

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Lambda Legal Defense and Education Fund,	:
Inc.	:
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Plaintiff,	:
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v.	:
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	:
United States Department of Education and	:
United States Department of Justice,	:
	:
	:
Defendants.	:
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No. 1:17-CV-6390

COMPLAINT

Plaintiff Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”), by and through its undersigned attorneys, in support of its complaint against Defendants United States Department of Education (“ED”) and United States Department of Justice (“DOJ”), (collectively “Defendants”), alleges as follows:

Summary and Nature of the Case

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to enforce the public’s right to information about Defendants’ withdrawal of guidance relating to Title IX of the Education Amendments Act of 1972 (“Title IX”) and transgender students. Lambda Legal seeks injunctive and other appropriate relief with respect to Defendants’ unlawful withholding of this information.

2. Pursuant to the FOIA, Lambda Legal has requested records relating to Defendants’ rescission of two guidance documents pertaining to schools’ Title IX obligations with respect to transgender students: (i) an unpublished opinion letter from James A. Ferg-Cadima, Acting Deputy

Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education, to Emily Prince dated January 7, 2015 (“January 2015 Opinion Letter”); and, (ii) the Dear Colleague Letter on Transgender Students jointly issued by Defendants on May 13, 2016 (“May 2016 Joint Guidance”) (collectively, “the Title IX Transgender Guidance Materials”). Lambda Legal also requested documents related to the Dear Colleague Letter jointly issued by Defendants on February 22, 2017 (“February 2017 Rescission Letter”).

3. The January 2015 Opinion Letter reaffirmed ED’s position that Title IX’s prohibition on sex discrimination requires schools to treat transgender students consistent with their gender identity, including with respect to sex-segregated facilities. The unpublished opinion letter responded to a December 14, 2014 inquiry for guidance on ED policies or rules for school districts regarding transgender students’ access to restrooms and other sex-segregated facilities.

4. On May 13, 2016, Defendants jointly issued the May 2016 Joint Guidance to assist schools in protecting transgender students from discrimination and complying with their obligations under Title IX and its implementing regulations. Deemed “significant guidance” by the issuing agencies, the May 2016 Joint Guidance responded to requests by schools across the country for assistance on providing equal educational opportunities to transgender students. The May 2016 Joint Guidance stated that Title IX’s prohibition of sex discrimination encompasses discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status.

5. On February 22, 2017, Defendants jointly issued the February 2017 Rescission Letter. The February 2017 Rescission Letter withdrew the January 2015 Opinion Letter and the May 2016 Joint Guidance without taking a position on Title IX and its implementing regulations with respect to transgender students. As a result, the February 2017 Rescission Letter created

confusion for schools across the country and eliminated an important resource for ensuring that schools meet their Title IX obligations.

6. An estimated 150,000 youth between ages 13 and 17 are transgender. Jody L. Herman, et al, *Age of Individuals Who Identify as Transgender in the United States*, The Williams Institute, 2-3 (January 2017), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf>. These transgender students, along with younger transgender children, experience alarming rates of harassment, bullying, and discrimination in their schools, which often goes unaddressed by school administrators. Many are denied access to sex-segregated facilities, such as school restrooms and locker rooms, in accordance with their gender identities. See, e.g., Movement Advancement Project and GLSEN, *Separation and Stigma: Transgender Youth & School Facilities* (April 2017) (“*Separation and Stigma*”), <http://www.lgbtmap.org/file/transgender-youth-school.pdf>. This puts transgender students at risk of profound physical and emotional health consequences, and causes them daily humiliation in the schools that are a dominant and formative part of their lives. Transgender students’ success in school is closely correlated with whether their administrators and teachers accept them for who they are, including by allowing them access to sex-specific facilities consistent with their gender identities. See, e.g., *id.* at 4; Williams Institute, *Media Advisory: Fact Sheet on Guidance Protecting Over 350,000 Transgender Youth and Young Adults from Discrimination (Annotated Version)* (Feb. 27, 2017), <https://williamsinstitute.law.ucla.edu/uncategorized/media-advisory-fact-sheet-on-guidance-protecting-over-350000-transgender-youth-and-young-adults-from-discrimination-annotated-version/>. A recent study found that the majority of students identifying or perceived as transgender had negative experiences in school, correlating with higher rates of attempted suicide, homelessness, and psychological distress. S.E. James et al., Nat’l Center for

