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Legal Memo

School Districts Must Reject Obama Administration's Legally Baseless School "Transgender" Demands

Liberty Counsel is a non-profit litigation, education, and policy organization with an emphasis on constitutional law, with offices in Florida, Virginia, and Washington, D.C. Liberty Counsel provides *pro bono* legal representation to individuals, groups, and government entities, such as school districts, with a particular focus on religious liberty and other First Amendment issues.

On May 13, 2016, the Obama Administration's U.S. Department of Education, Office of Civil Rights ("OCR") and the U.S. Department of Justice ("DOJ") released a joint "Dear Colleague" "Letter on Transgender [sic] Students" ("Letter") claiming that Title IX[1] now requires sweeping new changes regarding accommodations for gender-confused students (so called "transgender," a misnomer). The Administration has taken a similar position for Title VII[2] and "transgender" employee accommodations.

Title IX and Title VII do not cover "transgender" student or employee demands to use opposite-sex bathrooms and lockers. The positions taken in the May 13, 2016 Letter are wholly without basis in the law. School districts should resist this overreach and protect students. No school district has lost federal funding on this issue.

The purpose of this legal memo is therefore to offer assistance in defending school districts if they continue to maintain gender-appropriate restroom, locker room, and shower room policies. Schools that allow boys to use girls facilities or vice versa face the risk of actually violating Title IX and other rights to privacy and personal security of students who clearly have the right to use such facilities consistent with their birth sex. School districts which bend to the "transgender" demands expose themselves to liability from lawsuits filed by parents of students whose rights are violated by the school district's implementation of this lawless directive.

The May 13 OCR/DOJ directive is designed to force school districts across the country to enact policies recognizing "gender identity," "gender expression," "gender nonconformity," "transgender," and other subjective, invented categories as protected classes. The directive and previous "guidance" purports to require teachers and/or students to address gender-confused students

[1] Title IX of the Educational Amendments of 1972, 20 U.S.C. § 168 1(a).
[2] Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in volume 42 of the United States Code, beginning at section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin.

by false names and pronouns, and permit gender-confused students unfettered entry into opposite-sex lockers, showers, restrooms, and sports programs, and sleep in the bedrooms of opposite-sex students on overnight field trips, typically without notice to the other students and their parents. The May 13 directive purports to require additional "private spaces" within facilities that have, by their nature, always been private. In so doing, the Obama Administration treats the vast majority of gender-congruent students and their parents desiring to protect *status quo* privacy rights as somehow aberrant, abnormal, or bigoted.

Nothing in federal law supports or requires such "gender identity" policies, nor does anything in the law of most states. School districts should be wary of implementing any recommendations regarding "sexual orientation" or "transgender" issues based upon the "guidance" of the U.S. Department of Education, Office of Civil Rights or the position of the current administration's Department of Justice. Parents should scrutinize school district sources for any draft policies of this nature.

No Scientific Authority

There is much disinformation on the "gender identity" and "transgender" issue from pro-homosexual sources. Actual science shows that the vast majority of gender-confused students who are not labeled or pigeonholed by parents, teachers, or government authorities; are affirmed in their masculinity or femininity; or are otherwise not subjected to misleading propaganda, will simply outgrow their confusion, and will achieve congruence with their biological sex. As observed by Dr. Paul McHugh, former chief psychiatrist at Johns Hopkins Hospital, "when children who reported transgender feelings were tracked without medical or surgical treatment at both Vanderbilt University and London's Portman Clinic, over 70%-80% of them spontaneously lost those feelings." Dr. McHugh's findings are emphatically confirmed by the DSM-V, which shows as many as 97.8% of gender-confused boys and 88% of gender-confused girls eventually accept their biological sex after naturally passing through puberty.[3]

Moreover, principled scientists and physicians are rejecting the false policy positions of professional associations captured by homosexual activists. A recent position statement of the American College of Pediatricians[4] (signed by Dr. McHugh) urges caution by educators and legislators, to avoid harming both gender-confused and gender-congruent children. It is a grave disservice to gender-confused children (not to mention the majority of gender-congruent children) to enact a policy which affirms a false notion of reality, and which violates the other children's fundamental rights to privacy, modesty, safety, and religious practice accommodated by restroom separation between biological males and females.[5]

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[3] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, Arlington, VA, American Psychiatric Association, 2013 (451-459). See page 455 re: rates of persistence of gender dysphoria.
[4] http://www.acpeds.org/the-college-speaks/position-statements/gender-ideology-harms-children
[5] Paul McHugh, *Transgender Surgery Isn't the Solution*, THE WALL STREET JOURNAL, June 12, 2014, *available at* http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120.

