New Mexico School Boards Association

POLICY SERVICES ALERT

To: All Superintendents and Board Members

Date: May 29, 2016

Re: Revisions to the Fair Labor Standards Act concerning Exemptions to Overtime

Guidance from the Office of Civil Rights on Transgender Rights and Treatment under Title IX

Revisions to the Fair Labor Standards Act concerning Exemptions to Overtime

The Fair Labor Standards Act exemptions to overtime for Executive, Administrative, Professional, Outside sales and Computer Employees as to salary levels was revised to be effective December 1, 2016. The effect this may have on school districts is to raise the salary level of "white collar exemptions" and may require the district to institute time keeping and payment of overtime for employees who formerly met the salary exemption requirements.

The Department of Labor (DOL) rule change to the Fair Labor Standards Act (FLSA) "overtime rule" updated the salary level above which certain "white collar" workers may be exempt from overtime pay requirements. The change raises the salary level from its previous amount of $455 per week (the equivalent of $23,660 per year) to a new level of $913 per week (the equivalent of $47,476 per year). These amounts will increase every three years with the first increase taking place in 2020. The salary level and salary basis requirements do not apply to teachers as professionals. The professional exemption is applied to the employee whose "primary duty" must be to primarily perform work that either requires advanced knowledge in a field of science or learning or that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. This definition also exempts those administrative and professional positions for which a teaching credential is required to perform their duties from the salary level and basis requirement.

The school district employees more likely to be affected by the change are non-educator administrators and executives such as support staff department heads, confidential administrative assistants, purchasing agents and finance officers. Rather than try to explain the three part (plus in some cases) test for exempting employees from the requirement to pay overtime for working in excess of forty (40) hours per week, Policy Services has provide guidance documents that can be used to make those determinations and assist with strategies for meeting the requirements of this new change. You will find the documents following the text of the alert. It is suggested that each district review those employees who do not hold education credentials (license or certification) for performance of their

functions and who have been exempted in the past from overtime pay to determine if the salary level requirement has made an employee eligible for overtime pay and what actions must be taken to resolve the issue. The required actions could be to start paying overtime, raise the employee's salary or even mandate no work over 40 hours. Guidance documents from the DOL are attached including: "Guidance for Private Employers on Changes to the White Collar Exemptions in the Overtime final Rule," and "Fact sheet # 23: Overtime Pay Requirements of the FLSA"

Guidance from the Office of Civil Rights on Transgender Rights and Treatment under Title IX

Most educators are aware of the expanded interpretation of Title IX by the Office of Civil Rights (OCR) which has been seen in the expansion of the categories of persons who fall within those who cannot be discriminated against. Title IX, as a law has only 37 words. But among those words are these: "No 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." The expansion has been that OCR now considers school age transgender children entitled to the protection of Title IX against discrimination and harassment. The OCR is authorized by both the Department of Justice and the Department of Education to investigate and deny federal funds to those education institutions receiving federal funding if discrimination is present.

Each New Mexico member district of Policy Services has a policy (AC) Nondiscrimination/Equal Opportunity that prohibits discrimination based on "sexual orientation" as mandated in the New Mexico Human Rights Act per 28-1 NMSA. The policy manual also has several policies prohibiting harassment and bullying, including ACA, JICD and JII. These policies are the basis for compliance with the guidance from OCR regarding Transgender students. It is Policy Services' position that this is still a nondiscrimination issue based upon nondiscrimination toward "sexual orientation" as contained in each of the nondiscrimination policies in the recommended policies for schools in New Mexico. No new policy issue is brought up by the OCR guidance and this is therefore not the subject of further policy development.

The real challenge for districts will be the provision of a safe and nondiscriminatory environment free of harassment, gender hostility and name-calling among other things for the transgender child. The recommendation of Policy Services is that districts develop training and information programs to prevent discrimination and bullying before it's onset.

Attached are guidance documents related to each of the above topics:

U.S. Department of Labor (Wages and Hours Division)

"Guidance for Private Employers on Changes to the White Collar Exemptions in the Overtime Final Rule"

"Fact Sheet #23: Overtime Pay Requirements of the FLSA"

National School Boards Association

"NSBA Statement Regarding Guidance from Departments of Justice and Education"

U.S. Department of Justice and Department of Education (Civil Rights Division)

"Dear Colleague Letter on Transgender Students"

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

Guidance for Private Employers on Changes to the White Collar Exemptions in the Overtime Final Rule

May 18, 2016

Introduction

The Department of Labor's ("Department") Final Rule on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act (FLSA) (the "Overtime Rule" or "Final Rule") updates the salary level required for the executive, administrative, and professional ("white collar") exemption to ensure that the FLSA's intended overtime protections are fully implemented, and to simplify the identification of overtime-exempt employees. The Final Rule strengthens overtime protections and provides greater clarity for workers and employers across a wide range of sectors. Employers, however, are not required to pay minimum wages or overtime to executive, administrative, and professional employees who satisfy the salary level and other requirements to meet one of the white collar exemptions. The Department is issuing this guidance on the application of the white collar exemptions at the same time as publication of the Final Rule in order to help private sector employers evaluate current practices and transition to the requirements of the Final Rule.

In the Final Rule, the Department updated the salary level above which certain "white collar" workers may be exempt from overtime pay requirements to equal the 40th percentile of earnings of full-time salaried workers from the lowest wage Census Region. This change raises the salary level from its previous amount of $455 per week (the equivalent of $23,660 per year) to a new level of $913 per week (the equivalent of $47,476 per year). Salaried white collar employees paid below the updated salary level are generally entitled to overtime pay, while employees paid at or above the salary level may be exempt from overtime pay if they primarily perform certain duties. The Final Rule also raises the compensation level for highly compensated employees subject to a more minimal duties test from its previous amount of $100,000 to $134,004 annually. These changes take effect on December 1, 2016. The Final Rule also establishes a mechanism for automatically updating the salary and compensation levels every three years, with the first update to take place in 2020. The Final Rule does not include any changes to the duties tests, which also affect the determination of who is exempt from overtime.

