



STATE OF SOUTH CAROLINA
DEPARTMENT OF EDUCATION

MEMORANDUM

TO: District Superintendents
South Carolina School Board Members
Public Information Officers

FROM: John E. Tyler, Esq.
Deputy Superintendent and General Counsel

DATE: August 27, 2024

RE: Update on Title IX and Budget Proviso 1.120

As you are aware from our [Memo](#) on July 31, 2024, multiple federal District Courts have issued orders granting various states preliminary injunctions against the enforcement of the United States Department of Education's (USED) new Title IX regulation. While the District Court for the Northern District of Alabama denied South Carolina's request for preliminary injunctive relief, the 11th Circuit Court of Appeals subsequently enjoined the initial implementation of the regulation until the matter could be further briefed, argued, and reviewed.

Last week, the 11th Circuit Court of Appeals issued an Order granting South Carolina and other plaintiffs a rule-wide injunction pending appeal against the new Title IX rule. This injunction is in place until the 11th Circuit can more fully rule on the matter. In granting the injunction, the 11th Circuit held that "defining 'sex' to include 'gender identity' could not comport with the plain meaning of 'sex' at the time of Title IX's enactment and the purpose of Title IX and its implementing regulations...." Citing *Loper Bright Enterprises v. Raimondo*, the court held "it is certainly highly likely that the Department's new regulation defining discrimination 'on the basis of sex' to include 'gender identity' is contrary to law and 'in excess of statutory authority.'" Furthermore, the 11th Circuit finds that the new rule "runs headlong into First Amendment concerns."

Meanwhile, in an attempt to preserve implementation of its new Title IX rule, USED appealed two similar orders to the Supreme Court of the United States of America (SCOTUS). On August

16, 2024, SCOTUS unanimously held that the various plaintiff states are entitled to these injunctions:

[A]ll Members of the Court today accept that the plaintiffs were entitled to preliminary injunctive relief as to three provisions of the rule, including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity. *Department of Education v. Louisiana*, 603 U.S. ____ (2024).

Both the 11th Circuit's order and the SCOTUS decision are in line with prior guidance that we have provided to the districts, where we have consistently recommended districts not implement policies that comply with the challenged Title IX rule. Our recommendation is strengthened by these two rulings.

During the pendency of South Carolina's litigation against the USED, Governor McMaster signed South Carolina's FY 2024-2025 budget into law which contains Budget Proviso 1.120. A copy of the Proviso is included at the end of this memo.

The Proviso requires that all South Carolina public schools (to include traditional public schools, charter schools, and special schools¹) must designate multi-occupancy restrooms and changing facilities for use only by members of one sex *and* prohibits students of the opposite sex from using the same bathrooms, changing facilities, overnight sleeping quarters, shared bathrooms, locker rooms, and shower rooms. For further explanation of the Proviso and recommended steps for compliance, please see our July 23, 2024 [Memo](#).

The Student Physical Privacy Proviso requires the State Department of Education (SCDE) to withhold 25% of state funds used to support district operations for violation of this policy. In response to some questions asked, we are putting together a table demonstrating that amount for each district. SCDE stands ready to enforce this proviso where noncompliance by passage of a conflicting policy or inconsistent implementation occurs.

To reiterate, Proviso 1.120 *does not* prohibit districts from providing reasonable accommodation to a student when the student's parent has requested on the student's behalf, such as access to a single-occupancy staff restroom. Districts should seek legal counsel on the allowability of any

¹ Special Schools include the Governors School for Science and Math, the Governors School for the Arts and Humanities, Wil Lou Gray Opportunity School, Governors School for Agriculture at John de la Howe, School for the Deaf and the Blind, Felton Lab, Department of Juvenile Justice, and Palmetto Unified School District.

accommodation, but the Proviso under no circumstance permits a student use a designated single-sex restroom other than one which correlates to the student's biological sex at birth.

The SCDE stands ready to offer technical assistance as your district implements this policy. If you have any questions, please contact Robert Cathcart, Policy & Legal Advisor at (803) 734-2230 or rdcathcart@ed.sc.gov. Please share this memo with your district's legal counsel.

1.120. (SDE: Student Physical Privacy)

(A) For the purposes of this provision:

(1) Changing Facility means a facility in which a person may be in a state of undress in the presence of others, including a locker room, changing room, or shower room.

(2) Restroom means a facility that includes one or more toilets or urinals.

(3) Sex means a persons biological sex, either male or female, as objectively determined by anatomy and genetics existing at the time of birth. Evidence of a persons biological sex includes, but is not limited to, any government-issued identification document that accurately reflects a persons sex as listed on the persons original birth certificate issued at or near the time of birth.

(4) Sleeping Quarters means a room with a bed in which more than one individual is housed overnight.

(B) A school district supported in part by funds appropriated by this act, shall not permit any public school within the district to use any funds to maintain or operate any restroom or changing facility on its premises that is not in compliance with this provision or facilitate any public-school authorized activity or event involving overnight lodging that is not in compliance with this provision. A school district that violates any portion of this provision shall be penalized twenty-five percent of the funds appropriated by this act that are used to support the school districts operations.

(C)(1) Multi-occupancy public school restrooms and changing facilities shall be designated for use only by members of one sex. Any public school restrooms and changing facilities that are designated for one sex shall be used only by members of that sex; no person shall enter a restroom or changing facility that is designated for one sex unless he or she is a member of that sex; and the public school with authority over that building shall take reasonable steps to ensure that all restrooms and changing facilities provide its users with privacy from members of the opposite sex. The provisions in this item do not apply: (a) to custodial or maintenance work when the restroom or changing facility is not being used or otherwise occupied by a member of the opposite sex; (b) to a person or people rendering medical assistance; and (c) during a natural disaster, emergency, or when use of the restroom or changing facility is necessary to prevent a serious threat to good order or student safety.

(2) During any public-school authorized activity or event where students share overnight lodging, no student shall share a sleeping quarter or multi-occupancy restroom with a member of the opposite sex, unless such persons are members of the same family, such as a parent, legal guardian, sibling, or grandparent.

(3) In any other public-school facility or setting where a person may be in a state of undress in the presence of others, school personnel shall provide separate, private areas designated for use

by persons based on their sex, and no person shall enter these private areas unless he or she is a member of the designated sex.

(D) Nothing in this proviso may be construed to prohibit schools from adopting policies necessary to accommodate disabled persons or young children in need of physical assistance when using restrooms or changing facilities.