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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510–6250

May 17, 2016

The Honorable John B. King, Jr.
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Dear Secretary King:

I write today to express my alarm regarding the Dear Colleague letter issued May 13, 2016 by the Department of Education's Office for Civil Rights (OCR) and the Department of Justice pertaining to transgender students.[1] As guidance, the Dear Colleague letter purports to merely interpret existing discrimination law under Title IX of the Education Amendments of 1972 (Title IX); in reality however, the guidance represents an abrupt departure from longstanding sex discrimination policy. In keeping with OCR's troubling tradition of flouting federal law to advance substantive policy serving the administration's political agenda, OCR's latest guidance conflates an individual's gender identity with the widely accepted and longstanding understanding of sex without support in Title IX.

As Chairman of the Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management (RAFM), I have consistently proclaimed my gratitude for the hard work that takes place every day in schools in communities throughout the country to ensure safety and equality for all students. There is no place for bullying or discrimination in our schools and all children should feel safe while they receive an education. However, in keeping with my oversight of guidance documents in which OCR has prescribed policy preferences not otherwise found in law,[2] I believe that the Dear Colleague letter on transgender students advances substantive and binding regulatory policies that may only be imposed on schools through an act of Congress followed by the promulgation of rules compliant with notice-and-comment procedures. Such statutory direction or adherence to rulemaking processes would have shaped a smarter policy better fortified against impending legal challenge.

Before promulgating substantive regulatory policy, the Administrative Procedure Act (APA) requires agencies to provide notice of a proposed rule and solicit public comment on the proposal.[3] The APA exempts from its notice-and-comment rulemaking "interpretative rules or

[1] U.S. Dept. of Edu., Office for Civil Rights, Dear Colleague (May 13, 2016).
[2] *See* letter from Sen. James Lankford to Dr. John King, Acting Sec'y (Mar. 4, 2016); letter from Sen. James Lankford to Dr. John King, Acting Sec'y (Jan. 7, 2016); *Examining the Use of Agency Regulatory Guidance: Hearing Before the S. Subcomm. on Regulatory Affairs & Fed. Mgmt.*, 114th Cong. (Sept. 23, 2015).
[3] Administrative Procedure Act, 5 U.S.C. § 553.

general policy statements," also referred to as guidance.[4] Agencies may issue guidance only to "advise the public of the agency's construction of the statutes and rules it administers,"[5] so long as its construction does not impose additional legal requirements and obligations beyond those found in the statutory or regulatory language itself. If a policy statement does more than bind regulated parties to an agency's interpretation of a governing statute or rule, it would be properly characterized as a substantive rule, subject to APA rulemaking procedures.

The Dear Colleague letter impermissibly extends Title IX's regulatory reach by prescribing onerous and at times nonsensical obligations on recipient schools. For example, while Title IX prohibits only the discrimination of students on the basis of sex, the Dear Colleague letter asserts that "[t]he Departments may find a Title IX violation when a school... fail[s] to take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth..."[6] The guidance also prohibits school officials from "designat[ing] students' sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy."[7] To many Americans, this policy reflects the out-of-touch political correctness agenda advanced by Washington bureaucrats—how can the mere designation of a student's sex rise to the level of sex discrimination?[8] It is difficult to imagine how Title IX or its implementing regulations prohibit such conventional disclosures with such broad strokes.

The American public is similarly unsure about what legally binding policies the Dear Colleague letter advances. Adding to the confusion, White House Press Secretary Josh Earnest assured reporters at his May 13 press briefing: "So let's be clear about what's included in the guidance. The guidance does not add additional requirements to the applicable law. "[9] While I wish I could be assured by statements like this, the Dear Colleague letter does in fact assert requirements: "A school… *must* allow transgender students access to such facilities consistent with their gender identity. A school *may not require transgender students to use… individual-user facilities* when other students are not required to do so."[10]

The breadth of the guidance relies on OCR's novel definitions of "sex" for purposes of Title IX.[11] Title IX prohibits discrimination "on the basis of sex."[12] Under the umbrella of "sex," OCR in its Dear Colleague letter attempts to introduce the concept of "gender identity," which