In view of the changes introduced by the Final Rule to the salary level in particular, the Department is providing this guidance to assist employers in preparing for implementation of the Final Rule. Part I of this guidance provides a brief background on the FLSA's white collar exemptions and how they apply generally.

Part II details some of the options employers may exercise in determining how best for their organizations to ensure that they comply with the Final Rule. This guidance, however, is not a comprehensive guide to coverage and compliance under the FLSA. For additional, detailed guidance documents, please visit the Wage and Hour Division's website at **dol.gov/whd**.

I. Considerations for Applying the White Collar Exemptions

A review of the baseline white collar exemption requirements will help clarify what has changed as a result of the Final Rule. In the Final Rule, among other things, the Department updated the salary level from its previous amount of $455 per week (the equivalent of $23,660 per year) to $913 per week (the equivalent of $47,476 per year). The salary level is one of three tests for determining whether employees employed as executive, administrative, or professional employees are exempt from the FLSA's minimum wage and overtime requirements. *See* 29 U.S.C. 213(a)(1); 29 CFR Part 541. These exemptions are sometimes referred to collectively as the "white collar" exemptions. The Final Rule also made changes to the highly compensated employee exemption and how bonuses are treated for purposes of determining an employee's exempt status. For guidance on these issues or for additional information on the Final Rule visit **dol.gov/whd/overtime/final2016/**.

Establishing that a white collar employee is exempt from the FLSA's minimum wage and overtime requirements involves assessing how the employee is paid (salary basis test), how much the employee earns (salary level test), and whether the employee primarily performs the kind of job duties that Congress meant to exclude from the law's overtime protections (duties test). Job titles never determine exempt status under the FLSA. Additionally, receiving a particular salary, alone, does not indicate that an employee is exempt from overtime and minimum wage protections. Rather, in order for a white collar exemption to apply, an employee's specific job duties and earnings must meet all of the applicable requirements provided in the regulations. Not all salaried white collar employees qualify for the white collar exemptions; in fact, many salaried white collar employees are entitled to minimum wage and overtime.

A. Three Tests Must Be Met in Order to Claim a White Collar Exemption

The regulations implementing the white collar exemptions generally require individuals to satisfy three criteria to be exempt from overtime requirements:

- First, they must be paid on a salary basis not subject to reduction based on quality or quantity of work ("salary basis test") rather than, for example, on an hourly basis;
- Second, their salary must meet a minimum salary level, which after the effective date of the Final Rule will be $913 per week, which is equivalent to $47,476 annually for a full-year worker ("salary level test"); and
- Third, the employee's primary job duty must involve the kind of work associated with exempt executive, administrative, or professional employees (the "standard duties test").

The salary level is not a minimum wage requirement, and no employer is required to pay an employee the salary specified in the regulations, unless the employer is claiming an applicable white collar exemption. Administrative and professional employees may also be paid on a "fee basis." *See* 29 CFR 541.605. For additional information about payment on a fee basis, *see*

Job titles never determine exempt status under the FLSA. Additionally, receiving a particular salary, alone, does not indicate that an employee is exempt from overtime and minimum wage protections.

Overtime-eligible employees may be paid a salary and do not need to be paid on an hourly basis. That is, **salaried workers may be eligible for overtime**.

WHD Fact Sheet 17G.

Note that the discussion in this guidance focuses on the standard exemption. For additional information on the highly compensated employee exemption, which pairs a more relaxed duties test with a higher total earnings level ($134,004 per year, beginning on December 1, 2016), *see* **WHD Fact Sheet 17H**.

B. Primary Job Duties for Exempt Executive, Administrative, and Professional Employees

The duties tests remain unchanged under the Final Rule. These tests are summarized below.

Professional Exemption. There are several different kinds of exempt "professional" employees. These include "learned professionals," "creative professionals," teachers, and employees practicing law or medicine. Under the Final Rule, exempt professional employees must receive at least $913 a week (the equivalent of $47,476 a year) on a salary or fee basis (compared to $455 a week under the old rule), and must primarily perform work that either requires advanced knowledge in a field of science or learning, usually obtained through a degree, or that requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

Many businesses may employ certain professionals who will be unaffected by the new salary level. Specifically, the salary level and salary basis requirements do not apply to teachers, lawyers, or doctors ("bona fide practitioners of law or medicine"). *See* **WHD Fact Sheet 17D**.

> *Example*: A business hires an attorney with a law degree to work in its General Counsel's office. The attorney performs legal work for the business. The attorney is a bona fide professional, exempt from the FLSA's provisions, regardless of whether she is paid on a salary basis or meets the salary level.

Administrative Exemption. To qualify for the administrative exemption, an employee must receive at least $913 a week (the equivalent of $47,476 a year) on a salary or fee basis, and the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. Additionally, the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. *See* 29 CFR 541.203 for examples, and **WHD Fact Sheet 17C** for additional information.

Executive Exemption. To qualify for the executive exemption, an employee must receive compensation on a salary basis of not less than $913 per week (the equivalent of $47,476 a year), and have the primary duty of managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise. Additionally, the employee must customarily and regularly direct the work of at least two other full-time employees or their equivalent (for example, one full-time and two half-time employees are equivalent to two full-time employees), and have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight. *See* **WHD Fact Sheet 17B**.

