Statement of Commissioners Gail Heriot and Peter N. Kirsanow
Concerning the Department of Education's Recently Announced Transgender Policy
June 17, 2016

Today, the U.S. Commission on Civil Rights issued a statement strongly supporting the policy of the Department of Education's Office for Civil Rights on transgender use of toilet, locker room and shower facilities. We dissent from that statement.

We believe the Department of Education is acting lawlessly on this issue. Its pronouncements are in no way tethered to Title IX—the actual law that the Department purports to be following. The Commission should not be supporting executive branch overreach of this kind.

The recently-announced transgender guidance requires schools across the country to allow intact anatomical boys, who say they psychologically identify as girls, to share toilet, locker room and shower facilities with actual girls (and vice versa). It also requires that, at least under many circumstances, anatomical boys who identify as female be allowed to compete in athletic activities ordinarily reserved for girls.

Congress intended no such thing when it passed Title IX as part of the Education Amendments Act of 1972. That statute prohibits sex discrimination by federally funded schools, colleges and universities, plain and simple. It makes an exception for separate living facilities, which was crystalized in a rule promulgated in 1975. That rule, which was signed by President Gerald Ford explicitly authorizes separate "toilet, locker room and shower facilities" based on sex.

To claim that back in the 1970s the 92nd Congress intended or that the American people understood Title IX to require schools to allow anatomical boys who view themselves as girls to use the girls' room would be simply nonsense. Indeed, the Department of Education doesn't even claim it. Instead its argument—insofar as it has one—is that it apparently only recently noticed that a 1989 Supreme Court case, *Price Waterhouse v. Hopkins*, requires this result.

Well, no it doesn't. *Price Waterhouse* concerned a woman who allegedly had not been promoted because she was perceived as "too aggressive." The court reasoned that if a male employee with the same aggressive personality would have been promoted, then she was indeed discriminated against on account of her *sex* within the meaning of Title VII.

Fine. But let's try that same line of reasoning in connection with the transgender guidance: Suppose a school has a student who is anatomically male, but who identifies psychologically as female. Would a female student with the same psychological identification been permitted to use the girls' room? Yes, of course. But that's very different from *Price Waterhouse v. Hopkins*, because Title IX and its implementing regulations explicitly permit schools to "provide separate toilet, locker room, and shower facilities on the basis of sex." More importantly, note that applying this line of reasoning proves too much. ***Consider instead an anatomically male student who***

identifies as male. A masculine male or cisgender male if you will. It is still true that his female counterpart—an anatomical female who also identifies as male—would have been permitted to use the girls' locker room. Yet we know that schools are explicitly authorized to have separate toilets, locker rooms and shower facilities for each sex. This takes these cases outside the *Price Waterhouse* situation.

Note what we are not saying: First, we are not saying that a transgender student needs to conform to any federal, state, or local government's expectations regarding members of his or her sex. That's what freedom is all about. We support freedom.

Second, we are not saying that Title IX *requires* schools to separate students by sex—defined anatomically or biologically—for toilet, locker room and shower purposes. The statute simply authorizes them to do so. Unisex facilities or other methods for assigning facilities are permissible. But given that sex discrimination was explicitly forbidden by Title IX, an explicit authorization was necessary in order to allow for separate facilities based on sex.

No explicit authorization is necessary to authorize schools to assign facilities based on gender identity, given that gender identity discrimination is not outlawed by Title IX in the first place. Schools have always had the authority to allocate toilet, locker room and shower facilities on the basis of gender identity (rather than sex) *if that is what they want to do*.

Put differently, properly interpreted, the law has always given schools the flexibility to deal with transgender students on a case-by-case basis. Sometimes the right thing to do is assign such a student to the facilities for his anatomical sex. At other times, the best course is to assign him to the facilities for the opposite sex (but same gender). And finally, sometimes the right thing to do is to pursue a third course of action, such as assigning him to private facilities ordinarily reserved for faculty members.

The Department of Education's transgender guidance, on the other hand, is one size fits all. Anatomical boys who psychologically identify as girls must be permitted in the girls' facilities (and vice versa). It ties the hands of local teachers and principals.

It is simply not the case that this is required by Title IX. It is profoundly anti-democratic for the Department of Education to be issuing such a mandate. Legislation is for Congress, not for the executive branch.