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[4] 5 U.S.C. § 553(b)(A).
[5] Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015).
[6] Dear Colleague letter, *supra* note 1, at 4.
[7] *Id.* at 5.
[8] In support of this policy, OCR cites to prior FERPA disclosure guidance to secondary educators defining directory information to preclude sex. As guidance itself, this interpretation does not hold the precedential value OCR appears to assert. U.S. Dept. of Edu., letter from Paul Gammill, Dir., Family Policy Compliance Office, to Institutions of Postsecondary Education 3 (Sept. 2009).
[9] Press Briefing by Press Sec'y Josh Earnest (May 13, 2016), *available at* https://www.whitehouse.gov/the-press-office/2016/05/13/press-briefing-press-secretary-josh-earnest-5132016-0 (emphasis added).
[10] Dear Colleague letter, *supra* note 1, at 3.
[11] Indeed, the Departments acknowledged that the policies contained in the May 13 Dear Colleague letter constituted "significant guidance" for purposes of review by the Office of Information and Regulatory Affairs. Dear Colleague letter, *supra* note 1, at 1.
[12] 20 U.S.C. §1681.

OCR defines as "an individual's internal sense of gender."[13] Of course, "gender identity" is not the same as sex—transgender people identify as such precisely *because* their sex does not match their gender identity. Working backward from such a revisionist conclusion, OCR then attempts to qualify the longstanding understanding of sex as "sex assigned at birth," defined as "the sex designation recorded on an infant's birth certificate should such a record be provided at birth."[14]

The interpretation of a definition so foundational to the scope and application of Title IX was surely not contemplated by Congress in 1972 when it wrote and passed the law—to interpret the meaning of "sex" to include "gender identity," OCR disregards congressional intent and ignores the axiom that Congress does not "hide elephants in mouseholes."[15] Nor is it consistent with the policy preferences of the 114th Congress, which considered expanding discrimination protections on the basis of gender identity as part of the debate over comprehensive elementary and secondary education reform last year but declined to do so,[16] or to otherwise redefine sex for purposes of Title IX coverage. OCR's encroachment on fundamental legislative powers is regrettably and alarmingly prevalent within OCR and elsewhere throughout the Obama administration.

The procedural infirmities with which the OCR guidance was issued lie in stark contrast to a companion Department of Health and Human Services (HHS) policy that was subjected to notice-and-comment rulemaking processes.[17] The HHS Office for Civil Rights proposed the rule, prohibiting the denial of healthcare access or coverage to individuals based on their gender identity, and requiring that such individuals "must be treated consistent with their gender identity, including in access to facilities."[18] As a basis for their action, HHS cited Title VII and Title IX's prohibition on the basis of sex.[19] The proposed rule, dating back to September 2015, received over 2000 comments,[20] and states that "[w]e propose that discrimination on the basis of sex further includes discrimination on the basis of gender identity...."[21] For what amount to essentially mirror-image policies extending sex discrimination protections to transgender individuals, it is baffling that OCR refuses to acknowledge that its policy pronouncements amount to a sea-change in the longstanding interpretation of federal civil rights law.

Indeed, in substantively revising a definition so foundational to the scheme and scope of federal civil rights law (including its application to both Title IX and Title VII), OCR should have

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[13] Dear Colleague letter, *supra* note 1, at 1.
[14] *Id.*
[15] Whitman v. American Trucking Ass'n, 531 U.S. 457, 468 (2001).
[16] S. Amdt. 2093 to S. Amdt. 2089 did not achieve 60 votes in the affirmative, and was therefore not agreed to in the Senate by a Yea-Nay vote 52-45 (Rec. vote no. 236) (*see* S. Rep. No. 114-231, at 14 (to accompany S. 1177, Every Student Succeeds Act), https://www.congress.gov/114/crpt/srpt231/CRPT-114srpt231.pdf).
[17] Nondiscrimination in Health Programs and Activities, RIN 0945-AA02 (May 13, 2016) (to be codified at 45 C.F.R. pt. 92).
[18] *Id.* at 353 (to be codified at 45 C.F.R. § 92.206).
[19] *Id.* at 329-330 (to be codified at 45 C.F.R. § 92.1).
[20] Nondiscrimination in Health Programs and Activities, Docket No. HHS-OCR-2015-0006, REGULATIONS.GOV (accessed May 17, 2016).
[21] Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54,176 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92).

waited for the American people to speak through their elected representatives by drafting and passing legislation. By relegating Title IX's longstanding understanding of "sex" to now mean merely "sex assigned at birth" and by including a fundamentally distinct concept of "gender identity" within Title IX's definition of "sex," OCR has reached into policy territory unilaterally, impermissibly, and contrary to congressional intent. As I have discussed with you before, I will continue to push back against agencies' improper use of guidance documents that, while purporting to merely interpret existing law, fundamentally alters the regulatory landscape.