> *Example*: A maintenance department, which is responsible for maintaining the buildings and grounds of a large technology company, employs a groundskeeping crew lead. The crew lead coordinates the work of three groundskeepers and

The salary level is not a minimum wage requirement, and no employer is required to pay an employee the salary specified in the regulations, unless the employer is claiming an applicable white collar exemption.

makes recommendations for their terminations and promotions. The crew lead earns $38,000 a year ($731 per week) on a salary basis. The crew lead does not meet the new salary level, and therefore is eligible for overtime compensation when the crew lead works more than 40 hours a week. The facility does not need to determine whether the crew lead meets the duties test, because the crew lead does not pass the salary test.

For more information on all of the white collar exemptions, *see* **WHD Fact Sheet 17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees under the Fair Labor Standards Act (FLSA)**.

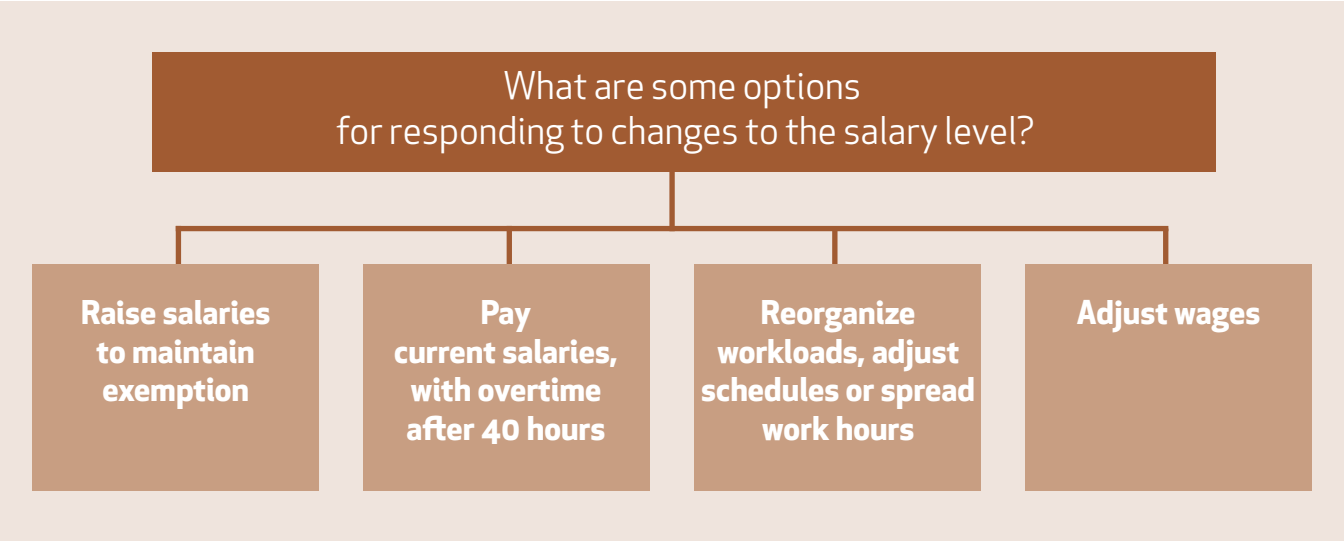
II. Options for Compliance for Employers Who Might be Impacted by the Final Rule

Employers have a wide range of options for responding to the changes to the salary level, and the Department does not dictate or recommend any method. Organizations may ensure compliance for those employees affected by the Final Rule in a number

Basic Requirements for Claiming a White Collar Exemption under the Standard Duties Test

	EXECUTIVE	ADMINISTRATIVE	PROFESSIONAL
Salary Basis Test	• Employee must be paid on a salary basis	• Employee must be paid on a salary or fee basis	• Employee must be paid on a salary or fee basis
Standard Salary Level Test	• $913 per week ($47,476 per year for a full-year worker)	• $913 per week ($47,476 per year for a full-year worker) • Special salary level for certain academic administrative personnel	• $913 per week ($47,476 per year for a full-year worker) • Salary level test does **not** apply to doctors, lawyers, or teachers
Standard Duties Test	• The employee's "primary duty" must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise (and managing 2 full-time employees as well). • Additional requirements provided in 29 CFR 541 Subpart B	• The employee's "primary duty" must include the exercise of discretion and independent judgment with respect to matters of significance. • Additional requirements provided in 29 CFR 541 Subpart C	• The employee's "primary duty" must be to primarily perform work that either requires advanced knowledge in a field of science or learning or that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. • Additional requirements provided in 29 CFR 541 Subpart D

of ways, including providing pay raises that increase workers' salaries to the new threshold, spreading employment by reducing or eliminating work hours of individual employees working over 40 hours per week for which no overtime is being paid, or paying overtime. This rule does not require employers to convert a salaried worker making less than the new salary threshold to hourly status: employers can pay non-exempt employees on a salary basis and pay overtime for hours worked beyond 40 in a week. As long as they are complete and accurate, employers may use any method they choose for tracking and recording hours. The method for compliance, which is entirely within each employer's discretion, will likely depend on the circumstances of that organization's workforce, including how much employees currently earn and how often employees work overtime, and may include a combination of responses, such as paying overtime and adjusting employees' hours and schedules. Some potential responses are discussed below.