Transgender Equality, *Report of the 2015 U.S. Transgender Survey*, 130-135 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

7. Defendants' rescission of the Title IX Transgender Guidance Materials leaves these children even more vulnerable to abuse and discrimination in their schools. It sends the troubling signal that Defendants will not follow through on their responsibility to enforce Title IX for transgender children. It sends the false message that schools may not be obligated under Title IX to respect and protect their transgender students, including when it comes to access to sex-segregated facilities consistent with students' gender identities.

8. Lambda Legal has therefore sought documents—including documents dated after the February 2017 Rescission Letter—concerning Defendants' decision to withdraw the Title IX Transgender Guidance Materials. This information is important to ensuring the health and safety of transgender students. The purpose of the FOIA is to promote government transparency and accountability. It establishes the public's right to access all federal agency records unless such records may be withheld by the agency pursuant to one of nine narrowly construed FOIA exemptions. 5 U.S.C. § 552(b)(1)-(9).

9. On March 13, 2017, Lambda Legal filed FOIA requests with each of ED ("ED FOIA Request") and DOJ ("DOJ FOIA Request"), (collectively, "FOIA Requests").

10. To date, the ED has not processed Lambda Legal's ED FOIA Request, provided responsive documents, or asserted any applicable basis for withholding disclosure.

11. DOJ decided to split Lambda Legal's DOJ FOIA Request in two and handle each part separately. To date, DOJ has not processed Lambda Legal's DOJ FOIA Request to the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legal Policy and

Public Affairs. DOJ has processed Lambda Legal's DOJ FOIA Request to the Civil Rights Division and determined responsive documents exist but are exempt from production.

12. Lambda Legal is legally entitled to responses to the FOIA Requests that satisfy the statute's requirement that an agency provide a prompt and thorough search for and production of documents, which in this case were requested more than five months ago. Defendants have far exceeded the statutory and regulatory time limitations to conduct a search and produce the requested documents.

13. Lambda Legal seeks an injunction ordering Defendants to respond to Lambda Legal's FOIA Requests, conduct a thorough search for all responsive records, and provide the requested documents in a timely manner. Lambda Legal also seeks attorney's fees and other equitable relief as deemed appropriate by this Court.

Jurisdiction and Venue

14. The court has jurisdiction over this matter pursuant to 5 U.S.C. § 522(a)(4)(B) and 28 U.S.C. §§ 1331 and 1336.

15. Venue lies in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1391 because Lambda Legal is a resident of the Southern District of New York.

Parties

16. Plaintiff Lambda Legal is a tax-exempt, not-for-profit legal, educational, and charitable organization under section 501(c)(3) of the Internal Revenue Code, headquartered at 120 Wall Street, 19th Floor, New York, NY 10005. Founded in 1973, Lambda Legal is the nation's oldest and largest nonprofit legal organization working to secure the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and individuals living with HIV. Educating the public

on LGBT issues and publishing information about the rights of LGBT people are among Lambda Legal's primary purposes. According to its 2015 Annual Report, Lambda Legal organized over 200 community education events and trainings in that fiscal year, with 15,000 estimated participants. Lambda Legal also had over 750,000 unique visitors to its website, along with approximately 23,000 unique visitors to its Spanish-language website. It also spent over \$6.4 million on educational programming in its 2015 fiscal year.

17. Defendant ED is a Department of the executive branch of the United States Government and is an agency within the meaning of 5 U.S.C. § 552(f). ED is the federal agency responsible for oversight of education. Among its responsibilities is enforcement of certain federal civil rights laws, including Title IX, which prohibits sex discrimination in federally funded education programs and activities. ED has possession of and control over the records sought by Lambda Legal.

