



March 31, 2016

**TO:** All North Carolina Public School Administrators, Local Boards of Education, and Public Institutions of Higher Learning and their Counsel

**RE: Potential Legal Liability Arising from Failure to Follow Federal Law Regarding Equal Access to Sex-Specific Facilities for Transgender Students, Notwithstanding House Bill 2**

On March 23, 2016, North Carolina Governor Pat McCrory signed into law House Bill 2 (“H.B. 2”), also known as the “Public Facilities Privacy & Security Act.” The law purports to require access to all sex-specific public restrooms and changing facilities, including facilities in public schools and public institutions of higher learning, to be based only on “biological sex,” which is defined by the gender marker on a person’s birth certificate.

We are making this open letter available to all administrators of public schools and higher education institutions in North Carolina, as well as counsel who advise them, to inform them that compliance with H.B. 2’s provisions concerning access to facilities violates federal law and puts school districts at risk of loss of federal funding as well as lawsuits by federal agencies and private parties.

**Because this provision of H.B. 2 directly conflicts with federal law, it is legally invalid. Public educational institutions have no obligation to comply with this provision of H.B. 2, and any attempt to comply with it is a violation of federal law. For this reason, the best course for any public educational institution considering its legal obligations under H.B. 2 is to allow all students to access facilities based on their gender identity, as federal law requires.**

NCLR is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people (“LGBT”) and their families through litigation, public policy advocacy, and public education. NCLR’s Transgender Youth Project represents transgender students in cases involving discrimination by educational institutions throughout the country. We offer this advice to North Carolina’s public education community based on decades of experience working with the United States Department of Education (“Department of Education”) and other federal agencies and litigating cases involving discrimination in education.

**LEGAL ANALYSIS**

Discriminatory policies that fail to treat transgender students consistent with their gender identity, such as the policy H.B. 2 purports to require, violate federal nondiscrimination laws. All students, including transgender students, are protected against sex-based discrimination under federal law. Title IX of the Education Amendments of 1972 (“Title IX”) prohibits discrimination “on the basis of sex” in any education program, such as a public school, that receives federal financial assistance.<sup>1</sup>

Binding guidance issued by the U.S. Department of Education and rulings from numerous federal courts have made clear that Title IX protects students from discrimination based on their gender identity, gender nonconformity, or transgender status, and that transgender students must be treated consistent with their gender identity for all purposes, including in the use of facilities, programs, and activities.<sup>2</sup> The Office for Civil Rights (“OCR”) of the Department of Education, which enforces Title IX, has published guidance making explicit that “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity . . . and OCR accepts such complaints for investigation” and resolution.<sup>3</sup>

The U.S. Department of Education has clarified that Title IX requires schools to treat transgender students consistent with their gender identity with respect to single-sex facilities.<sup>4</sup> The U.S. Department of Education and U.S. Department of Justice have entered into several binding settlement agreements requiring school districts to allow transgender students to use restrooms and other sex-specific facilities that correspond to their gender identity—just like all other boys and girls.<sup>5</sup> While Title IX permits schools to maintain gender-segregated facilities, it requires schools to give students access to those facilities on the basis of their gender identity, and schools may not determine access based solely on the gender marker that appears on a student’s birth certificate. The Department’s interpretation is also consistent with the vast

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<sup>1</sup> 20 U.S.C. § 1681(a).

<sup>2</sup> See, e.g., *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 152 (N.D.N.Y. 2011); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

<sup>3</sup> U.S. Dep’t of Educ., Office for Civil Rights, Questions & Answers on Title IX and Sexual Violence, at 5 (Apr. 29, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>4</sup> Statement of Interest of the United States, *G.G. ex rel. Grimm*, Exhibit B; Letter from Adele Rapport, Reg’l Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Dr. Daniel E. Cates, Superintendent, Twp. High Sch. Dist. 211 (Nov. 2, 2015), <http://www.nytimes.com/interactive/2015/11/02/us/document-letter-from-the-us-dept-ofeducation-to-daniel-cates.html>.

<sup>5</sup> Resolution Agreement, Township High School District 211, OCR Case No. 05-14-1055, at 2 (Dec. 2, 2015), available at <http://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf>; Resolution Agreement, Downey Unified School District, OCR Case No. 09-12-1095, at 1 (Oct. 8, 2014), available at <http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>; Resolution Agreement, Arcadia Unified School District, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, at 3 (July 24, 2013), available at <http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf>.

number of federal courts and agencies that have likewise ruled with near-unanimity in the past 15 years that discrimination against transgender people is sex discrimination under federal laws.<sup>6</sup>

Federal agencies, including the U.S. Department of Housing and Urban Development,<sup>7</sup> the U.S. Department of Justice,<sup>8</sup> the U.S. Department of Labor,<sup>9</sup> the U.S. Equal Employment Opportunity Commission,<sup>10</sup> and the Occupational Health and Safety Administration,<sup>11</sup> all have concluded that transgender people must be allowed to use sex-specific facilities that are consistent with their gender identity and that to deny access is a form of sex discrimination.