A. Numerous Options for Compliance

i. After evaluation, no changes to pay or hours necessary

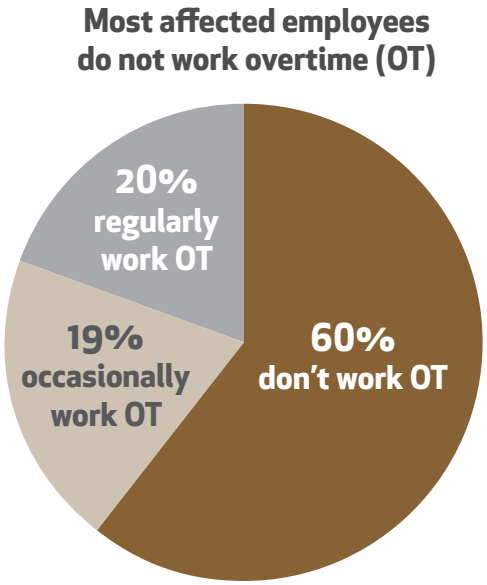
Many organizations may have white collar employees who satisfy one of the duties tests for exemption and earn between the old salary level ($455 per week) and the new salary level ($913 per week). Employers should evaluate all such categories of white collar employees to determine which employees do not work more than 40 hours per workweek. The Final Rule will have no effect on these employees' pay because they do not work any overtime even though they will become overtime-protected. They can continue to be paid a salary as before.

Example: An office manager performs the duties of a bona fide administrator and is paid a fixed salary of $42,000 a year. The manager regularly works from 9am-5pm, Monday through Friday. Because of the change in the salary level, the manager is no longer an exempt employee. Nevertheless, the Final Rule has no impact on the manager's pay, because the manager does not work more than 40 hours in a given week. The office can continue to pay the manager a fixed salary of $42,000 a year.

ii. Raise salaries

Employers may choose to raise the salaries of employees who meet the duties tests, whose salaries are close to the new salary level, and who regularly work overtime, to at or above the salary level to maintain their exempt status.

Example: An operations manager at an international corporation is paid a salary of $45,000 a year. Her job duties qualify her for the administrative exemption. The manager's job requires regularly working overtime to direct business operations in multiple time zones. The employer may choose to raise the manager's salary to at or above $47,476 a year to maintain the manager's administrative exemption.



**Totals don't sum to 100 due to rounding. For more information, please see Section VI of the Final Rule.*

iii. Pay overtime above a salary

Employers also can continue to pay employees a salary and pay overtime for hours in excess of 40 per week. Although the FLSA requires employers to keep records of how many hours overtime-eligible employees work, the law does not require that overtime-eligible workers be paid on an hourly basis. Rather, employers may continue to pay employees a salary covering a fixed number of hours, which could include hours above 40. There are several ways to pay a salary and pay overtime.

An employer might pay employees a salary for the first 40 hours of work per week, and then pay overtime for any hours over 40. Employers may choose to do this, for example, for employees who work 40 hours per week and do not frequently work overtime, or who do not consistently work the same amount of overtime.

> *Example*: Alexa, a manager at an advertising agency, earns a fixed salary of $41,600 per year ($800 per week) for a 40 hour workweek. Because her salary is for 40 hours per week, Alexa's regular rate is $20 per hour. If Alexa works 45 hours one particular week, the employer would pay time and one-half (overtime premium) for five hours at a rate of $30 per hour. Thus, for that week, Alexa should be paid $950, consisting of her $800 per week salary and $150 overtime compensation.

Employers also have the option of paying a straight time salary for more than 40 hours in a week for employees who regularly work more than 40 hours, and paying overtime in addition to the salary. Using this method, the employer will only be required to pay an additional half time overtime premium for overtime hours already included within the salary, and time and a half for hours beyond those included in the salary.

> *Example*: Jamie, an HR manager at a catering company, earns a fixed salary of $44,200 per year ($850 per week) for a 50 hour workweek. The salary does not include the overtime premium. Because the salary is for 50 hours per week, Jamie's regular rate is $17 ($850/50). In a normal 50 hour week, the employer would pay Jamie the additional half time overtime premium for the 10 hours of overtime ($8.50/hour). If Jamie worked more than 50 hours in a week, the employer would also owe overtime compensation at time

Employers can also pay non-exempt employees on a salary basis and pay overtime for hours worked beyond 40 in a week. As long as they are complete and accurate, **employers may use any method they choose for tracking and recording hours**.

Many organizations may already have systems in place for tracking non-exempt employees' hours. These **existing systems can be used for newly overtime-protected employees impacted by the Overtime Rule**.

and a half the regular rate ($17 x 1.5) for hours beyond 50 (because the salary does not cover any payment for those hours).

It is also possible for an employer and employee to agree to a fixed salary for a workweek of more than 40 hours, in which the salary includes overtime compensation under certain conditions. If, however, the employee's schedule changes in any way during any week (either by working more or fewer hours), the employer must adjust the salary for that week. Employees must be paid based on the hours actually worked during the workweek. This method of paying for overtime, therefore, might be most helpful for employees who consistently work the same amount of overtime every week.

Example: Andre, a manager on a construction project, has an agreement with his company where he is paid a fixed salary of $39,520 per year ($760 per week) for a 45 hour workweek. The fixed salary includes both straight time for the first 40 hours ($16 regular rate x 40 hours) and overtime compensation for hours 41-45 ($24 overtime rate x 5 hours). If Andre's schedule changes in any way for any week, his salary needs to be adjusted to reflect the hours actually worked for that week.

Finally, where employees have hours of work which fluctuate from week to week, employers can pay a fixed salary that covers a fluctuating number of hours at straight time if certain conditions are met, including a clear mutual understanding between the employer and employee. *See* 29 CFR 778.114 for additional information and criteria for this payment method.

Any overtime-eligible employee may continue to be paid a salary, provided that overtime compensation is also paid and appropriately documented in the employer's record. Many organizations may already have systems in place for tracking non-exempt employees' hours. These existing systems can be used for newly overtime-protected employees impacted by the Overtime Rule. As long as they are complete and accurate, employers may use any method they choose for recording hours. Employers may use their own system to keep track of employees' work hours or require employees to enter their own time into payroll programs. *See* **WHD Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA)**.