No Legal Authority

In addition to the lack of scientific authority for current policy demands regarding the "gender identity" issue, **there is no legal authority** for the claim that federal law requires students to be given "gender identity" access to opposite sex restrooms, facilities, and programs. Such assertions are meritless, for the following reasons:

First, Title VII (covering employees) and Title IX (in the education context, covering students) only prohibit discrimination between males and females based on biological "sex," but they do not require the abolition of personal privacy. Neither statute requires or supports the idea that males *are* females, that females *are* males, or the recognition of "gender identity" or "expression." Congress has rejected multiple attempts to amend Title VII and Title IX, over the 40+ year history of these statutes, where these attempts tried to include specific recognition of "sexual orientation" and "gender identity." Neither statute requires admission to opposite-sex restrooms, lockers, showers, or other traditionally private places. On April 7, 1975, for that matter, Supreme Court Justice Ruth Bader Ginsburg, then a professor at Columbia Law School, wrote in The Washington Post, "Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy."[6]

Second, the right to bodily privacy has long been recognized in U.S. law. *See, e.g.*, *Doe v. Luzerne County*, 660 F.3d 169, 177 (3d Cir. 2011) (holding that bodily exposure may meet "the lofty constitutional standard" and constitute a violation of one's reasonable expectation of privacy); *Brannum v. Overton County School Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (holding that a student's "constitutionally protected right to privacy encompasses the right not to be videotaped while dressing and undressing in school athletic locker rooms"); *Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2002) ("there is a right to privacy in one's unclothed or partially unclothed body"); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body."). Violations of the right to bodily privacy are most acute when one's body is exposed to a member of the opposite sex. *See Doe*, 660 F.3d at 177 (considering whether "Doe's body parts were exposed to members of the opposite sex" in deciding whether her reasonable expectation of privacy was violated); *Brannum*, 516 F.3d at 494 ("the constitutional right to privacy... includes the right to shield one's body from exposure to viewing by the opposite sex"); *York*, 324 F.2d at 455 (highlighting that the exposed plaintiff was female and the viewing defendant male); *Poe*, 282 F.3d at 138 (citing with approval the Ninth Circuit's emphasis on the different genders of defendant and plaintiff in York). Thus, the proponents of "gender identity" or "transgender" admission to opposite-sex restrooms, lockers and other places completely ignore this long-standing right to bodily privacy.

Third, prior to the May 13 letter, OCR's much-vaunted "Questions and Answers on Title IX and Sexual Violence"[7] had been frequently referenced as an authority by proponents of school "gender identity" policies. However, the "Q&A" **failed to cite any legal authority - case law or statutory** - for the claim that Title IX now applies to students claiming to be the opposite sex for purposes of access to the opposite sex's restrooms and locker rooms.

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[6] https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/09/prominent-feminist-bans-on-sex-discrimination-emphatically-do-not-require-unisex-restrooms/

[7] http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

Fourth, even the decision by a three judge panel of the Fourth Circuit Court of Appeals in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016) (which has no controlling effect outside of North Carolina, South Carolina, Virginia, West Virginia and Maryland) has not addressed the ultimate issue relating to whether Title IX applies to "gender identity." The ruling only went so far as to hold that the trial court should have given deference to the Department of Education's "novel" interpretation of Title IX, and then sent the case back to the trial court for further proceedings. The panel stopped short of requiring a policy of wholesale admittance into the restrooms and lockers of the opposite sex, requiring only that the district court give greater consideration to administrative agency "interpretation" of the statutes. The court did not even undertake to define the term "sex" under Title IX, or the implications for sex-based protections, if subjective mental belief or claim can override such protections. **Aside from the Obama administration, and this three judge panel, no other administration's Department of Education, and no federal court, has reached this conclusion.**

The Gloucester County School Board is asking the United States Supreme Court to review the decision. Meanwhile, the Supreme Court agreed on a 5-3 vote to stay the Fourth Circuit decision. This means that Gloucester County's policy requiring that students use restrooms that correspond with their biological sex remains in place until the Supreme decides whether it will review the case and if it decides to review it, the policy will remain in place until the Supreme Court issues a decision. Other than this one decision, which is stayed at this time, there remains **no legal authority - case law or statutory** - for the claim that Title IX now applies to students claiming to be the opposite sex for purposes of access to the opposite sex's restrooms and locker rooms.

