



Jeff Landry
Attorney General

State of Louisiana

DEPARTMENT OF JUSTICE
CIVIL DIVISION
P.O. BOX 94005
BATON ROUGE
70804-9005

May 24, 2016
OPINION 16-0078

The Hon. Representatives Johnson, Abraham, Amedee, Bacala, Bagley, S. Bishop, Carmody, Coussan, DeVillier, Edmonds, Emerson Garafalo, Harris, Havard, Henry, Hodges, Hoffman, Hollis, Horton, Huval, Ivey, Mack, McFarland, Miguez, Jim Morris, Jay Morris, Richard, Simon, Seabaugh, Stokes, Talbot, and Willmott
Louisiana House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

15-A Constitutional Law

La. R.S. 49:215

Governor's authority as it relates to
Executive Orders.

To the Honorable Messrs. and Mmes.:

You have requested an opinion regarding new directives issued by executive branch officials in both our State and the Federal Government.

Specifically, you raise questions regarding the Obama Administration's recently issued guidance (referenced in your letter and herein as the "Obama Directive") regarding Title IX and transgender student access to bathroom and locker facilities. You request an opinion on whether school districts in our State must comply with the Obama Directive and/or whether a legal challenge to the Obama Directive may be appropriate at this time.

You also ask for an opinion regarding Executive Order No. JBE 16-011 ("JBE 2016-11" or "the Order"), in which Governor John Bel Edwards provides that "state agencies, offices, commissions, boards, entities, or officers of the State of Louisiana" shall not "discriminate" on various grounds, which include "gender identity." This prohibition encompasses the provision of any service by these entities and persons as well as covering employment matters. JBE 2016-11 also extends to any "contracts for the purchase of services" and further requires that contracts include a provision that the contractor will not discriminate on any of the prohibited grounds, including gender identity. JBE 2016-11 also directs all state entities, officials, and political subdivisions of the State to cooperate with the implementation of the Order.

The specific questions on which you have requested an opinion are:

- (1) By using the term "gender identity," is JBE 2016-11 unconstitutionally vague under either the United States Constitution or the Louisiana Constitution? If it is not, then what meaning does the State's chief legal officer ascribe to that term as used in JBE 2016-11?
- (2) JBE 2016-11 requires non-discrimination on the basis of "gender identity." Does this mean that "all state agencies, departments, offices, commissions, boards and entities of the State must allow persons to use public restrooms of the gender with which they identify, regardless of their biological sex? JBE 2016-11 also requires private businesses that contract with the State not to discriminate on the basis of "gender identity." Does this mean that those private contractors must allow persons to use public restrooms of the gender with which they "identify," regardless of their biological sex?
- (3) JBE 2016-11 purports to bind "officers of the State of Louisiana." Does this term encompass state officials outside the executive branch, such as state legislators or justices of the Louisiana Supreme Court? If so, does JBE 2016-11 thereby violate separation of powers in the Louisiana Constitution?
- (4) JBE 2016-11 purports to bind "any political subdivision" of the State of Louisiana. Does the Order thereby exceed the authority of the executive branch under the Louisiana Constitution? Does the Order violate separation of powers in the Louisiana Constitution by purporting to enact legislation?
- (5) JBE 2016-11 exempts from its contractor non-discrimination provision certain religious entities, namely "a religious corporation, religious association, religious educational institution, or religious society." These terms are not defined by reference to state or federal law; therefore, you ask what meaning is ascribed to these terms. Do these terms mean no private business or individual contractor is exempt, regardless of the sincere religious beliefs of the owners of that business or that individual?
- (6) Are the terms referenced above in question 5, as used in JBE 2016-11, as broad as the term "person" in the Preservation of Religious Freedom Act, ("PRFA"), La. R.S. 13:5234(1) and in La. R.S. 1:10? If not, can JBE 2016-11 be read to be consistent with PRFA? If not, is JBE 2016-11 invalid to that extent? If so, could an aggrieved person sue the State under PRFA for injunctive relief, damages, attorney fees, and costs?
- (7) Does JBE 2016-11 further empower or expand the jurisdiction of the Louisiana Commission on Human Rights ("LCHR") in these matters and/or allow LCHR to define or adjudicate using the term "gender identity," and/or fine businesses and

employers who may be accused of violating the Order? If so, would that expansion of jurisdiction over such a matter violate the LCHR limitations currently provided by La. R.S. 51:2232, *et. seq.*?

