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May 18, 2016

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Re: USDOE/USDOJ "Dear Colleague" Letter on Transgender Students

Dear Sirs:

The President of the United States, through the U.S. Department of Education (USDOE) and the U.S. Department of Justice (USDOJ) ("the Administration"), last Friday issued a "Dear Colleague" letter ("Guidance") that purportedly requires school districts, colleges, and universities in this country to allow transgender students to use bathrooms and locker rooms that match the student's chosen gender identity and threatening federal civil rights litigation and education funding withholdings.[1] I write to provide information to you and the schools and students you supervise, manage, and/or advise and to reassure you that-- as your Attorney General-- I will vigorously defend the State and its citizens from unlawful action threatened on the basis of this incorrect interpretation of law. Although the Administration's actions are not legally binding, its actions are certainly not benign - the threat alone to the State or any local entity's receipt of federal funds pursuant to Title IX not only jeopardizes the safety and well-being of the student body, but also creates an immediate crisis with the entire State and local

[1] *See*, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html, last accessed May 18, 2016. USDOE has characterized the letter as "significant guidance," which is a defined term under federal regulatory and administrative law. Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507good_guidance.pdf.) USDOJ, in official actions in North Carolina, has taken the same position as USDOE and claims that its interpretation of Title IX also applies to Title VII and the Violence Against Women Reauthorization Act of 2013, a position which has implications for employers and corrections facilities. Clearly the implications of this position in prison facilities are dangerous to corrections officers and the inmate population.

public education funding structure. I am currently evaluating further legal actions that may be necessary to protect our State.[2]

Let me be perfectly clear: President Obama and his appointees do not have legal authority to require our children to share locker rooms and bathrooms with children of the opposite sex. More specifically, the federal government cannot change existing law through "unofficial guidance;" cannot impose *new* conditions in existing programs then restrict continued receipt of funds on these new conditions without the consent of the States; and cannot threaten to revoke funds based upon new and unfounded interpretations of law that are contrary to existing regulations and judicial settled interpretations of Title IX.[3] The Administration's legal interpretation has been uniformly rejected by the federal courts.[4] The court cases cited in the

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[2] *See Final Bulletin for Agency Good Guidance Practices*; *supra, n. 1* ("Guidance can have coercive effects or lead parties to alter their conduct....Even if not legally binding, such guidance could affect behavior in a way that might lead to an economically significant impact."). By letter dated May 17, the Attorneys General of Oklahoma, Texas, and West Virginia have requested additional clarification from USDOE and USDOJ regarding the effects intended by the "Dear Colleague" letter. Title IX expressly permits federally funded educational facilities to maintain separate living facilities for the different sexes and its implementing regulations permit schools to provide "separate toilet, locker room, and shower facilities on the basis of sex" provided the separate facilities are "comparable" for each sex. 20 U.S.C. §1686, 34 C.F.R. §106.33. However, USDOE has issued "guidance documents" over the past few years purporting to redefine the term "sex" in Title IX to include "gender identity." *See,* USDOE, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, 5 (Apr. 2014); Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities,* 25 (Dec. 2014);USDOE, Office for Civil Rights, *Title IX Resource Guide,* 1, 15, 16, 19, 21-22 (Apr. 2015).

[3] Title IX generally bans discrimination "on the basis of sex" by any education program or activity receiving federal funding. 20 U.S.C. §1681; 34 C.F.R. §§106.31(a); 34 C.F.R. 106.31(b). Nothing in Title IX's text, legislative history, or implementing regulations address or mention "gender identity." Federal legislation has been introduced every year since 2011 to introduce "gender identity" into Title IX, but it has failed every year.

[4]Federal courts have interpreted Title IX and Title VII consistently and have uniformly held that Title VII applies to one's biological sex, not to sexual identity. *See Lakoski v. James,* 66 F.3d 651 (5th Cir. 1995) ("Finally, other circuit courts have acknowledged that the prohibitions of discrimination on the basis of sex of Title IX and Title VII are the same."); *Preston v. Commwealth of Va. ex rel. New River Community College,* 31 F.3d 203, 206 (4th Cir. 1994) (Title VII principles govern claims of employment discrimination under Title IX); *Mabry v. State Bd. of Community Colleges & Occupational Educ.,* 813 F.2d 311 (10th Cir. 1987) ("We find no persuasive reason not to apply Title VII's substantive standard regarding sex discrimination to Title IX suits."); *Ulane v. Eastern Airlines,* 742 F.2d 1081, 1084 (7th Cir.1984)(Title VII applies to one's biological sex, not to sexual identity); *Etsitty v. Utah Transit Authority,* 502 F.3d 1215 (10th Cir. 2007) (discrimination based upon person's status as transsexual was not discrimination "because of sex" under Title VII, rejecting equal protection claim because transsexual was not

Guidance deal with sex and gender *stereotyping,* not gender identity, and are therefore not controlling.[5] Nor is there any indication in Title IX's language or legislative history of any purpose on the part of Congress to reach alleged discrimination on the basis of gender identity.[6]

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member of a protected class, and noting "use of a bathroom designated for the opposite sex does not constitute mere failure to conform to sex stereotypes under Title VII); *see also Oiler v. Winn–Dixie La., Inc.*, No. Civ. A. 00–3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002) (Title VII applies to one's biological sex); *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015); *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994) (finding it "clear" that Title IX and its regulations allow "separate toilet, shower and locker room facilities"); *Doe v. Clark Cty. Sch. Dist.*, No. 206-CV-1074-JCM-RJJ, 2008 WL 4372872, at *4 (D. Nev. Sept. 17, 2008) (noting that Title IX does not require letting students use the restroom that corresponds with their gender identity); *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 477 S.W.3d 185, 187 (Mo. Ct. App. 2015) (dismissing appeal on procedural grounds and noting that court below ruled that biological girl who identified as a boy has "no existing, clear, unconditional legal right which allows [her] to access restrooms or locker rooms consistent with [her male] gender identity."). In *G.G. ex rel. Grimm v. Gloucester City Sch. Bd.,* No 15-2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016), the single outlier, the Fourth Circuit gave deference to the Department's new interpretation of existing rules under Title IX; however, the case is currently still in litigation on appeal.

