

LETTER TO DISTRICTS and CHARTERS RE TITLE IX PROPOSED GUIDANCE

A number of school board members have inquired about the Department of Education's position with respect to the federal Department of Education's (USDOE) proposed Title IX regulations which are scheduled to take effect on August 1, 2024. These proposed regulations have met with a number of defeats in the federal courts, and it is uncertain what the final situation will be.

I believe I should let the schools know what has been happening in the courts with respect to the proposed regulation. This is not legal advice. The Arizona Attorney General may disagree with some of the things I say below. We are a local control state, and it will be up to the districts and charters to determine how to proceed in this situation. They need to consult with their lawyer. I am only providing information that I think might be useful.

In *Louisiana v. USDOE*, the federal court described the impact of the August 1 rule as follows:

...requires students to be allowed to access bathrooms and locker rooms based on their gender identity [chosen, not at birth, requires schools to use whatever pronouns the student requests; and imposes additional requirements that will result in substantial costs to the school.

But the Final Rule ignores significant evidence offered by commenters regarding the safety and privacy interests at stake. Tennessee, for example, tendered a comment identifying numerous instances of males attacking females in public restrooms that were designated for females only. In Tennessee's view, the new rules would further enable such conduct, as men and boys could then enter restrooms designated for females without restriction. Additionally, girls and women may be subjected to voyeurism against which they would have little recourse because male perpetrators could enter and remain in spaces traditionally reserved for women. *Id.*

In intimate spaces like bathrooms and locker rooms, students retain “a significant privacy interest in their unclothed bodies.” This necessarily includes “the right to shield one's body from exposure to viewing by the opposite sex.” Id. After all, in the words of former Justice Ruth Bader Ginsburg, the integration of an all-male military institution “would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.”

In an amicus brief to a Texas court considering whether to make its injunction against the new regulation nationwide, it was pointed out that "the Governing Board of the Dysart District in Arizona adopted a resolution on July 11, 2024, affirming its commitment to the pre-Final rule interpretation of Title IX, formally affirming that the Final Rule is contrary to the statutory text."

In the past I've been asked by districts and charters, as a policy matter, about their consideration of rules, permitting biological boys who have male genitalia being allowed in girls' bathrooms, locker rooms, and showers. My response was that there should be unisex bathrooms available, and if there was no room for them, the faculty bathroom should be used for that purpose. That would preserve the dignity of biological boys who identify as girls. But if they were allowed in girls' facilities, I thought parents might well remove the girls from the school and send them to another district, Charter School, or private school. So, this rule could significantly injure public education.

This is your choice, but you may wish to consult your attorney as to whether you wish to delay implementing the new regulations until the legal situation is clarified. If the regulations are implemented, and then they are later overruled by the courts, students may suffer damages in the meantime. For those interested in more detail about what has been happening in the courts, a summary of some of these cases is attached in an appendix.

Sincerely,

Tom Horne
Superintendent of Public Instruction