The Federal Guidance

The Obama Administration issued a directive through the federal Department of Education and Department of Justice, Office of Civil Rights, on Friday, May 13, 2016 which purports to include "gender identity" in the coverage of Title IX ("the Federal Guidance").¹ It is the policy of this Office not to issue Attorney General Opinions interpreting federal law or addressing matters that are in or likely to be in litigation. Your request regarding the Federal Guidance clearly presents questions requiring interpretation of federal law. We also believe the Federal Guidance raises issues that are likely to result in litigation in which this Office may be involved. For both of these reasons, we decline to issue an Attorney General's Opinion on the questions related to the Federal Guidance. This matter is, however, of great concern and creates an immediate harm to the State by causing confusion and chaos in planning for state and local funding statewide. For this reason, we have issued to various stakeholders who receive Title IX funds and are subject to its constraints a letter addressing the current status of federal law on this issue. That letter is attached to and incorporated into this Opinion in response to your questions regarding the legal effect and enforceability of this Guidance.

There is no doubt the Federal Guidance causes immediate, direct, and substantial harm to this State (and others) *and that it is intended to do so*. The threat alone of losing \$1 billion in federal funding is disruptive to lawmakers and school boards who have structured their budgets incorporating the use of these funds. It creates personal, financial, and political chaos and upheaval with stakeholders, such as parents who have children in schools who receive federal funding and taxpayers whose taxes support the

¹ See The White House Office of Budget Management's *Final Bulletin for Agency Good Guidance Practices*; *supra*, n. 1 ("Guidance can have coercive effects or lead parties to alter their conduct....Even if not legally binding, such guidance could affect behavior in a way that might lead to an economically significant impact."). By letter dated May 17, the Attorneys General of Oklahoma, Texas, and West Virginia have requested additional clarification from USDOE and USDOJ regarding the effects intended by the "Dear Colleague" letter. Title IX expressly permits federally funded educational facilities to maintain separate living facilities for the different sexes and its implementing regulations permit schools to provide "separate toilet, locker room, and shower facilities on the basis of sex" provided the separate facilities are "comparable" for each sex. 20 U.S.C. §1686, 34 C.F.R. §106.33. However, USDOE has issued "guidance documents" over the past few years purporting to redefine the term "sex" in Title IX to include "gender identity." See, USDOE, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, 5 (Apr. 2014); Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, 25 (Dec. 2014); USDOE, Office for Civil Rights, *Title IX Resource Guide*, 1, 15, 16, 19, 21-22 (Apr. 2015).

public education system. Thus, the threat alone of loss of funding is a tangible harm. No funds are immediately available to simply backfill a loss, even to a single school district. Loss of funding would impact the MFP Formula, which is adopted by BESE and approved by the Legislature each year. If the State is required to backfill a loss of federal funding, the entire State budget is impacted. Notwithstanding the Obama Administration's lack of statutory authority, it has brought enforcement actions in the State of North Carolina. We urge you, therefore, to advise our office *immediately* if you become aware of *any instance* in which the Administration takes any adverse action in this State in an attempt to enforce this non-binding policy. We are continuing to evaluate our legal options and will take whatever steps are necessary to ensure the rule of law is followed.

JBE Executive Order 2016-11

Your letter raises a number of questions arising from Governor Edwards' Executive Order 2016-11. In addressing the legal effect of JBE 2016-11, most of these questions are resolved. The brief answer is an Executive Order cannot expand or create state law. "Gender identity" is not and has never been a legally protected class under state² or federal³ anti-discrimination laws. For reasons which follow, therefore, to the extent the

² La. R.S. 23:332 prohibits employment discrimination on the basis of an individual's "race, color, religion, sex, or national origin." State courts have applied the same legal standards of proof under state law as required under federal law. See, *Martin v. Winn-Dixie Louisiana, Inc.*, 132 F.Supp.3d 794 (M.D. La. 2015) (Plaintiff who fails to meet burden under Title VII will simultaneously fail to satisfy or concurrently demonstrate the prerequisites set forth in Louisiana employment discrimination law); *Corley v. Louisiana ex rel. Div. of Admin., Office of Risk Management*, 816 F.Supp.2d 297 (M.D. La. 2011) (race discrimination claim under §1981, Title VII, and the Louisiana Employment Discrimination Law are governed by the same analysis); *Alleman v. Louisiana Dept. of Economic Development*, 698 F.Supp.2d 644 (M.D. La. 2010) (well-established *McDonnell Douglas* framework is applied to consideration of disparate treatment claims brought under Title VII, §1981, and LEDL); *Knapper v. Hibernia Nat. Bank*, 2009-1036 (La. App. 4 Cir. 9/8/10), 49 So.3d 898 (same); *Burnett v. East Baton Rouge Parish School Bd.*, 2011-1851 (La. App. 1 Cir. 5/3/12), 99 So.3d 54 (Louisiana courts routinely look to federal jurisprudence for guidance in determining whether a claim of racial discrimination has been asserted and the proper burden of proof has been followed).