Congressional oversight vindicates the checks and balances required by our Constitution, and it is my duty— just as it is the duty of every senator and representative— to ensure that all agencies adhere to the Administrative Procedure Act, which Congress enacted to safeguard against precisely these threats of administrative fiat. Accordingly, I request answers to the following no later than noon on May 31, 2016:

1. Please explain OCR's legal justification for expanding "sex" under Title IX to include "gender identity," and qualifying the longstanding understanding of "sex" to mean "sex assigned at birth." If the Department General Counsel viewed, consulted, prepared or requested the preparation of an internal legal opinion on Title IX's application to gender identity, please provide the legal opinion.

2. One of the principal virtues of the rulemaking process is a productive discussion of how best to articulate proposed policy objectives in the clearest manner possible while avoiding potentially unintended consequences.

    a. A former Department of Justice official asserts that by expanding the definition of "sex" to include "gender identity," OCR's interpretation "would nullify the very protection" Title IX recognizes: "If the majority and the Obama administration are right that a boy who identifies as female has a right under Title IX to use the girls' bathrooms, locker rooms, and shower facilities, then it would be discrimination on the basis of gender identity [*and thus on the basis of sex*] to bar a boy who identifies as male from having the same access."[22] How would OCR respond to this reading?

    b. Are schools prohibited from taking into account the privacy rights of all students in service of adherence to the discrimination policies set forth by OCR? For example, how would OCR advise a recipient school to respond to a complaint from a female student (identifying consistent with her sex assigned at birth) uncomfortable being exposed in front of a transgender female student using the women's locker rooms, or sharing assigned dormitories or overnight housing?

    c. Why did OCR adopt highly prescriptive policies regarding the treatment of gender identity at the expense of allowing individual recipient schools to decide their own

[22] Ed Whelan, *Fourth Circuit Inflicts Sex Change on Title IX—Part 2*, NAT'L REV. (Apr. 25, 2016), http://www.nationalreview.com/bench-memos/434535/fourth-circuit-transgender-ruling.

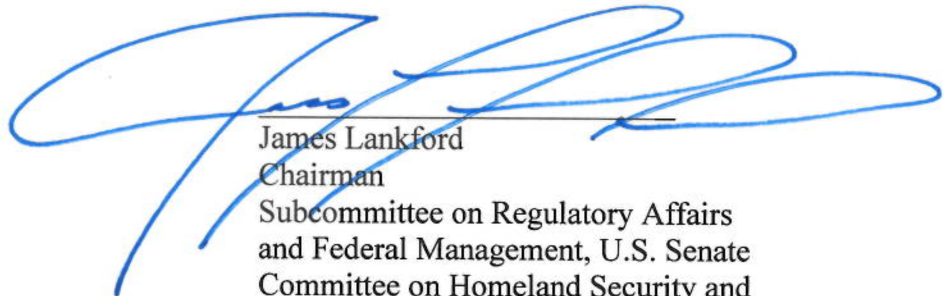
policies and better attend to the needs of all students consistent with Title IX and its implementing regulations? What alternatives to this policy were considered?

3. In light of past Department practice where OCR has taken enforcement action against schools based on noncompliance with policies advanced in Dear Colleague letters, and in light of conflicting statements from Department and administration officials, please clarify for the American public whether the latest Dear Colleague letter will or will not impose binding regulations on schools throughout the country. In addition, please clarify whether a recipient school will lose any federal funding if it does not comply with any policy advanced by the Dear Colleague letter.

4. The Department of Education designated this guidance as "significant," which is defined as guidance that will "(i) Lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended."[23] Please describe which of these criteria applied to this guidance document and summarize the content of OIRA's review. Please also specify the date OIRA received the guidance; the date OIRA returned the guidance; any suggestions OIRA made to the Department; and any changes made in response to OIRA's suggestions.

If you have any questions, please contact RAFM staff at (202) 224-2862. Thank you for your attention to this matter.

Sincerely,



James Lankford
Chairman
Subcommittee on Regulatory Affairs
and Federal Management, U.S. Senate
Committee on Homeland Security and
Governmental Affairs

[23] Office of Mgmt. and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 2,432 (Jan. 25, 2007).

cc: The Honorable Loretta Lynch
Attorney General
U.S. Department of Justice

The Honorable Heidi Heitkamp
Ranking Minority Member
Subcommittee on Regulatory Affairs and Federal Management