There is no requirement that employees "punch in" and "punch out." An employer does not need to require an employee to sign in each time she starts and stops work. The employer must, however, keep an accurate record of the number of daily hours worked by the employee. To do so, an employer could allow an employee to just provide the total number of hours worked each day, including the number of overtime hours, by the end of each pay period. For employees who work a fixed schedule, an employer need not track the employee's exact hours worked each day; rather, the employer and employee can agree to a default schedule that reflects daily and weekly hours, and indicate that the employee followed the agreed-upon schedule, if that is true. Only when the employee deviates from the schedule is the employer required to record the number of hours worked each day. Many employees, both exempt and non-exempt, track their daily and weekly hours by simply recording their hours worked for the employer.

iv. Reorganize Workloads, Adjust Schedules or Spread Work Hours

Employers may wish to reorganize workload distributions or adjust employee schedules in order to comply with the Final Rule. For example, work assignments that are predictable could be assigned at the beginning of the workweek (rather than, for instance, late in the day on Friday for an employee who typically works Monday–Friday) in order to manage overtime hours. Or, when employees regularly perform duties outside of a 9 to 5 workday, organizations may

consider adjusting those employees' schedules to encompass when most of the work takes place, so that they will not work more than 40 hours each workweek. (The FLSA does not specify days or schedules, such as a Monday—Friday workweek or a 9 to 5 workday; this is provided only as an example of a schedule that many workers follow.)

> *Example*: John, a manager for a local hardware store who satisfies the duties test for the executive exemption, currently begins work at 9am Monday—Friday. Under the Final Rule's new salary level, he would be newly entitled to overtime compensation. Among other duties, John works until the store closes at 7pm. The store may wish to adjust John's schedule such that he doesn't need to begin work until 10am, thus limiting the number of overtime hours he works.

To reduce or eliminate overtime hours, employers may decide to hire new employees or redistribute work hours in excess of 40 across current staff, such as by increasing the work hours of staff who work less than 40 hours per week.

v. Adjust Wages

Employers can adjust the amount of an employee's earnings to reallocate it between regular wages and overtime so that the total amount paid to the employee remains largely the same. Employers may not, however, reduce an employee's hourly wage below the highest applicable minimum wage (federal, state, or local), or continually adjust wages each workweek in order to manipulate the regular rate. The employees' hours worked must still be recorded, and overtime must be paid according to the actual number of hours worked each week.

Example: Assume a supervisor at a private gym who satisfies the duties test for the executive exemption earns $37,000 per year ($711.54 per week). The supervisor regularly works 45 hours per week. The employer may choose to instead pay the employee an hourly rate of $15 and pay time and one-half for the 5 overtime hours worked each week.

$600.00 (40 hours x $15 / hour)

+ $112.50 (5 OT hours x $15 x 1.5)

$712.50 per week

Alternatively, the employer may choose to pay that employee a salary for 40 hours of $600 per week and pay the overtime for hours in excess of 40 per week.

$600.00 (salary for 40 hours/week, equivalent to $15/hour)

+ $112.50 (5 OT hours x $15 x 1.5)

$712.50 per week

Conclusion

The overtime rule updated the regulations to ensure that the FLSA's intended overtime protections are fully implemented, and to simplify the identification of overtime-eligible workers, making the exemption easier for employers and workers to understand and apply. This guidance is provided to help employers understand their responsibilities and options for complying with the FLSA's overtime provisions following publication of the Final Rule.

For additional information, please visit **www.dol.gov/whd**.

The Department announced a Final Rule focused primarily on updating the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt. For more information, see http://www.dol.gov/whd/overtime/final2016/.

Fact Sheet #23: Overtime Pay Requirements of the FLSA

This fact sheet provides general information concerning the application of the overtime pay provisions of the FLSA.

Characteristics

An employer who requires or permits an employee to work overtime is generally required to pay the employee premium pay for such overtime work.

Requirements

Unless specifically exempted, employees covered by the Act must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay. There is no limit in the Act on the number of hours employees aged 16 and older may work in any workweek. The Act does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest, as such.

The Act applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees. Averaging of hours over two or more weeks is not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular pay day for the pay period in which the wages were earned.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments excluded by the Act itself. Payments which are not part of the regular rate include pay for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays, discretionary bonuses, gifts and payments in the nature of gifts on special occasions, and payments for occasional periods when no work is performed due to vacation, holidays, or illness.

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. This is calculated by dividing the total pay for employment (except for the statutory exclusions noted above) in any workweek by the total number of hours actually worked.

Where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. In addition, section 7(g)(2) of the FLSA allows, under specified conditions, the computation of overtime pay based on one and one-half times the hourly rate in effect when the overtime work is performed. The requirements for computing overtime pay pursuant to section 7(g)(2) are prescribed in 29 CFR 778.415 through 778.421.

Where non-cash payments are made to employees in the form of goods or facilities, the reasonable cost to the employer or fair value of such goods or facilities must be included in the regular rate.

Typical Problems

Fixed Sum for Varying Amounts of Overtime: A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, no part of a flat sum of $180 to employees who work overtime on Sunday will qualify as an overtime premium, even though the employees' straight-time rate is $12.00 an hour and the employees always work less than 10 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at $13.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire $78.00 must be included in determining the employees' regular rate.

Salary for Workweek Exceeding 40 Hours: A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 45 hour workweek for a weekly salary of $405. In this instance the regular rate is obtained by dividing the $405 straight-time salary by 45 hours, resulting in a regular rate of $9.00. The employee is then due additional overtime computed by multiplying the 5 overtime hours by one-half the regular rate of pay ($4.50 x 5 = $22.50).

Overtime Pay May Not Be Waived: The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee's right to compensation for compensable overtime hours that are worked.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

NSBA Statement Regarding Guidance from Departments of Justice and Education

May 13, 2016

National School Boards Association Statement Regarding Guidance from Departments of Justice and Education

Alexandria, Va. (May 13, 2016) - "The National School Boards Association (NSBA) and its members are committed to protecting students and ensuring they have equal opportunity to receive the best education possible and fulfill their potential.