³ Federal courts have interpreted Title IX and Title VII consistently and have uniformly held that Title VII applies to one's biological sex, not to sexual identity. See *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995) ("Finally, other circuit courts have acknowledged that the prohibitions of discrimination on the basis of sex of Title IX and Title VII are the same."); *Preston v. Commonwealth of Va. ex rel. New River Community College*, 31 F.3d 203, 206 (4th Cir. 1994) (Title VII principles govern claims of employment discrimination under Title IX); *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311 (10th Cir. 1987) ("We find no persuasive reason not to apply Title VII's substantive standard regarding sex discrimination to Title IX suits."); *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1084 (7th Cir.1984)(Title VII applies to one's biological sex, not to sexual identity); *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007) (discrimination based upon person's status as transsexual was not discrimination "because of sex" under Title VII, rejecting equal protection claim because transsexual was not member of a protected class, and noting use of a bathroom designated for the opposite sex does not constitute mere failure to

Order purports to establish a new, legally protected class, it may not do so and should be interpreted as merely aspirational and without any binding legal effect. Additionally, because an executive order may not expand or create State law, Section 3 of the JBE 2016-11 regarding contracts has no legally binding effect. Finally, because an executive order may not expand or create State law, it cannot be the basis for liability or a cause of action initiated by or against the State.

La. R.S. 49:215 grants the legislative authority for the governor to issue executive orders and states the issuance of an executive order is pursuant only to the power of the governor to see that *state laws are faithfully executed*. Thus, it is purely an *executive* power among the separation of powers, as explained in *I.N.S. v. Chadha, et al.*, 462 U.S. 919, 103 S.Ct. 2764 (1983); *State v. Broom*, 439 So.2d 357 (La. 1983) (Lawmaking is not an executive function).⁴ Lawmaking is the province of the legislative branch of government.⁵ Therefore, while nothing prohibits the Governor from issuing an Executive Order and such orders are statutorily authorized, the *content* does not constitute nor can it substitute for legislation. The Governor's authority may be limited by the separation of powers doctrine and other constitutionally divided powers among

conform to sex stereotypes under Title VII); See also *Oiler v. Winn-Dixie La., Inc.*, No. Civ. A. 00-3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002) (Title VII applies to one's biological sex); *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F.Supp.3d 657, 676 (W.D. Pa. 2015); *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994) (finding it "clear" that Title IX and its regulations allow "separate toilet, shower and locker room facilities"); *Doe v. Clark Cty. Sch. Dist.*, No. 206-CV-1074-JCM-RJJ, 2008 WL 4372872, at *4 (D. Nev. Sept. 17, 2008) (noting that Title IX does not require letting students use the restroom that corresponds with their gender identity); *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 477 S.W.3d 185, 187 (Mo. Ct. App. 2015) (dismissing appeal on procedural grounds and noting that court below ruled that biological girl who identified as a boy has "no existing, clear, unconditional legal right which allows [her] to access restrooms or locker rooms consistent with [her male] gender identity."). In *G.G. ex rel. Grimm v. Gloucester City Sch. Bd.*, No 15-2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016), the single outlier, the Fourth Circuit gave deference to the Department's new interpretation of existing rules under Title IX; however, the case is currently still in litigation on appeal.

⁴ See also *Unwired Telcom Corp. v. Parish of Calcasieu*, 2003-0732 (La. 1/19/05), 993 So.2d 392, 400, and *St. Charles Gaming Company, Inc. v. Riverboat Gaming Comm.*, 94-2697 (La. 1/17/95), 648 So.2d 1310, 1319.