[5] "Gender identity" describes a condition in which an individual "identifies" with a gender other than their biological gender. An individual's biological gender is commonly and scientifically understood and accepted as the condition of being male or female, as medically determined at a person's birth. Gender can also be determined by an individual's DNA. The normal individual has 46 chromosomes, two of which designate sex. An XX configuration denotes female; XY denotes male. These chromosome patterns cannot be surgically altered. Wise, *Transsexualism: A Clinical Approach to Gender Dysphoria,* 1983 Medic. Trial Tech. Q. 167, 170. "Gender dysphoria" is a medically recognized psychological disorder covering the spectrum of conditions that result from "disjunction between sexual identity and organs." The American College of Pediatricians has urged educators and legislators to reject all policies that condition children to accept as normal a life of chemical and surgical impersonation of the opposite sex, confirming "everyone is born with a biological sex." The College's official statement further states, "[w]hen an otherwise healthy biological boy believes he is a girl, or an otherwise healthy biological girl believes she is a boy, an objective psychological problem exists that lies in the mind not the body, and it should be treated as such. These children suffer from gender dysphoria." *See,* http://www.acpeds.org/the-college-speaks/position-statements/gender-ideology-harms-children.

[6] In *Etsitty*, 502 F.3d at 1224, the 10th Circuit found that a transsexual who had been discharged from her job could not claim protection under Title VII based upon transsexuality *per se*, but instead must rest on the *Price Waterhouse* theory of protection as a man who fails to conform to sex stereotypes. The Court nevertheless could not "conclude [*Price Waterhouse*] requires employers to allow biological males to use women's restrooms." Moreover, the Court agreed with the lower court that the Utah Transit Authority's reason that it was concerned use of women's public restrooms by a biological male could result in liability for the UTA stated a legitimate, non-discriminatory reason for Etsitty's termination.

The Administration does not contend -- nor could it contend -- that people with a gender identity different from their biological sex are a constitutionally-protected class under the Fourteenth Amendment, nor that globally extending Title IX to such a class is congruent and proportional to the goal of preventing *unconstitutional* discrimination against members of that class. Accordingly, given that it is grounded solely in the Fourteenth Amendment, Title IX cannot constitutionally be construed to extend to the coverage the Administration contends.[7]

Providing protection through gender specific means in State-owned facilities falls squarely within the police power protected from federal encroachment by the enumerated powers doctrine and recognized in the Tenth Amendment. Indeed, the Administration's interpretation of Title IX constitutes an improper attempt to commandeer State-owned property in pursuit of a federal policy that has uniformly been rejected by the federal courts.

Moreover, no Title IX-covered entity in this State faces loss of funds without direct agency action, subject to a hearing and judicial review. Notwithstanding the Administration's misleading and threatening representations, no federal statute or regulation remotely requires the Administration's policy. The "guidance" is nothing more than policy disguised as law with footnotes. It is my understanding at this time no public or private entity has received any notice from the Administration advising it has violated any federal law or regulation or threatening it with loss of federal funds based upon its locker room or bathroom facilities, academic or athletic programs, or other activities funded through Title IX. I *urge* you to notify my office *immediately* in the event you or an organization under your supervision, management, membership or oversight does receive such a letter. I intend to intervene immediately.

My Office has aggressively pursued and prosecuted individuals who prey on children. The policy position adopted by the Obama Administration irresponsibly creates an environment in which children may be more easily exposed to sexual predators. Furthermore, this irresponsible and illegally issued Guidance places the mental well-being and privacy rights of ninety nine percent of Louisiana's children at risk without *any* demonstrable evidence of benefit to the less than one percent of the population this policy purports to benefit, in direct contravention of recommendations of the American Academy of Pediatricians. In addition to the aforementioned concerns, the Guidance violates settled legitimate expectations of privacy and safety that have long prevailed and are embraced by both federal law and our State constitution and statutes. The President's position, as demonstrated through the Guidance and USDOE and USDOJ's legal actions, are both bad law and policy.

Harassment that targets a student based on transgender identity is neither appropriate nor permissible under the law. School officials may make reasonable accommodations upon a person's request to address special circumstances and must exercise reasonable judgment in

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[7] *See Brown v. Zavaras,* 63 F.3d 967, 971 (10th Cir.) (prisoner equal protection claim; "[w]hen the plaintiff is not a member of a protected class and does not assert a fundamental right, we determine only whether government classifications have a rational basis.")

responding to a situation to ensure the safety and well-being of the student population.[8] While there are opportunities for state lawmakers, school districts, athletic associations, and colleges and universities to address complex student safety issues in a nondiscriminatory manner - this mandate and threat of lawsuits and withholding of education funding is not a proper or legal approach. I am and will continue evaluating proper action with other State Attorneys General.

Sincerely,

Jeff Landry
Attorney General

Cc: The Hon. John Alario
The Hon. Taylor Barras
The Hon. John Bel Edwards
The Hon. Members of the Louisiana House of Representatives
The Hon. Members of the Louisiana Senate

[8] Under 42 USC §12211(b), "disability" expressly excludes "transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders no resulting from physical impairments, or other sexual behavior disorders. Although these conditions are excluded, another condition may be present that is recognized as a disability under the Act. Therefore, any institution should evaluate individual circumstances when any individual requests accommodation under the ADA.