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Fifth, a federal court in *Johnston v. Univ. of Pittsburgh* held in March 2015 that a "policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, **does not violate Title IX's prohibition of sex discrimination."** (emphasis added). *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, No. CIV.A. 3:13-213, 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015).

Sixth, the decisions of the trial courts in *Gloucester* and *Johnston* are consistent with how numerous other courts have dismissed cases of alleged "discrimination" brought by "transgender" individuals claiming "gender identity" access to private facilities. Most recently, the Seventh Circuit Court of Appeals affirmed that Title VII does not include "sexual orientation," *Hively v. Ivy Tech Community College*, 2016 WL 4039703 (7th Cir. july 28, 2016). *See, also, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1228 (10th Cir.2007); *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir.1995); *Braninburg v. Coalinga State Hosp.*, No. 1:08–cv–01457–MHM, 2012 WL 3911910, at *8 (E.D.Cal. Sept.7, 2012) ("it is not apparent that transgender [sic] individuals constitute a 'suspect' class"); *Jamison v. Davue*, No. S–11–cv–2056 WBS, 2012 WL 996383, at *3 (E.D.Cal. Mar.23, 2012) (so-called "transgender" individuals do not constitute a 'suspect' class, so allegations that defendants discriminated...are subject to a mere rational basis review"); *Kaeo–Tomaselli v. Butts*, No. 11–cv–00670 LEK, 2013 WL 399184, at *5 (D.Haw. Jan.31, 2013) (noting the plaintiff's status as a claimed "transgender" person did not qualify the plaintiff as a member of a protected class and explaining the court could find no "cases in which transgender [sic] individuals constitute a 'suspect' class"); *Lopez v. City of New York*, No. 05–cv–1032–NRB, 2009 WL 229956, *13 (S.D.N.Y. Jan.30, 2009) (explaining that because such individuals are not a protected class for the purpose of Fourteenth

Amendment analysis, claims that a plaintiff was subjected to "discrimination" based on his status as a transvestite are subject to rational basis review).

Sex separate bathroom and locker rooms are required to protect the rights of all students. A policy of limiting bathroom and locker room facilities on the basis of birth sex is "substantially related to a sufficiently important government interest." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir.2011) (*quoting Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47, (1985)). Such a policy is based on the need to ensure the privacy of students to disrobe, shower or use the restroom outside of the presence of members of the opposite sex. This justification has been repeatedly upheld by courts. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir.2007) (the use of women's public restrooms by a biological, cross-dressing male could result in liability for employer, and such a motivation constitutes a legitimate, nondiscriminatory reason).

Finally, consistent with the historic interpretation of Titles VII and IX in the above cases, parents in the Cook County Township High School District 211 in Illinois filed suit on May 4, 2016, against District 211, the U.S. Department of Education, and Attorney General Loretta E. Lynch, for violating their gender-congruent children's civil rights. Similar lawsuits have been filed by 24 states in federal courts in Texas, Nebraska and North Carolina (which itself was sued by the Obama Administration) seeking to have the OCR and DOJ "interpretations" struck down.

Conclusion

Nothing in the text of Title IX requires school districts to allow students to use the restroom, locker room, and shower room of their choice. The rights of privacy and the protection of personal safety should be paramount. A school district may not, under any circumstances, require other students, upon pain of official sanction, to use obviously incorrect pronouns when referring to a gender-confused student.

Beyond students with gender confusion, teachers are in a position of authority and influence over impressionable children, and may not impose their own lifestyle upon them in contravention of their healthy development of their own personal identity. Teacher cross-dressing in the classroom is confusing, misleading, and harmful to children, who are in their formative years and are beginning to learn appropriate behavior and roles from those placed in positions of authority over them.

Liberty Counsel is prepared to assist school districts and provide guidance in this area. Should you have questions about any of the points contained in this memo, please call 407-875-1776 or email Liberty@lc.org.