⁵ La. Const. Art. II, §§ 1 and 2; La. Const. Art. III, § 1; See also 20 La. Civ. L. Treatise, Legis. Law & Proc. §8.1 (2015 ed.) (Legislative power is vested solely in the Legislature.) Although the Legislature may constitutionally delegate authority to executive branch agencies to "fill in the details" of a law by adopting administrative rules and regulations, it cannot delegate primary legislative authority. A proper delegation must contain a clear expression of legislative policy, must prescribe sufficient standards to guide the agency in the execution of that policy, and must be accompanied by adequate safeguards to protect against the abuse of discretion by the agency. *Schwegmann Bros. Giant Super Markets v. McCrory*, 112 So.2d 606 (La. 1959). The Governor's general authority to issue executive orders does not meet this test.

constitutionally-created officers and entities in the executive branch.⁶ In addition, although the Governor has a general responsibility to see that the laws are faithfully executed, the legislature has distributed a vast array of the direct responsibility for administering the laws of this State to various state officers, agencies, departments and political subdivisions within the executive branch.

Gubernatorial executive orders are a means whereby the Governor can order his appointed agency heads to execute faithfully the federal and state constitutions and the laws enacted by the Louisiana Legislature. As in the case of administrative rules, the language contained in executive orders may constitute statements of enforcement policy and may include how or in what manner a governor intends to execute particular laws.⁷ Where the law is somewhat broad but reasonably clear, the executive order may spell out the precise details of the manner of its enforcement; provided however, that the constitution, legislation, or the Louisiana Administrative Procedures Act may impose constraints on the exercise of this general authority.⁸ An executive order would appear to be valid when the legislation it enforces is valid and sufficient legislative power, guidelines, substance, and delegation are given in the law to formulate the executive order. But an executive order cannot legislate or purport to adopt what the legislature

⁶ See *Hill v. Jindal*, 2014-1757 (La. App. 1 Cir. 6/17/15), 175 So.3d 988 (finding two of Governor Jindal's executive orders unconstitutionally infringed upon BESE's constitutional powers to supervise and control the state's public schools) and *Aguillard v. Treen*, 440 So.2d 704 (La. 1983) (holding that state statute mandating a course of study was in keeping with legislature's constitutional charge to establish and maintain public education system and did not encroach on BESE's authority); See also *Louisiana Hosp. Ass'n v. State*, 2013-579 (La. App. 1 Cir. 12/30/14), 168 So.3d 676 (concluding the Louisiana Homeland Security and Emergency Assistance and Disaster Act did not intend to convey legislative authority to the governor during a state of emergency. Since the governor had no authority to enact substantive law, he had no authority to transfer such power to the Commissioner of Insurance by executive order), and La. Atty. Gen. Op. No. 78-1381A (explaining that an executive order issued to implement a statute is nullified when the statute is repealed).

⁷ Unlike administrative rules, an executive order is published but not promulgated as required of rules or regulations under the LAPA, nor has the Legislature granted the Governor the authority to promulgate rules in this instance. La. R.S. 49:954.1.

⁸ If the legislature has granted rule-making authority to an agency in enforcing laws, the agency must follow the Louisiana Administrative Procedures Act ("LAPA") to adopt such rules and regulations pursuant to that authority. La. R.S. 49:950, *et seq.* The LAPA requires promulgation of rules, the process by which notice and an opportunity to comment are afforded to all. A rule means "each agency statement guide, or requirement for conduct or action, exclusive of those regulating only the internal management of the agency and those purporting to adopt, increase, or decrease any fees imposed on the affairs, actions, or persona regulated by the agency, which has general applicability and the effect of implementing or interpreting substantive law or policy, or which prescribes the procedure or practice requirements of the agency...." La. R.S. 49:951. Expanding the interpretation of gender discrimination through an executive order is not a permissible way to fill gaps in the law when rulemaking is required and, in any event, would likely constitute an invalid rule because it exceeds statutory authority.

has clearly rejected.⁹ With regard to JBE 2016-11, the general authority to issue an executive order is not sufficient delegation of authority to interpret the term “sex” under the State anti-discrimination laws – indeed, no such delegation to *any* agency exists in the Louisiana statutes and the Governor’s inclusion of “sexual identity” contravenes well-settled interpretations of the term as excluding such an interpretation.¹⁰

It is the opinion of this Office, therefore, that, while possibly aspirational, the Edwards Order does not and cannot create a protected class and cannot create any legally enforceable standard regarding discrimination based upon gender identity.

As to state contracts, if reasonably within the legislative intent, an executive order *may* require certain procedures be followed, or terms be included, so that persons who are state contractors have to abide by those conditions and terms with respect to a particular project or purchases for which state funds have been appropriated by the legislature. So, for example, an executive order requiring review by the State Procurement Officer of cooperative endeavor agreements is likely within the parameters of existing state procurement law and procedure.