18. Defendant DOJ is a Department of the executive branch of the United States Government and is an agency within the meaning of 5 U.S.C. § 552(f). DOJ has possession of and control over the records sought by Lambda Legal.

Lambda Legal's FOIA Request to ED

19. On March 13, 2017, Lambda Legal submitted the ED FOIA Request to ED requesting records, correspondence, and memos, in any and all formats, that mention, discuss, reference, or relate to:

- (i) The withdrawal of the January 2015 Opinion Letter;
- (ii) The withdrawal of the May 2016 Joint Guidance; and
- (iii) The February 2017 Rescission Letter.

20. A copy of Lambda Legal's March 13, 2017 ED FOIA Request is attached hereto as Exhibit A.

21. By letter dated March 28, 2017, ED acknowledged receipt of Lambda Legal's ED FOIA Request (the "ED Acknowledgement Letter"). Exhibit B. The ED Acknowledgement Letter instructed Lambda Legal to "check the status of [Lambda Legal's] FOIA request at the link provided" and furnished a phone number and email address to contact regarding future correspondence or questions about Lambda Legal's ED FOIA Request.

22. Lambda Legal, through its undersigned attorneys, attempted to follow up with ED several times after Lambda Legal filed the ED FOIA Request on March 13, 2017. On April 18, 2017, an attorney for Lambda Legal called ED's FOIA phone number advertised on its website and included in the ED Acknowledgement Letter—202-401-8365—but the number rang to a voice mailbox that was full and would not allow the attorney for Lambda Legal to leave a message. Afterward, an attorney for Lambda Legal e-mailed ED on April 19, 2017.

23. On April 25, 2017, ED sent Lambda Legal a boilerplate letter, attached hereto as Exhibit C, stating that it was "unable to respond" within the statutorily required timeline ("April 25 Letter"). The April 25 Letter noted that the agency had received Lambda Legal's ED FOIA Request on March 28, 2017. ED acknowledged that "FOIA requires that an agency make a determination on a FOIA request within 20 working days of the request in the appropriate office," but nonetheless explained that it would be unable to fulfill Lambda Legal's request by that deadline "due to the volume of [Lambda Legal's] request, the backlog of requests and the competing demands for the time of staff that are working to respond to [Lambda Legal's] request." Exhibit C.

24. The April 25 Letter instructed Lambda Legal to "check on the status of [Lambda Legal's] request on ED's FOIA Web page" by checking the previously provided link if Lambda

Legal has not “received [its] responsive documents within 30 days from receipt of this letter” However, the FOIA tracking number provided was not listed on the linked webpage until five months after the ED FOIA Request.

25. Since receiving the April 25 Letter, Lambda Legal, through its attorney, called ED’s FOIA office four times inquiring about the status of the Lambda Legal ED FOIA Request. On two occasions, an attorney for Lambda Legal was informed that certain of ED’s component offices subject to the ED FOIA Request have completed their search but that half still have not responded. Lambda Legal, through its attorney, was told the Institute of Education Sciences, Office of Elementary and Secondary Education, Office of the Deputy Secretary, and Office of the Under Secretary have no responsive documents. Lambda Legal, through its attorney, was also told responses have been pending for several months from the Office of the Secretary, Office for Civil Rights, Office of the General Counsel, and Office of Communications and Outreach.

26. On June 30, 2017, Lambda Legal appealed ED’s failure to expedite its Request and to produce any documents within the statutorily prescribed time frame. Exhibit D. On July 3, 2017, ED acknowledged receipt of the appeal. Exhibit E. Since then, Lambda Legal has not received a decision on its appeal.

27. ED has failed to comply with the time limits imposed by the FOIA and ED’s regulations. Although statutorily obligated to determine whether to comply with a FOIA request within 20 days (excluding weekends and legal holidays) after receiving it, 5 U.S.C. § 522(a)(6)(A)(i), ED has not responded to Lambda Legal’s ED FOIA Request within the meaning of the statute.