"We believe education is a civil right and that students learn best in safe learning environments. Students and school staff should not be subjected to discrimination on any basis. School board members, as community leaders, play a key role in promoting productive dialogue about diversity, including gender identity. NSBA looks forward to working with school boards to lead their communities in modelling and encouraging inclusive thinking and behavior, considering credible and balanced information on the issue of gender identity to ultimately create a positive change.

"On April 10, NSBA issued a comprehensive guide, "Transgender Students in Schools," to help school districts navigate the unsettled law on gender identity and Title IX. Decisions impacting the day-to-day activities within our nation's schools are inherently local and NSBA's guidance seeks to inform those local decisions by clarifying existing law. The guidance issued today by the Departments of Education and Justice adds another voice to an ongoing conversation about how gender identity is addressed, and expresses an interpretation of Title IX that is unsettled law. A dispute about the intent of the federal law must ultimately be resolved by the courts and the Congress."

The National School Boards Association (NSBA) is the leading advocate for public education and supports equity and excellence in public education through school board leadership. NSBA represents state school boards associations and their more than 90,000 local school board members throughout the U.S. Learn more at: www.nsba.org

Linda Embrey
Communications Office
National School Boards Association
703.838.6737, lembrey@nsba.org
www.nsba.org

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

Dear Colleague Letter on Transgender Students
Notice of Language Assistance

If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

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Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

May 13, 2016

Dear Colleague:

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance.[1] This prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status. This letter summarizes a school's Title IX obligations regarding transgender students and explains how the U.S. Department of Education (ED) and the U.S. Department of Justice (DOJ) evaluate a school's compliance with these obligations.

ED and DOJ (the Departments) have determined that this letter is *significant guidance*.[2] This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you have questions or are interested in commenting on this guidance, please contact ED at ocr@ed.gov or 800-421-3481 (TDD 800-877-8339); or DOJ at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Accompanying this letter is a separate document from ED's Office of Elementary and Secondary Education, *Examples of Policies and Emerging Practices for Supporting Transgender Students*. The examples in that document are taken from policies that school districts, state education agencies, and high school athletics associations around the country have adopted to help ensure that transgender students enjoy a supportive and nondiscriminatory school environment. Schools are encouraged to consult that document for practical ways to meet Title IX's requirements.[3]

Terminology

- *Gender identity* refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth.

- *Sex assigned at birth* refers to the sex designation recorded on an infant's birth certificate should such a record be provided at birth.

- *Transgender* describes those individuals whose gender identity is different from the sex they were assigned at birth. A *transgender male* is someone who identifies as male but was assigned the sex of female at birth; a *transgender female* is someone who identifies as female but was assigned the sex of male at birth.

- *Gender transition* refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

Compliance with Title IX

As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations.[4] The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments' interpretation is consistent with courts' and other agencies' interpretations of Federal laws prohibiting sex discrimination.[5]

The Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity. Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.[6] Because transgender students often are unable to obtain identification documents that reflect their gender identity (*e.g.*, due to restrictions imposed by state or local law in their place of birth or residence),[7] requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity.

A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students.[8]

1. Safe and Nondiscriminatory Environment

Schools have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. Harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly.[9] If sex-based harassment creates a hostile environment, the school must take prompt and effective steps to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. A school's failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX. For a more detailed discussion of Title IX

requirements related to sex-based harassment, see guidance documents from ED's Office for Civil Rights (OCR) that are specific to this topic.[10]

2. Identification Documents, Names, and Pronouns

Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex. The Departments have resolved Title IX investigations with agreements committing that school staff and contractors will use pronouns and names consistent with a transgender student's gender identity.[11]

3. Sex-Segregated Activities and Facilities

Title IX's implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances.[12] When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.[13]

- **Restrooms and Locker Rooms**. A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.[14] A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.[15]

- **Athletics.** Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.[16] A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (*i.e.*, the same gender identity) or others' discomfort with transgender students.[17] Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport.[18]

- **Single-Sex Classes**. Although separating students by sex in classes and activities is generally prohibited, nonvocational elementary and secondary schools may offer nonvocational single-sex classes and extracurricular activities under certain circumstances.[19] When offering such classes and activities, a school must allow transgender students to participate consistent with their gender identity.

- **Single-Sex Schools**. Title IX does not apply to the admissions policies of certain educational institutions, including nonvocational elementary and secondary schools, and private undergraduate colleges.[20] Those schools are therefore permitted under Title IX to set their own

sex-based admissions policies. Nothing in Title IX prohibits a private undergraduate women's college from admitting transgender women if it so chooses.

- **Social Fraternities and Sororities**. Title IX does not apply to the membership practices of social fraternities and sororities.[21] Those organizations are therefore permitted under Title IX to set their own policies regarding the sex, including gender identity, of their members. Nothing in Title IX prohibits a fraternity from admitting transgender men or a sorority from admitting transgender women if it so chooses.

- **Housing and Overnight Accommodations**. Title IX allows a school to provide separate housing on the basis of sex.[22] But a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students. Nothing in Title IX prohibits a school from honoring a student's voluntary request for single-occupancy accommodations if it so chooses.[23]

- **Other Sex-Specific Activities and Rules**. Unless expressly authorized by Title IX or its implementing regulations, a school may not segregate or otherwise distinguish students on the basis of their sex, including gender identity, in any school activities or the application of any school rule. Likewise, a school may not discipline students or exclude them from participating in activities for appearing or behaving in a manner that is consistent with their gender identity or that does not conform to stereotypical notions of masculinity or femininity (*e.g.*, in yearbook photographs, at school dances, or at graduation ceremonies).[24]

4. Privacy and Education Records

Protecting transgender students' privacy is critical to ensuring they are treated consistent with their gender identity. The Departments may find a Title IX violation when a school limits students' educational rights or opportunities by failing to take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth.[25] Nonconsensual disclosure of personally identifiable information (PII), such as a student's birth name or sex assigned at birth, could be harmful to or invade the privacy of transgender students and may also violate the Family Educational Rights and Privacy Act (FERPA).[26] A school may maintain records with this information, but such records should be kept confidential.