JBE 2016-11 cannot establish a new condition of contracting for all state contracts that require a state contractor who is a private person to behave in some special way for all purposes or for all his, her, or its activities. Nor can what would amount to substantive contractual changes be imposed unilaterally upon contractors with pre-existing contracts. Private persons have federal and state constitutional freedoms that cannot be curtailed or restricted in a wholesale way for merely doing business with the state with respect to merely one aspect of its activities and purposes. This general observation is most true when the private person engages in expressive activity protected by the First and Fourteenth Amendments to the Constitution of the United States of America.¹¹ Again, to the extent JBE 2016-11 seeks to establish a new condition of contracting by imposing a prohibition against discrimination against a class of individuals that exceeds protections required by state or federal law, it is unenforceable and should be treated merely as

⁹ See House Bills 612 and 632 of the 2015 Regular Session, House Bills 199 and 887 and Senate Bills 424 and 164 of the 2014 Regular Session, House Bill 85 of the 2013 Regular Session, and House Bill 47 of the 2012 Regular Session. House Bills 501 and 925 of the 2016 Regular Session were deferred. Senate Bills 436 and 332, as of the date of this Opinion, were still pending on the Senate Floor.

¹⁰ The Louisiana Employment Discrimination Law, La. R.S. 23:301, *et seq.* prohibits intentional discrimination in employment because of the individual’s race, color, religion, sex or national origin. See fn. 2 and 3, *supra*, and cases cited therein discussing the interpretation of the term “sex.”

¹¹ Note also that where parties have entered into existing contracts, new terms that substantially change the original terms of the agreement between the party could be grounds for breach of contract. In the arena of publicly bid projects, for example, the bid documents issued prior to JBE 2016-11 would not have required the additional terms and could constitute a material change to the bid documents.

aspirational and voluntary between the contracting parties.

Consequently and in conclusion, the questions you ask regarding the scope and effect of JBE 2016-11 appear to be resolved by the conclusion of this Office that the Order has no binding legal effect to the extent it purports to create or expand the law. With regard to the meaning of the term "gender identity," this Office defers to jurisprudence describing this term and the conditions to which it applies.¹² To your specific question regarding bathroom facilities, for reasons previously explained, it is the opinion of this Office that no agency, department, office, commission, board, or private or public entity must allow persons to use the bathroom of the gender with which they identify on the purported authority of JBE 2016-11.¹³ JBE 2016-11 does not bind any officers of the State or political subdivisions to the extent it expands or creates law. It does not conflict with PRFA because it cannot create or expand the law. It does not further empower or expand the jurisdiction of the LCHR because it cannot create or expand the law.¹⁴ It does not create a new mandatory condition for state contracting. And because it carries no legal power to expand, enforce, or interpret state law, it cannot be a basis of a cause of action for liability against the State.¹⁵

¹² The term "sexual identity" has been discussed in the jurisprudence. "Gender identity" in the jurisprudence describes a condition in which an individual "identifies" with a gender other than their biological gender. See cases cited, *supra*, fn. 3, and in the prisoner context, *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) and *Kothmann v. Rosario*, 558 Fed. Appx. 907 (11th Cir. March 7, 2014).

¹³ We note, also, that the Order does not specifically discuss or purport to direct any officer or agency with regard to bathroom access. La. R.S. 49:146 (Facilities to which public invited; discrimination), like the employment discrimination laws, prohibits discrimination "based on age, sex, or physical or mental disability."

¹⁴ The LCHR is located within the Executive Branch, Office of the Governor. La. R.S. 36:4 (B)(12). It is established in La. R.S. 51:2231 *et seq.* and charged with executing the policies embodied in the Federal Civil Rights Act of 1964, 1968, and 1972 and the Age Discrimination in Employment Act of 1967, as amended. La. R.S. 51:2231 (A). LCHR also has the power to adjudicate claims of discrimination prohibited by the Louisiana Employment Discrimination Law and pay discrimination prohibited by La. R.S. 23:664. La. R.S. 51:2231. Because an Executive Order may not expand or create law, the Order cannot legally expand the definition of disability in Title 51 or grant LCHR the authority to adjudicate claims of discrimination based on homosexuality, bisexuality, transvestism, transexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders. The powers and duties of the Commission in La. R.S. 2235 and section 14 grant authority to "adopt, promulgate, amend, and rescind rules and regulations to effectuate the purposes and provisions of this Chapter, including regulations requiring the posting of notices prepared or approved by the commission." However, it only has rulemaking authority as it pertains to Title 51 and, in any event, would be violating separation of powers to the extent it attempted to interpret existing state law in a manner that it attempted to create new law or expand current law.