28. Nor has ED responded to Lambda Legal's appeal, despite the statutorily mandated 20-day deadline (excluding weekends and legal holidays) to make a determination on an appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

29. Through ED's failure to make substantive determinations as to Lambda Legal's ED FOIA Request within the time period required by law, Lambda Legal is deemed to have exhausted administrative remedies. 5 U.S.C. § 522(a)(6)(C).

Lambda Legal's FOIA Request to DOJ

30. On March 13, 2017, Lambda Legal submitted the DOJ FOIA Request to DOJ requesting records, correspondence, and memos, in any and all formats, that mention, discuss, reference, or relate to:

- (i) The withdrawal of the January 2015 Opinion Letter;
- (ii) The withdrawal of the May 2016 Joint Guidance; and
- (iii) The February 2017 Rescission Letter.

31. A copy of Lambda Legal's March 13, 2017 DOJ FOIA Request is attached hereto as Exhibit F.

32. By letter dated March 15, 2017, DOJ acknowledged receipt of Lambda Legal's DOJ FOIA Request and indicated that it was processing the Civil Rights Division's response separately from the other components. Exhibit G.

The Civil Rights Division's Response

33. By letter dated March 16, 2017, the Civil Rights Division acknowledged receipt of Lambda Legal's DOJ FOIA Request and indicated that "some delay may be encountered in processing [Lambda Legal's] request" and that the Division "adopted a policy of processing requests in the approximate order of receipt." Exhibit H.

34. On June 19, 2017, the Civil Rights Division notified Lambda Legal that it had located responsive documents but that “access to the documents should be denied pursuant to 5 U.S.C. § 552(b)(5)” because the records contain “attorney work product and include intra-agency memoranda contain pre-decision, deliberative material.” Exhibit I. No additional explanation was given.

35. Lambda Legal, through its attorneys, contacted the Civil Rights Division on June 20, 2017 and inquired about the responsive documents. The Division reported that it had found 109 pages of responsive material and did not elaborate on the justification of its privilege claim.

36. On July 23, 2017, Lambda Legal appealed the Civil Rights Division’s determination to withhold the documents. Exhibit J.

37. The Civil Rights Division has failed to comply with the time limits imposed by the FOIA and DOJ’s regulations. Although statutorily obligated to determine whether to reach a determination of a FOIA appeal within 20 days (excluding weekends and legal holidays) after receiving it, 5 U.S.C. § 522(a)(6)(A)(ii), the Civil Rights Division has not responded to Lambda Legal’s DOJ FOIA Request appeal within the meaning of the statute.

38. Nor has the Civil Rights Division responded to Lambda Legal’s appeal, despite the statutorily mandated 20-day deadline (excluding weekends and legal holidays) to make a determination on an appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

39. Through the Civil Rights Division’s failure to reach a determination as to Lambda Legal’s DOJ FOIA Request appeal within the time period required by law, Lambda Legal is deemed to have exhausted administrative remedies. 5 U.S.C. § 522(a)(6)(C).

The Remaining DOJ Components' Response

40. By letter dated March 23, 2017, DOJ's remaining components acknowledged receipt of Lambda Legal's DOJ FOIA Request. Exhibit K. The remaining components denied Lambda Legal's request for expedited treatment and stated that the DOJ FOIA Request "falls within 'unusual circumstances'" because it "require[s] searches in other Offices" Exhibit K. DOJ advised that Lambda Legal "may wish to narrow the scope of [its] request to limit the number of potentially responsive records so that it can be placed in a different processing track." Exhibit K.

41. Lambda Legal, through its attorney, agreed with DOJ on April 17, 2017 to several limitations to the DOJ FOIA Request. Exhibit L. DOJ informed an attorney for Lambda Legal that DOJ's IT support would be gathering e-mails from potential custodians for review. On May 10, 2017, an attorney for Lambda Legal called DOJ's FOIA office and was told the request to DOJ's IT support to gather e-mails was sent April 18, 2017.

42. Since the May 10 phone call, Lambda Legal, through its attorney, called DOJ's FOIA office four times inquiring about the status of the DOJ FOIA Request. Each time, Lambda Legal's attorney was informed that DOJ's IT support had not even gathered e-mails from potential responsive custodians.