- **Disclosure of Personally Identifiable Information from Education Records**. FERPA generally prevents the nonconsensual disclosure of PII from a student's education records; one exception is that records may be disclosed to individual school personnel who have been determined to have a legitimate educational interest in the information.[27] Even when a student has disclosed the student's transgender status to some members of the school community, schools may not rely on this FERPA exception to disclose PII from education records to other school personnel who do not have a legitimate educational interest in the information. Inappropriately disclosing (or requiring students or their parents to disclose) PII from education records to the school community may

violate FERPA and interfere with transgender students' right under Title IX to be treated consistent with their gender identity.

- **Disclosure of Directory Information**. Under FERPA's implementing regulations, a school may disclose appropriately designated directory information from a student's education record if disclosure would not generally be considered harmful or an invasion of privacy.[28] Directory information may include a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance.[29] School officials may not designate students' sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy.[30] A school also must allow eligible students (*i.e.*, students who have reached 18 years of age or are attending a postsecondary institution) or parents, as appropriate, a reasonable amount of time to request that the school not disclose a student's directory information.[31]

- **Amendment or Correction of Education Records**. A school may receive requests to correct a student's education records to make them consistent with the student's gender identity. Updating a transgender student's education records to reflect the student's gender identity and new name will help protect privacy and ensure personnel consistently use appropriate names and pronouns.

  - Under FERPA, a school must consider the request of an eligible student or parent to amend information in the student's education records that is inaccurate, misleading, or in violation of the student's privacy rights.[32] If the school does not amend the record, it must inform the requestor of its decision and of the right to a hearing. If, after the hearing, the school does not amend the record, it must inform the requestor of the right to insert a statement in the record with the requestor's comments on the contested information, a statement that the requestor disagrees with the hearing decision, or both. That statement must be disclosed whenever the record to which the statement relates is disclosed.[33]
  - Under Title IX, a school must respond to a request to amend information related to a student's transgender status consistent with its general practices for amending other students' records.[34] If a student or parent complains about the school's handling of such a request, the school must promptly and equitably resolve the complaint under the school's Title IX grievance procedures.[35]

*** * ***

We appreciate the work that many schools, state agencies, and other organizations have undertaken to make educational programs and activities welcoming, safe, and inclusive for all students.

Sincerely,

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education

/s/

Vanita Gupta
Principal Deputy Assistant Attorney General for Civil Rights
U.S. Department of Justice

[1] 20 U.S.C. §§ 1681–1688; 34 C.F.R. Pt. 106; 28 C.F.R. Pt. 54. In this letter, the term *schools* refers to recipients of Federal financial assistance at all educational levels, including school districts, colleges, and universities. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that compliance would not be consistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a).

[2] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf.

[3] ED, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 13, 2016), www.ed.gov/oese/oshs/emergingpractices.pdf. OCR also posts many of its resolution agreements in cases involving transgender students online at www.ed.gov/ocr/lgbt.html. While these agreements address fact-specific cases, and therefore do not state general policy, they identify examples of ways OCR and recipients have resolved some issues addressed in this guidance.

[4] 34 C.F.R. §§ 106.4, 106.31(a). For simplicity, this letter cites only to ED's Title IX regulations. DOJ has also promulgated Title IX regulations. *See* 28 C.F.R. Pt. 54. For purposes of how the Title IX regulations at issue in this guidance apply to transgender individuals, DOJ interprets its regulations similarly to ED. State and local rules cannot limit or override the requirements of Federal laws. *See* 34 C.F.R. § 106.6(b).

[5] *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998); *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *8 (4th Cir. Apr. 19, 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008); *Macy v. Dep't of Justice*, Appeal No. 012012082 (U.S. Equal Emp't Opportunity Comm'n Apr. 20, 2012). *See also* U.S. Dep't of Labor (USDOL), Training and Employment Guidance Letter No. 37-14, *Update on Complying with Nondiscrimination Requirements: Discrimination Based on Gender Identity, Gender Expression and Sex Stereotyping are Prohibited Forms of Sex Discrimination in the Workforce Development System* (2015), wdr.doleta.gov/directives/attach/TEGL/TEGL_37-14.pdf; USDOL, Job Corps, Directive: Job Corps Program Instruction Notice No. 14-31, *Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program* (May 1, 2015), https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi_14_31.pdf; DOJ, Memorandum from the Attorney General, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (2014), www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf; USDOL, Office of Federal Contract Compliance Programs, Directive 2014-02, *Gender Identity and Sex Discrimination* (2014), www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

[6] *See Lusardi v. Dep't of the Army*, Appeal No. 0120133395 at 9 (U.S. Equal Emp't Opportunity Comm'n Apr. 1, 2015) ("An agency may not condition access to facilities—or to other terms, conditions, or privileges of employment—on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity.").

[7] *See G.G.*, 2016 WL 1567467, at *1 n.1 (noting that medical authorities "do not permit sex reassignment surgery for persons who are under the legal age of majority").

