

**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 92<sup>nd</sup> 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 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.

**Exhibit: USCCR Majority Statement**

The United States Commission on Civil Rights strongly supports the joint guidance set forth by the Department of Education’s Office for Civil Rights and the Department of Justice on the protections for transgender students under Title IX of the Education Amendments Act of 1972.

Title IX of the Education Amendments of 1972 (Title IX) states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...”<sup>1</sup> The Department of Education’s Office for Civil Rights and the Department of Justice issued guidance stating that for the purposes of Title IX and its implementing regulations, “[t]he Departments treat a student’s gender identity as the student’s sex...”<sup>2</sup> To ensure nondiscrimination on the basis of sex, transgender students must be allowed to participate in activities, use facilities, and access housing consistent with their gender identities.<sup>3</sup> Under Title IX and Family Educational Rights and Privacy Act, a school is obligated to protect transgender students’ privacy related to their transgender status.<sup>4</sup> Schools are required to provide a safe and nondiscriminatory environment, and when harassment based on gender identity is discovered, “...must take prompt and effective steps to end the harassment, prevent its reoccurrence, and, as appropriate, remedy its effects.”<sup>5</sup>

The guidance put forth by the Department of Education and the Department of Justice reasonably interprets sex discrimination to necessarily include gender identity discrimination for the purposes of compliance with Title IX. It is the logical outgrowth of voluntary resolutions into which both Departments entered in prior litigation.<sup>6</sup> It also serves as the correct foundation of the recent decision handed down by the Fourth Circuit, that the Department’s interpretation of its own regulations regarding restroom access by transgender individuals should be given deference.<sup>7</sup>

On April 18, 2016, the U.S. Commission on Civil Rights, by a majority vote, strongly condemned the recent state laws and proposals targeting members of the lesbian, gay, bisexual, and transgender (“LGBT”) community for discrimination, including North Carolina’s legislation forcing transgender people to use public bathrooms based on sex, and not according to their

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<sup>1</sup> 20 U.S.C. §1681(a)

<sup>2</sup> Catherine Lhamon, Office for Civil Rights, U.S. Dep’t of Ed., Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights, U.S. Dep’t of Justice, Dear Colleague Letter, May 13, 2016, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *See, e.g.,* Resolution Agreement Between Arcadia Unified School District, the U.S. Dept. of Education, and The U.S. Dept. of Justice, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70 (July 24, 2013), <https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf> and Agreement to Resolve Between Township High School District 211 and the U.S. Department of Education, Office for Civil Rights, OCR Case # 05-14-1055 (December 2, 2015), <http://adc.d211.org/wp-content/uploads/2015/12/D211-OCR-Agreement.pdf>

<sup>7</sup> *See* G.G. v. Gloucester Cnty. Sch. Bd., 2016 WL 1567467 (4<sup>th</sup> Cir. 2016);

gender identities.<sup>8</sup> These recent state laws attempting to nullify the protections of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to individuals based on gender identity jeopardizes the dignity and physical safety of transgender people.<sup>9</sup> Today, we strongly support the Departments' joint guidance on this issue.

Commission Chair Martin R. Castro stated, "Transgender students have the same rights as other students. Transgender students present a threat to no one. These students are our children. Our schools must not be allowed to strip them of their dignity and if our states fail to afford these students their rights, it is incumbent upon the federal government to intervene and protect these children."

The Commission, therefore, stands with the Department of Education and the Department of Justice as they ensure the promise of fair educational opportunities for every student, regardless of their gender or transgender status.

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<sup>8</sup> USCCR, The U.S. Commission on Civil Rights Statement Condemning Recent State Laws and Pending Proposals Targeting the Lesbian, Gay, Bisexual, and Transgender Community, April 18, 2016, available at [http://www.usccr.gov/press/2016/PR\\_Statement\\_LGBTDiscrimination.pdf](http://www.usccr.gov/press/2016/PR_Statement_LGBTDiscrimination.pdf).

<sup>9</sup> *Id.*