case, OCR concludes that the District, on the basis of sex, excluded Student A from participation in and denied her the benefits of its education program, provided her different benefits or benefits in a different manner, subjected her to different rules of behavior, and subjected her to different treatment in violation of the Title IX regulation, at 34 C.F.R. § 106.31.

Procedural Posture

OCR has engaged in extensive negotiations with the District to resolve the Title IX violation in this case. OCR notified the District of its Title IX determination on July 13, 2015, and has actively negotiated with the District from that date through the date of this letter. OCR discussed a proposed agreement with the District on July 13, July 16, July 20, August 1, August 13, August 19, September 16, September 25, and October 8, 2015. On October 12, 2015, the District informed OCR that it would not resolve the Title IX violation voluntarily. On October 13, 2015, OCR issued a letter declaring an impasse in the negotiations. OCR informed the District of its continued willingness to negotiate an agreement, including holding an in-person meeting with the District's Superintendent on October 21. During the meeting of October 21, 2015, the District presented OCR diagrams and blueprints of its locker room facilities that were consistent with what OCR had observed during its onsite. The District also gave OCR a photograph of a mock-up shower curtain as a representation of what it would use for privacy curtains within the PE girls' locker room.

On October 28, 2015, OCR conducted an onsite visit at the School to view the privacy curtains that District installed on October 27, 2015, and had further negotiations with counsel for the District. To date, OCR's efforts to resolve this complaint voluntarily with the District have not been successful. OCR continues to be willing to negotiate an agreement with the District. If an agreement is not reached within 30 calendar days of the date of this Letter of Findings OCR must follow the procedures in its *Case Processing Manual*, at Section 305 for the issuance of a Letter of Impending Enforcement Action.

This concludes OCR's investigation of the complaint and 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.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she had 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, we will seek to protect, to the extent provided by law, personally identifiable information, which if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you or your staff members have any questions about this matter, please do not hesitate to contact Melissa Howard, Attorney Advisor, at 312-730-1527.

Sincerely,

/s/

Adele Rapport
Regional Director

cc: Jennifer Smith, Esq.