[8] 34 C.F.R. § 106.31(b)(4); *see G.G.*, 2016 WL 1567467, at *8 & n.10 (affirming that individuals have legitimate and important privacy interests and noting that these interests do not inherently conflict with nondiscrimination principles); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman "merely [to be] present in the women's faculty restroom" created a hostile environment); *Glenn*, 663 F.3d at 1321 (defendant's proffered justification that "other women might object to [the plaintiff]'s restroom use" was "wholly irrelevant"). *See also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (recognizing that "mere negative attitudes, or fear . . . are not permissible bases for" government action).

[9] *See, e.g.,* Resolution Agreement, *In re Downey Unified Sch. Dist., CA*, OCR Case No. 09-12-1095, (Oct. 8, 2014), www.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (agreement to address harassment of transgender student, including allegations that peers continued to call her by her former name, shared pictures of her prior to her transition, and frequently asked questions about her anatomy and sexuality); Consent Decree, *Doe v. Anoka-Hennepin Sch. Dist. No. 11, MN* (D. Minn. Mar. 1, 2012), www.ed.gov/ocr/docs/investigations/05115901-d.pdf (consent decree to address sex-based harassment, including based on nonconformity with gender stereotypes); Resolution Agreement, *In re Tehachapi Unified Sch. Dist*., *CA*, OCR Case No. 09-11-1031 (June 30, 2011), www.ed.gov/ocr/docs/investigations/09111031-b.pdf (agreement to address sexual and gender-based harassment, including harassment based on nonconformity with gender stereotypes). *See also Lusardi,* Appeal No. 0120133395, at *15 ("Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment").

[10] *See, e.g.*, OCR, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001), www.ed.gov/ocr/docs/shguide.pdf; OCR, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), www.ed.gov/ocr/letters/colleague-201010.pdf; OCR, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), www.ed.gov/ocr/letters/colleague-201104.pdf; OCR, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), www.ed.gov/ocr/docs/qa-201404-title-ix.pdf.

[11] *See, e.g.*, Resolution Agreement, *In re Cent. Piedmont Cmty. Coll.*, *NC*, OCR Case No. 11-14-2265 (Aug. 13, 2015), www.ed.gov/ocr/docs/investigations/more/11142265-b.pdf (agreement to use a transgender student's preferred name and gender and change the student's official record to reflect a name change).

[12] 34 C.F.R. §§ 106.32, 106.33, 106.34, 106.41(b).

[13] *See* 34 C.F.R. § 106.31.

[14] 34 C.F.R. § 106.33.

[15] *See, e.g.*, Resolution Agreement, *In re Township High Sch. Dist. 211, IL*, OCR Case No. 05-14-1055 (Dec. 2, 2015), www.ed.gov/ocr/docs/investigations/more/05141055-b.pdf (agreement to provide any student who requests additional privacy "access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use.").

[16] 34 C.F.R. § 106.41(b). Nothing in Title IX prohibits schools from offering coeducational athletic opportunities.

[17] 34 C.F.R. § 106.6(b), (c). An interscholastic athletic association is subject to Title IX if (1) the association receives Federal financial assistance or (2) its members are recipients of Federal financial assistance and have ceded controlling authority over portions of their athletic program to the association. Where an athletic association is covered by Title IX, a school's obligations regarding transgender athletes apply with equal force to the association.

[18] The National Collegiate Athletic Association (NCAA), for example, reported that in developing its policy for participation by transgender students in college athletics, it consulted with medical experts, athletics officials, affected students, and a consensus report entitled *On the Team: Equal Opportunity for Transgender Student Athletes* (2010) by Dr. Pat Griffin & Helen J. Carroll (*On the Team*), https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf. *See* NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes* 2, 30-31 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf (citing *On the Team*). The *On the Team* report noted that policies that may be appropriate at the college level may "be unfair and too complicated for [the high school] level of competition." *On the Team* at 26. After engaging in similar processes, some state interscholastic athletics associations have adopted policies for participation by transgender students in high school athletics that they determined were age-appropriate.

[19] 34 C.F.R. § 106.34(a), (b). Schools may also separate students by sex in physical education classes during participation in contact sports. *Id*. § 106.34(a)(1).

[20] 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d); 34 C.F.R. § 106.34(c) (a recipient may offer a single-sex public nonvocational elementary and secondary school so long as it provides students of the excluded sex a "substantially

equal single-sex school or coeducational school").

[21] 20 U.S.C. § 1681(a)(6)(A); 34 C.F.R. § 106.14(a).

[22] 20 U.S.C. § 1686; 34 C.F.R. § 106.32.

[23] *See, e.g.,* Resolution Agreement, *In re Arcadia Unified. Sch. Dist., CA*, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, (July 24, 2013), www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf (agreement to provide access to single-sex overnight events consistent with students' gender identity, but allowing students to request access to private facilities).

[24] *See* 34 C.F.R. §§ 106.31(a), 106.31(b)(4). *See also*, *In re Downey Unified Sch. Dist., CA*, *supra* n. 9; *In re Cent. Piedmont Cmty. Coll., NC, supra* n. 11.

[25] 34 C.F.R. § 106.31(b)(7).

[26] 20 U.S.C. § 1232g; 34 C.F.R. Part 99. FERPA is administered by ED's Family Policy Compliance Office (FPCO). Additional information about FERPA and FPCO is available at www.ed.gov/fpco.

[27] 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1).

[28] 34 C.F.R. §§ 99.3, 99.31(a)(11), 99.37.

[29] 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.

[30] Letter from FPCO to Institutions of Postsecondary Education 3 (Sept. 2009), www.ed.gov/policy/gen/guid/fpco/doc/censuslettertohighered091609.pdf.

[31] 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. §§ 99.3. 99.37(a)(3).

[32] 34 C.F.R. § 99.20.

[33] 34 C.F.R. §§ 99.20-99.22.

[34] *See* 34 C.F.R. § 106.31(b)(4).

[35] 34 C.F.R. § 106.8(b).