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Promoting marriage, family, life & liberty in the Land of Lincoln

June 29, 2016

Dr. Tony Smith, Illinois State Superintendent of Education
Rev. James Meeks, Chairman of the Illinois State Board of Education
100 W. Randolph St #14-300
Chicago, IL 60601

Dear Gentlemen:

I am writing this letter on behalf of the Illinois Family Institute, regarding Title IX, 20 U.S.C. §§1681-1688, and its implementing regulation at 34 C.F.R. Part 106. This is of course the rule that schools receiving federal funding must accommodate gender-dysphoric students. Pursuant to Executive Order 12250, the Department of Justice has authority to bring enforcement actions to enforce these Title IX provisions.

Title IX provides that “[n]o 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...” 20 U.S.C. §1681. The regulations implementing Title IX provide, in relevant part, that “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular...or other education program or activity operated by a recipient which receives Federal financial assistance.” 34 C.F.R. §106.31(a).

The implementing regulations also provide that a funding recipient shall not, on the basis of sex:

“Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; ... Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; ... Deny any person any such aid, benefit, or service; ... Subject any person to separate or different rules of behavior, sanctions, or other treatment; ...[or] Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.” 34 C.F.R. §106.31(b).

The purpose of this letter is to urge you to refuse compliance with the Department of Justice’s (DOJ) interpretation of Title IX as requiring that “transgender” students be allowed to use lavatories, showers,

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and locker rooms that correspond to the gender with which they “identify,” rather than their biological gender. Nothing in the text, structure, legislative history, or accompanying regulations of Title IX addresses “gender identity.” Indeed, recognizing that Title IX does not protect against discrimination because of “gender identity” (but only against discrimination because of biological sex), beginning in 2011, Senator Al Franken (D-MN) has repeatedly introduced legislation modeled after Title IX that would protect against “gender identity discrimination” in the education context, and this legislation has failed to pass every year it has been introduced.

Title IX, and its accompanying regulations, use the term “sex,” not “gender identity,” in describing the type of discrimination prohibited. The term “sex” as used in Title IX and its implementing regulations means male and female, under the science-based binary conception of sex consistent with one’s birth or biological gender.

Title IX also states that “nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes[,]” 20 U.S.C. §1686, indicating that Congress intended that Title IX should respect student privacy rights and not violate them by compelling introduction of opposite-sex students into private areas designated for one biological sex only.

Regulations accompanying Title IX confirm that schools “may provide separate toilet, locker room, and shower facilities on the basis of sex, [as long as] such facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex.” 34 C.F.R. §106.33. Preventing the mixing of biological boys and girls in intimate environments like restrooms, locker rooms, and showers is the very reason Congress allowed for separate living facilities according to biological gender, and the reason that Title IX regulations allow for separate restrooms, locker rooms, and changing areas for the different sexes.

Schools in Illinois are not bound to this “gender identity” mandate, because the Department of Education (DOE) acts without legal authority by adopting and enforcing a legislative rule redefining “sex” in Title IX to include “gender identity.”

Under the Administrative Procedure Act (APA), any “rules which do not merely interpret existing law or announce tentative policy positions but which establish new policy positions that the agency treats as binding must comply with the APA’s notice-and-comment requirements, regardless of how they initially are labeled.” 72 Fed. Reg. 3433. Further, regulations enacted under Title IX must also be “approved by the President” before they become effective. 20 U.S.C. §1682.

The DOE has declared, without authority, that the term “sex” as used in Title IX’s prohibition on sex discrimination now means, or at least includes, “gender identity.” The DOE announced this new legislative rule redefining “sex” to schools nationwide in several DOE guidance documents published over the last few years, including the following: U.S. Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, 5 (Apr. 2014); U.S. Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Single-Sex Elementary and Secondary

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Classes and Extracurricular Activities, 25 (Dec. 2014); U.S. Department of Education, Office for Civil Rights, Title IX Resource Guide, 1, 15, 16, 19, 21-22 (Apr. 2015). DOE's new rule requires schools to treat students consistently with their perceived "gender identity," regardless of biological sex.

DOE is treating its mere declaration that Title IX bars "gender identity" discrimination as if it were a legislative rule binding on all schools that are subject to Title IX. Again, DOE did not comply with APA's notice-and-comment requirements when it adopted its legislative rule redefining "sex" in Title IX to include gender identity and mandating that schools give students seeking access to opposite-sex facilities based on their "gender identity" the access they desire. Having established that DOE has no authority to penalize Illinois schools (or any schools) for maintaining separate restroom facilities, locker rooms, and showers based on biological sex, not perceived or imagined "gender identity," we write to urge you NOT to comply with DOE's demands in this regard.

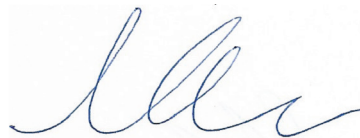
The tremendous harm that results from designating use of restroom facilities and showers and locker rooms by "gender identity" rather than biological sex cannot be overstated. A lawsuit is currently pending in federal court in Chicago where high school girls recount the distress and mortification they feel about having their privacy invaded by biological males who "perceive" themselves to be female, using the same restrooms, showers, and locker rooms as they. These young girls have had their right to privacy invaded, as well as their right to be free from gender-based harassment. They are harassed mercilessly for objecting to males sharing restrooms, showers, and locker rooms with them.

There is the even greater harm of DOE's illegitimate edict creating a ripe environment for sexual assault, especially given the ages of the students in question and the attendant hormonal changes students experience at these ages.

Again, on behalf of Illinois Family Institute, I urge you to refuse compliance with the DOE's illegitimate edict requiring use of restroom, locker room, and shower facilities in schools to be designated by "perceived gender identity" rather than biological sex. As this edict is not properly law, you would have recourse against the DOE and the DOJ if they were to attempt to punish you in any way for such refusal.

Please do not hesitate to contact me with any questions or concerns. Thank you for your attention to this critical matter.

Yours truly,

A handwritten signature in blue ink, appearing to read 'J. Craddock', with a stylized flourish at the end.

Jason R. Craddock

cc: The Honorable Bruce Rauner