



December 15, 2015

Dear Chairman Franks:

We write as two members of the eight-member U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole. We are writing in regard to recent actions taken by the Department of Education’s Office for Civil Rights (OCR) to force an Illinois high school district to allow a transgender high school student to change in the girls’ locker room. As the chairman of the committee that has oversight for OCR, we urge you to introduce legislation that would prohibit OCR from interpreting Title IX to force covered entities to allow transgender students to use the locker room they prefer rather than a private restroom or a locker room, or restroom or locker room that accords with their anatomical sex.

The facts, as we understand them, are as follows: Township High School District 211 in Palatine, Illinois has a transgender, male-to-female student – that is, a student who has male genitalia, but who takes female hormones, presents as female and wishes to be referred to as female.¹ The student is referred to as “Student A.” Student A wishes to change in the girls’ locker rooms. At least some of the girls who would be affected are uncomfortable with this possibility. Student A is a member of a girls’ sports team, and four girls and a parent complained that he entered the girls’ locker room, and “Coach A reported that students told her they felt uncomfortable undressing in front of Student A.”² Furthermore, “OCR’s investigation also revealed that six female students have complained to the District that they are uncomfortable having Student A in the girls’ locker room; the complaints were not made directly to Student A or in her presence.”³ OCR does not believe these girls’ discomfort, or the view of most adults that teenage girls should not have to change with a teenage boy (and vice versa), is worthy of more than a blithe dismissal.⁴

Until now, the school district has required Student A to use private restrooms when changing clothes. Student A filed a complaint with OCR, which launched an investigation of the school district. Under threat of losing federal funds, the school district agreed to allow the boy to use the girls’ locker rooms if he changed behind a curtain.⁵ After this settlement was reached, Catherine Lhamon, the Department of Education’s Assistant Secretary for Civil Rights, told the press that

¹ Letter from Adele Rapport, Regional Director, U.S. Dep’t of Ed., Office for Civil Rights, Region V, to Dr. Daniel E. Cates, Superintendent, Township High School District 211, Nov. 2, 2015, available at <https://assets.documentcloud.org/documents/2501220/letter-from-the-u-s-dept-of-education-to-daniel.pdf>.

² *Id.* at 8-9.

³ *Id.* at n. 9.

⁴ *Id.* at 9.

⁵ Agreement to Resolve Between Township High School District 211 and the U.S. Dep’t of Ed., Office for Civil Rights, OCR Case # 05-14-1055, Dec. 2, 2015, available at <http://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf>.



Student A *can* change behind the curtain, but cannot be *required* to do so.⁶ Outraged, the school district is threatening to retract its agreement. The district argues that the settlement agreement is predicated on Student A’s willingness to change behind a privacy curtain and that this agreement applies only to Student A, and that OCR is acting in bad faith in claiming that Student A cannot be required to change behind a curtain and that the agreement applies to any and all transgender students within the district.⁷

In its letter of findings dated November 2, 2015, OCR cited no legal authority for the proposition that high school students with gender dysphoria must be allowed to use the locker room they prefer. In fact, the letter cites no legal authority for the proposition that it is a violation of Title IX to treat a person in accord with their biological or anatomical sex rather than their preferred “gender.” The only statute cited is Title IX, and the only regulations cited are its implementing regulations. Neither the statute nor the regulations address transgender status. This initiative is based only on OCR’s fiat, untethered to any legal authority.

OCR’s actions mangle Title IX. Title IX prohibits discrimination on the basis of *sex*. Student A is biologically and anatomically male. OCR is interpreting Title IX as prohibiting discrimination on the basis of what these days is commonly referred to as “*gender*.” OCR is acting as if Student A is a member of the female sex, but Student A is an intact male. If the school district is discriminating against him by forbidding him from changing in front of teenage girls, then it is discriminating against all the teenage boys at the school by forbidding them from doing so. And Title IX’s implementing regulations specifically provide that covered institutions may maintain separate restroom and toilet facilities for the two sexes.⁸

It is clear OCR is not going to restrain itself. It appears to have an agenda that exceeds the scope of authority conferred by Congress by a very wide margin. It is going to continue to coerce school districts by threatening to withhold federal funding until they all agree to fall in line. The federal government should not force teenage girls to change with teenage boys, even if those teenage boys believe themselves to be girls. It is up to Congress to act and forbid OCR from enforcing Title IX in a manner unsupported by its plain language.

We recognize that those with gender dysphoria may have a difficult time in high school, and that special efforts may be necessary to ensure their safety and privacy. We also recognize that once individuals have gone through the surgery necessary to conform the appearance of their genitalia to their preferred gender that the better part of valor may be to permit them to use the locker

⁶ Emma Brown, *Under federal pressure, Illinois school district allows transgender student to use locker room*, WASH. POST, Dec. 3, 2015, <https://www.washingtonpost.com/news/education/wp/2015/12/03/under-federal-pressure-illinois-school-district-allows-transgender-student-to-use-locker-room/>.

⁷ *Deal for transgender student now in question amid ‘bad faith’ claims*, CHI. TRIB., Dec. 4, 2015, <http://www.chicagotribune.com/suburbs/schaumburg-hoffman-estates/news/ct-transgender-student-district-211-bad-faith-met-20151204-story.html>.

⁸ 34 C.F.R. § 106.33.



room and rest room assigned to their preferred “gender” rather than to their original sex.⁹ But this is not even a case in which the relevant individual has undergone surgery. This is an intact male. We therefore ask that you consider the following language:

- a. No entity covered by Title IX shall be prohibited from maintaining single-sex restrooms, locker rooms, changing rooms, or any other similar facilities or from prohibiting individuals who are anatomically male from using the facilities maintained for females or individuals who are anatomically female from using the facilities maintained for males.
- b. No entity covered by Title IX shall be required to permit an anatomically male individual to participate on a sports team for female participants or to permit an anatomically female individual to participate on a sports team for male participants.
- c. Nothing in this section shall be construed to prohibit or require covered entities from providing a private restroom, locker room, changing room or any other similar facility for the use of a transgender individual.
- d. Nothing in this section shall be construed to prohibit or require covered entities from maintaining restrooms, locker rooms, changing rooms or any other similar facilities that are open to both sexes.
- e. The Department of Education’s Office for Civil Rights shall be without jurisdiction to promulgate rules, issue guidances or investigate complaints related to transgender status or gender identity.
- f. “Anatomically female” is defined as possessing or primarily possessing genitalia of the female sex; “anatomically male” is defined as possessing or primarily possessing the genitalia of the male sex.

We would be happy to meet with you to discuss this issue. You may reach us at pkirsanow@usccr.gov or gheriot@usccr.gov. You may contact Commissioner Kirsanow’s special assistant, Carissa Mulder, at cmulder@usccr.gov.

Sincerely,

Peter Kirsanow

Gail Heriot

⁹ We doubt that there will be many cases of high school students who have undergone transgender surgery; such surgery is more common among adults (although rare even there). Some commentators have even suggested that parents who permit their children to undergo such surgery rather than wait till they are capable of making a mature decision on their own are guilty of “child abuse.” Ray Northstine, Popular Social Critic Camille Paglia: “A Lot of Lies” from “Transgendered Propagandists,” Christian Post (November 8, 2015)(quoting Paglia).