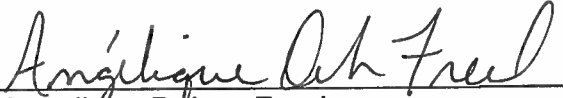
¹⁵ The focus of the Request is the "sexual identity" language in the Order. This Opinion does not address the general scope of the governor's authority to direct or control other constitutionally-created entities or offices. The First Circuit, however, has held that the Governor's authority is limited by the constitution's

As there is no constitutional or statutory provision in Louisiana banning discrimination on the basis of "gender identity," JBE 2016-11 goes beyond merely filling in the enforcement gaps surrounded and defined by statutory legislation and exceeded statutory authority by attempting to create new legislation in violation of the separation of powers. The Governor's constitutionally valid function is to see that the laws are faithfully executed and enforced, not to make any of the laws, which, constitutionally, is the legislative power and function.

We hope this opinion adequately addresses the legal issues you have raised. If our office can be of any further assistance, please do not hesitate to contact us.

With best regards,

JEFF LANDRY
ATTORNEY GENERAL

BY: 
Angelique Duhon Freel
Assistant Attorney General

JL: ADF



Jeff Landry
Attorney General

State of Louisiana
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
P.O. BOX 94005
BATON ROUGE
70804-9005

May 18, 2016

James D. Garvey
Chairman
BESE
1201 North Third Street
Baton Rouge, LA 70802

Eddie Bonine
Executive Director
LHSAA
12720 Old Hammond Hwy
Baton Rouge, LA 70816

Norwood "Woody" Oge
Chairman
LCTCS Board
833 Legion Drive
Gretna, LA 70056

Richard Lipsey
Chairman
Board of Regents
1201 North Third Street
Baton Rouge, LA 70802

Russ Wise
President
LA School Boards Ass'n
7912 Summa Avenue
Baton Rouge, LA 70809

James Buech
Acting Secretary
Office of Juvenile Justice
7919 Independence Blvd
Baton Rouge, LA 70806

Re: USDOE/USDOJ "Dear Colleague" Letter on Transgender Students

Dear Sirs:

The President of the United States, through the U.S. Department of Education (USDOE) and the U.S. Department of Justice (USDOJ) ("the Administration"), last Friday issued a "Dear Colleague" letter ("Guidance") that purportedly requires school districts, colleges, and universities in this country to allow transgender students to use bathrooms and locker rooms that match the student's chosen gender identity and threatening federal civil rights litigation and education funding withholdings.¹ I write to provide information to you and the schools and students you supervise, manage, and/or advise and to reassure you that-- as your Attorney General-- I will vigorously defend the State and its citizens from unlawful action threatened on the basis of this incorrect interpretation of law. Although the Administration's actions are not legally binding, its actions are certainly not benign - the threat alone to the State or any local entity's receipt of federal funds pursuant to Title IX not only jeopardizes the safety and well-being of the student body, but also creates an immediate crisis with the entire State and local

¹See, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>, last accessed May 18, 2016. USDOE has characterized the letter as "significant guidance," which is a defined term under federal regulatory and administrative law. Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507good_guidance.pdf.) USDOJ, in official actions in North Carolina, has taken the same position as USDOE and claims that its interpretation of Title IX also applies to Title VII and the Violence Against Women Reauthorization Act of 2013, a position which has implications for employers and corrections facilities. Clearly the implications of this position in prison facilities are dangerous to corrections officers and the inmate population.

public education funding structure. I am currently evaluating further legal actions that may be necessary to protect our State.²

Let me be perfectly clear: President Obama and his appointees do not have legal authority to require our children to share locker rooms and bathrooms with children of the opposite sex. More specifically, the federal government cannot change existing law through “unofficial guidance;” cannot impose *new* conditions in existing programs then restrict continued receipt of funds on these new conditions without the consent of the States; and cannot threaten to revoke funds based upon new and unfounded interpretations of law that are contrary to existing regulations and judicial settled interpretations of Title IX.³ The Administration’s legal interpretation has been uniformly rejected by the federal courts.⁴ The court cases cited in the

