



Julia Keleher
Secretary
Puerto Rico Department of Education
P.O. Box 190759
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VIA E-MAIL

January 27, 2017

Secretary Keleher,

We write to raise our concerns regarding your compromise to repeal Circular Letter 16-2015-16, which allows for transgender students to dress according to their gender identity. This policy enacted by the Department of Education in 2015 is important for the wellbeing and academic performance of students who identify as transgender¹ and has no effect or impact on the rights or privacy of other students who are not transgender.

Allowing these students to express their gender identity is not only beneficial to them, but vital to their emotional wellbeing. This policy allowed for them to present in a manner consistent with how they feel and intend to present themselves publicly. Furthermore, a number of these students are not out as transgender to their peers and forcing them to use a uniform incompatible with their appearance and identity would constitute a public outing likely to have a deeply negative impact in their wellbeing, academic performance and increase probability of them being subjected to bullying, physical harassment, and sexual abuse.² The repealing of the policy also sends a strong message of disapproval from the Department of Education to these students and their peers. Schools are a place where they should feel welcome and safe in order to maximize their academic performance, the message the Department threatens to send to these students will no doubt have a

¹ "Transgender" refers to having a gender identity that differs from one's sex assigned at birth. "Gender identity" refers to the basic conviction of being a man, woman or other gender (e.g., bigender, genderqueer, gender questioning, gender nonconforming). "Sexual orientation" refers to one's sexual attraction, sexual behavior and emotional attachments to men, women or both." The Psychology of Transgender, Eight Questions for transgender expert Walter Bockting, PhD, American Psychological Association (2015), available at: <http://www.apa.org/news/press/releases/2015/11/psychology-transgender.aspx>

² See: Ryan J. Testa et al., Effects of Violence on Transgender People, *Professional Psychology: Research and Practice*, Vol. 43 No. 5, 452-459 (2012); Nicholas C. Heck et al., Advances in Research with LGBTQ Youth in School, *Psychology of Sexual Orientation and Gender Identity*, Vol. 3 No. 4, 381-385 (2016); Joanna Almeida et al., Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation, *Journal of Youth Adolescence*, 38:1001-1014 (2009); Tamara B. Murdock and Megan B. Bolch, Risk and Protective Factors for Poor School Adjustment in Lesbian, Gay, and Bisexual (LGB) High School Youth: Variable and Person-Centered Analyses, *Psychology in the Schools*, Vol. 42(2) (2005); Jenifer K. McGuire et al., School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses, *Journal of Youth Adolescence*, 39:1175-1188 (2010); and Stephen T. Russell et al., Lesbian, Gay, Bisexual, and Transgender Adolescent School Victimization: Implications for Young Adult Health and Adjustment, *Journal of School Health*, Vol. 81, No. 5 223-230 (2011).



negative impact on their academic performance. Transgender individuals currently face an increment in crimes directed at them due to their gender identity, to put them at risk in schools is irresponsible and careless.

Law 35-2015 states that “students have a right to enjoy the school environment safely, free of all attacks to attacks to their their physical, **mental, or emotional** integrity, and an education free of **discrimination and abuse**.³ As stated above, forcing them to use a uniform inconsistent with their gender identity constitutes an attack to their mental and emotional integrity while the message against transgender individuals set forth by the Department increases the risk of sexual, physical, and emotional abuse from their peers and school staff.

Apart from the humanitarian plea we make that these students are treated with the decency they deserve we also want to remind the Department of Education that it has a legal duty under Title IX and the First Amendment to the United States Constitution.

It is a long standing precedent, dating back to 1943, that students in public schools in the United States have a right to free speech. *See, West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). Their right to free speech was reaffirmed by the Supreme Court in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). The Court in *Tinker* also expressed that “[students] are possessed of fundamental rights which the State must respect.” *Id.*, at 511. There should be little doubt that as to whether a transgender student’s decision to present his or herself according to their gender identity is speech. We believe it is. Only when the speech is disruptive of school activities could it be restricted by the Department; we find it unlikely that allowing a student to dress according to their gender identity would result in a disruption in the school.

Federal law also mandates this. Title IX of the of the Education Amendments of 1972, 20 U.S.C.A. § 1681 et. seq. (hereinafter Title IX), prohibits discrimination in education on the basis of sex. Recent developments in the interpretation of ‘sex’ under Title IX (and Title VII) have found that gender identity is protected under Title IX. The Department of Education’s Office for Civil Rights (hereinafter OCR) has stated that “when a school elects to separate or treat students differently on the basis of sex ... **a school must treat transgender students consistent with their gender identity**”⁴ The interpretation of the Department of Education is be subject to deference.⁵ This interpretation by the OCR protecting gender identity under Title IX was upheld by the Fourth Circuit⁶ and is set to be heard by the Supreme Court this term. Other District Courts throughout the nation have ruled similarly to the Fourth Circuit throughout the last year. *See: Board of Education of the Highland School District v. United States Department of Education*, ___ F. Supp. 3d ___ (2016); *Carcaño v. McCrory*, ___ F. Supp. 3d ___ (2016); and *Whitaker v. Kenosha Unified*

³ PR St. T. 18 § 3802 (10)(c).

⁴ Office of Civil Rights, Dept. of Educ., Questions and Answers on **Title IX** and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (2014) *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

⁵ *See: Auer v. Robbins*, 519 U.S. 452 (1997).

⁶ *See: G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709 (2016).



School District No. 1 __ F. Supp. 3d __ (2016). The case for transgender students being able to use the uniform according to their gender identity is stronger than the aforementioned ones, which deal primarily with the controversy regarding bathrooms and locker rooms; denying them of wearing the uniform that accurately matches their gender identity would constitute discrimination because of sex and gender stereotyping, based on the students' failure to conform to stereotypical notions of masculinity and femininity, of what is a boy and what is a girl.

The wellbeing of these students is at stake. A reversal of the hard fought rights of these students is detrimental to them. We request you reconsider your position regarding the policy and allow for transgender students to dress according to their gender identity. We also have serious concerns regarding the privacy of these students. All we want for them is to be able to receive their education in peace and without the stigma of being labeled and forced to present themselves in a manner inconsistent with who they are.

We wish you act in a manner that looks out for the wellbeing of **all** students in Puerto Rico's public schools and not moved by political forces that disregard and demean transgender youth. Paragraph 9 of Circular Letter 16-2015-2016 is vital for the wellbeing of transgender students. If you are unable to defend these students, we will not hesitate to do so.

Sincerely,

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Amárilis Pagán-Jiménez, Esq.

Osvaldo Burgos-Pérez, Esq.

Mary Cele Rivera-Martínez, Esq.

Members and spokespersons of the Comité Amplio por la Búsqueda de la Equidad (CABE)⁷

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⁷ CABE is a coalition composed of the following organizations: *Coalición Orgullo Arcoiris*, *Coaí*, *Proyecto Matria*, *Amnistía Internacional*, *Asociación de Psicología de Puerto Rico*, *Colegio de Profesionales del Trabajo Social*, *Comité contra la Homofobia y el Discrimen*, *Sección de Discrimen por Orientación Sexual y de Derechos Humanos de la Clínica de Asistencia Legal de la Escuela de Derecho de la UPR*, *Movimiento Amplio de Mujeres*, *Puerto Rico Community Network for Clinical Research on AIDS (PR CoNCRA)*, *American Civil Liberties Union (ACLU)*, *Iglesia Cristo Sanador*, *Asociación Legal de Estudiantes pro Derechos LGBT de la Facultad de Derecho de la Universidad Interamericana (ALEP)*, and other individuals in their personal capacity.