School districts that fail to provide equal opportunity to transgender students in their programs, activities and facilities are vulnerable to civil liability and the loss of federal funding. Lawsuits and investigations may be instituted by the U.S. Department of Education, U.S. Department of Justice, other federal agencies, or private parties. Public institutions that discriminate in this manner also face liability under 42 U.S.C. § 1983 for violation of transgender students’ constitutional rights, including their right to equal protection of the laws.<sup>12</sup>

The existence of a state law that purports to require North Carolina public schools to discriminate against transgender students will not insulate schools or school officials from liability under federal law, and schools are not required to comply with any state law that conflicts with Title IX. When a state law conflicts with federal law, the state law is invalid and

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<sup>6</sup> See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (in employment discrimination case under Equal Protection Clause, “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination”); *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004) (Title VII of the Civil Rights Act of 1964); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 2014 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII).

<sup>7</sup> U.S. Dep’t of Housing & Urban Dev., Notice CPD-15-02: Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities (Feb. 2015), <https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placementfor-Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf>.

<sup>8</sup> Statement of Interest of the United States, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-54, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015); Statement of the United States, *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 24, 2015); see also U.S. Dep’t of Justice, *Frequently Asked Questions: Nondiscrimination Grant Conditions in the Violence Against Women Reauthorization Act of 2013*, at 9 (Apr. 9, 2013).

<sup>9</sup> U.S. Job Corps Program Instruction Notice No. 14-31, Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program (May 1, 2015); Discrimination on the Basis of Sex, Notice of Proposed Rulemaking, RIN 1250-AA05, 80 Fed. Reg. 5247 (Jan. 30, 2015).

<sup>10</sup> *Lusardi*, 2015 WL 1607756; see also *EEOC v. Deluxe Fin. Servs., Inc.*, No. 15-cv-02646 (D. Minn. filed June 4, 2015).

<sup>11</sup> U.S. Occupational Safety & Health Admin., *A Guide to Restroom Access for Transgender Workers 1* (2015), available at [www.osha.gov/publications/OSHA3795.pdf](http://www.osha.gov/publications/OSHA3795.pdf).

<sup>12</sup> See, e.g., *Glenn*, 663 F.3d at 1317.

may not be followed.<sup>13</sup> This includes, but is not limited, to cases where “compliance with both federal and state regulations is a physical impossibility.”<sup>14</sup> H.B. 2 is such a law. Compliance with the law is impossible without putting public higher education institutions and school districts that receive federal funding in violation of Title IX and the U.S. Constitution.

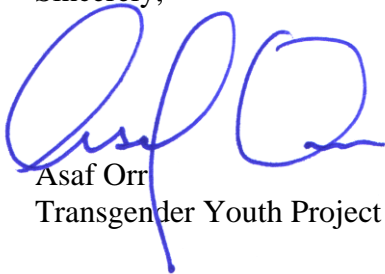
For all of these reasons, the best course of action for North Carolina public educational institutions that wish to minimize their legal risk of federal investigations, loss of funding, and lawsuits is simply to ignore H.B. 2 and allow all students to access facilities based on their gender identity, as federal law requires. In addition to avoiding liability, supporting and affirming transgender students in school is essential to their overall health and well-being, including their ability to grow academically.

### **OFFER OF ASSISTANCE**

NCLR has decades of experience helping schools and universities implement strong policies that protect all students, including LGBT students, against all forms of discrimination, including with respect to sex-specific facilities. Such policies provide a safe and supportive environment for all students and ensure compliance with federal laws and regulations.

We encourage all administrators to consult *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* for more information.<sup>15</sup> For additional assistance in implementing policies that comply with federal law and enhance all students’ safety and potential for success, please also feel free to contact our legal helpline at 1.800.528.6257.

Sincerely,

A handwritten signature in blue ink, appearing to read "Asaf Orr", is written over the typed name.

Asaf Orr  
Transgender Youth Project Staff Attorney

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<sup>13</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012).

<sup>14</sup> *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

<sup>15</sup> <http://www.nclrights.org/legal-help-resources/resource/schools-in-transition/>