² See *Final Bulletin for Agency Good Guidance Practices*; *supra*, n. 1 (“Guidance can have coercive effects or lead parties to alter their conduct....Even if not legally binding, such guidance could affect behavior in a way that might lead to an economically significant impact.”). By letter dated May 17, the Attorneys General of Oklahoma, Texas, and West Virginia have requested additional clarification from USDOE and USDOJ regarding the effects intended by the “Dear Colleague” letter. Title IX expressly permits federally funded educational facilities to maintain separate living facilities for the different sexes and its implementing regulations permit schools to provide “separate toilet, locker room, and shower facilities on the basis of sex” provided the separate facilities are “comparable” for each sex. 20 U.S.C. §1686, 34 C.F.R. §106.33. However, USDOE has issued “guidance documents” over the past few years purporting to redefine the term “sex” in Title IX to include “gender identity.” See, USDOE, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, 5 (Apr. 2014); Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, 25 (Dec. 2014); USDOE, Office for Civil Rights, *Title IX Resource Guide*, 1, 15, 16, 19, 21-22 (Apr. 2015).

³ Title IX generally bans discrimination “on the basis of sex” by any education program or activity receiving federal funding. 20 U.S.C. §1681; 34 C.F.R. §§106.31(a); 34 C.F.R. 106.31(b). Nothing in Title IX’s text, legislative history, or implementing regulations address or mention “gender identity.” Federal legislation has been introduced every year since 2011 to introduce “gender identity” into Title IX, but it has failed every year.

⁴ Federal courts have interpreted Title IX and Title VII consistently and have uniformly held that Title VII applies to one’s biological sex, not to sexual identity. See *Lakoski v. James*, 66 F.3d 651 (5th Cir. 1995) (“Finally, other circuit courts have acknowledged that the prohibitions of discrimination on the basis of sex of Title IX and Title VII are the same.”); *Preston v. Commonwealth of Va. ex rel. New River Community College*, 31 F.3d 203, 206 (4th Cir. 1994) (Title VII principles govern claims of employment discrimination under Title IX); *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311 (10th Cir. 1987) (“We find no persuasive reason not to apply Title VII’s substantive standard regarding sex discrimination to Title IX suits.”); *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1084 (7th Cir.1984)(Title VII applies to one’s biological sex, not to sexual identity); *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007) (discrimination based upon person’s status as transsexual was not discrimination “because of sex” under Title VII, rejecting equal protection claim because transsexual was not

Guidance deal with sex and gender *stereotyping*, not gender identity, and are therefore not controlling.⁵ Nor is there any indication in Title IX's language or legislative history of any purpose on the part of Congress to reach alleged discrimination on the basis of gender identity.⁶

member of a protected class, and noting "use of a bathroom designated for the opposite sex does not constitute mere failure to conform to sex stereotypes under Title VII); *see also Oiler v. Winn-Dixie La., Inc.*, No. Civ. A. 00-3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002) (Title VII applies to one's biological sex); *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015); *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994) (finding it "clear" that Title IX and its regulations allow "separate toilet, shower and locker room facilities"); *Doe v. Clark Cty. Sch. Dist.*, No. 206-CV-1074-JCM-RJJ, 2008 WL 4372872, at *4 (D. Nev. Sept. 17, 2008) (noting that Title IX does not require letting students use the restroom that corresponds with their gender identity); *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 477 S.W.3d 185, 187 (Mo. Ct. App. 2015) (dismissing appeal on procedural grounds and noting that court below ruled that biological girl who identified as a boy has "no existing, clear, unconditional legal right which allows [her] to access restrooms or locker rooms consistent with [her male] gender identity."). In *G.G. ex rel. Grimm v. Gloucester City Sch. Bd.*, No 15-2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016), the single outlier, the Fourth Circuit gave deference to the Department's new interpretation of existing rules under Title IX; however, the case is currently still in litigation on appeal.

⁵ "Gender identity" describes a condition in which an individual "identifies" with a gender other than their biological gender. An individual's biological gender is commonly and scientifically understood and accepted as the condition of being male or female, as medically determined at a person's birth. Gender can also be determined by an individual's DNA. The normal individual has 46 chromosomes, two of which designate sex. An XX configuration denotes female; XY denotes male. These chromosome patterns cannot be surgically altered. Wise, *Transsexualism: A Clinical Approach to Gender Dysphoria*, 1983 *Medic. Trial Tech. Q.* 167, 170. "Gender dysphoria" is a medically recognized psychological disorder covering the spectrum of conditions that result from "disjunction between sexual identity and organs." The American College of Pediatricians has urged educators and legislators to reject all policies that condition children to accept as normal a life of chemical and surgical impersonation of the opposite sex, confirming "everyone is born with a biological sex." The College's official statement further states, "[w]hen an otherwise healthy biological boy believes he is a girl, or an otherwise healthy biological girl believes she is a boy, an objective psychological problem exists that lies in the mind not the body, and it should be treated as such. These children suffer from gender dysphoria." *See*, <http://www.acped.org/the-college-speaks/position-statements/gender-ideology-harms-children>.