43. On July 23, 2017, Lambda Legal appealed the remaining DOJ components' failure to expedite its DOJ FOIA Request and to produce any documents within the statutorily prescribed time frame. Exhibit M. On July 31, 2017, DOJ denied Lambda Legal's appeal to expedite its DOJ FOIA Request and declined to rule on its failure to produce documents. Exhibit N.

44. DOJ has failed to comply with the time limits imposed by the FOIA and DOJ's regulations. Although statutorily obligated to determine whether to comply with a FOIA request within 20 days (excluding weekends and legal holidays) after receiving it, 5 U.S.C. §

522(a)(6)(A)(i), DOJ's remaining components have not produced nor searched for responsive documents to Lambda Legal's DOJ FOIA Request within the meaning of the statute. Through this failure to make substantive determinations as to Lambda Legal's DOJ FOIA Request within the time period required by law, Lambda Legal is deemed to have exhausted administrative remedies. 5 U.S.C. § 522(a)(6)(C).

Lambda Legal's Entitlement to a Waiver of or Reduced Processing Fees

45. Lambda Legal also asked for a waiver or reduction of document search, review, and duplication fees because disclosure is "likely to contribute significantly to the public understanding of the activities or operations of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

46. The records sought in the FOIA Requests will significantly contribute to the public understanding of (i) the operations and activities of Defendants, and (ii) the federal protections afforded to transgender students. In addition, disclosure is not in Lambda Legal's commercial interest. Lambda Legal will evaluate the disclosed documents and, depending on what is contained in the documents, may well disseminate the information to the public. If Lambda Legal publicly disclosed information obtained through the FOIA, it will do so at no cost to the public.

Causes of Action

47. Lambda Legal repeats and incorporates every allegation contained in the foregoing paragraphs and incorporates them as though fully set forth herein.

48. Defendants' failure to conduct a reasonable search for records responsive to Lambda Legal's requests violates FOIA, 5 U.S.C. §§ 552(a)(3)(A), (a)(3)(C), and (a)(6)(A), as well as the regulations promulgated thereunder.

49. Defendants' failure to release responsive records violates FOIA, 5 U.S.C. § 522(a)(3)(A), as well as the regulations promulgated thereunder.

50. Defendants' failure to officially grant Lambda Legal's request for a reduction or waiver of fees violates FOIA, 5 U.S.C. §§ 552(a)(4)(ii)(II) and (a)(4)(iii), as well as the regulations promulgated thereunder.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Lambda Legal requests that judgment be entered in its favor against Defendants, and that the Court:

A. Order Defendants and any of their departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendants to conduct a reasonable search for all records responsive to Lambda Legal's FOIA Requests submitted on March 13, 2017;

B. Enjoin Defendants and any of its departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendants from improperly withholding records or portions of records responsive to Lambda Legal's FOIA Requests submitted on March 13, 2017 and order them to promptly produce the same;

C. Order Defendants to produce, within twenty days of the Court's order, any and all non-exempt records responsive to Lambda Legal's FOIA Requests submitted on March 13, 2017 and *Vaughn* indexes of any responsive records withheld or redacted under claim of exemption;

D. Enjoin Defendants from charging Lambda Legal fees for the processing of its requests;

E. Award Lambda Legal its reasonable attorney's fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412.

F. Grant all other such relief to Lambda Legal as the Court deems just and proper.

Dated: August 22, 2017

/s/ Blair A. Silver

Blair A. Silver

Avi S. Garbow (*pro hac vice motion to be filed*)

Joseph P. Vardner (*pro hac vice motion to be filed*)

GIBSON, DUNN & CRUTCHER LLP

1050 Connecticut Avenue, N.W.

Washington, DC 11101

Telephone: 202.955.8500

/s/ Susan Sommer

Susan Sommer

LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.

120 Wall Street, 19th Floor

New York, NY 10005

Telephone: 212.809.8585

Attorneys for Plaintiff Lambda Legal Defense and
Education Fund, Inc.