⁶ In *Etsitty*, 502 F.3d at 1224, the 10th Circuit found that a transsexual who had been discharged from her job could not claim protection under Title VII based upon transsexuality *per se*, but instead must rest on the *Price Waterhouse* theory of protection as a man who fails to conform to sex stereotypes. The Court nevertheless could not "conclude [*Price Waterhouse*] requires employers to allow biological males to use women's restrooms." Moreover, the Court agreed with the lower court that the Utah Transit Authority's reason that it was concerned use of women's public restrooms by a biological male could result in liability for the UTA stated a legitimate, non-discriminatory reason for Etsitty's termination.

The Administration does not contend -- nor could it contend -- that people with a gender identity different from their biological sex are a constitutionally-protected class under the Fourteenth Amendment, nor that globally extending Title IX to such a class is congruent and proportional to the goal of preventing *unconstitutional* discrimination against members of that class. Accordingly, given that it is grounded solely in the Fourteenth Amendment, Title IX cannot constitutionally be construed to extend to the coverage the Administration contends.⁷

Providing protection through gender specific means in State-owned facilities falls squarely within the police power protected from federal encroachment by the enumerated powers doctrine and recognized in the Tenth Amendment. Indeed, the Administration's interpretation of Title IX constitutes an improper attempt to commandeer State-owned property in pursuit of a federal policy that has uniformly been rejected by the federal courts.

Moreover, no Title IX-covered entity in this State faces loss of funds without direct agency action, subject to a hearing and judicial review. Notwithstanding the Administration's misleading and threatening representations, no federal statute or regulation remotely requires the Administration's policy. The "guidance" is nothing more than policy disguised as law with footnotes. It is my understanding at this time no public or private entity has received any notice from the Administration advising it has violated any federal law or regulation or threatening it with loss of federal funds based upon its locker room or bathroom facilities, academic or athletic programs, or other activities funded through Title IX. I *urge* you to notify my office *immediately* in the event you or an organization under your supervision, management, membership or oversight does receive such a letter. I intend to intervene immediately.

My Office has aggressively pursued and prosecuted individuals who prey on children. The policy position adopted by the Obama Administration irresponsibly creates an environment in which children may be more easily exposed to sexual predators. Furthermore, this irresponsible and illegally issued Guidance places the mental well-being and privacy rights of ninety nine percent of Louisiana's children at risk without *any* demonstrable evidence of benefit to the less than one percent of the population this policy purports to benefit, in direct contravention of recommendations of the American Academy of Pediatricians. In addition to the aforementioned concerns, the Guidance violates settled legitimate expectations of privacy and safety that have long prevailed and are embraced by both federal law and our State constitution and statutes. The President's position, as demonstrated through the Guidance and USDOE and USDOJ's legal actions, are both bad law and policy.

Harassment that targets a student based on transgender identity is neither appropriate nor permissible under the law. School officials may make reasonable accommodations upon a person's request to address special circumstances and must exercise reasonable judgment in

⁷ See *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir.) (prisoner equal protection claim; "[w]hen the plaintiff is not a member of a protected class and does not assert a fundamental right, we determine only whether government classifications have a rational basis.")

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responding to a situation to ensure the safety and well-being of the student population.⁸ While there are opportunities for state lawmakers, school districts, athletic associations, and colleges and universities to address complex student safety issues in a nondiscriminatory manner - this mandate and threat of lawsuits and withholding of education funding is not a proper or legal approach. I am and will continue evaluating proper action with other State Attorneys General.

Sincerely,



Jeff Landry
Attorney General

Cc: The Hon. John Alario
The Hon. Taylor Barras
The Hon. John Bel Edwards
The Hon. Members of the Louisiana House of Representatives
The Hon. Members of the Louisiana Senate

⁸ Under 42 USC §12211(b), “disability” expressly excludes “transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders no resulting from physical impairments, or other sexual behavior disorders. Although these conditions are excluded, another condition may be present that is recognized as a disability under the Act. Therefore, any institution should evaluate individual circumstances when any individual requests accommodation under the ADA.