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May 17, 2016

Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
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Re: Dear Colleague Letter on Transgender Students

Dear Assistant Secretary Lhamon and Assistant Attorney General Gupta,

On May 13, 2016, you sent a "Dear Colleague Letter on Transgender Students" to recipients of federal funding subject to Title IX's requirements. We have reviewed the letter. As chief law officers of our respective states, it is imperative that we be able to advise our state agencies with a proper understanding of the effect you intend this letter to have. We thus write to you seeking clarification on several points.

First, you describe the letter as "significant guidance." We understand this designation to mean that you reasonably anticipate that your letter 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; or (ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or (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.[1]

That definition of "significant guidance," taken together with your statement that the purpose of the letter is to "inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations," leads us and others to understand that your Departments will consider any entity not adhering to this "significant guidance" as out of compliance with Title IX, and thus subject to loss of federal funding. In order to clarify this understanding, please answer the following questions: **In your view, must an entity receiving federal funding follow this "significant guidance" in order to be in compliance with Title IX and/or entitled to continued receipt of federal funding? Do circumstances exist in which you would consider a school still in compliance with Title IX despite non compliance with these guidelines? If so, please describe those circumstances and whether you would take steps to recoup or end federal funding.**

Second, in the "Final Bulletin for Agency Good Guidance Practices," the Office of Management and Budget stated that "given their legally nonbinding nature, significant guidance documents should not include mandatory language such as "shall," "must," "required" or "requirement[.]"[2] By our count, your letter uses the word "must" 15 times, and the words "required" and "requirement" 10 times. Because of the mandatory language used in your letter, it is our understanding that you intend the letter to bind recipients of federal funding to compliance. In order to clarify this understanding, please answer the following question: **Must recipients of federal funding satisfy the requirements described in the letter, including the requirement that recipients of federal funding "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations"?**

Third, you state that your letter "does not add requirements to applicable law." However, we are aware of no provision of Title IX, nor any decision of any court that would be binding in our states,[3] that mandates that schools "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations." In other words, if your letter imposes on its recipients the obligation to "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations," then we are at a loss as to how your letter does *not* in fact "add requirements to applicable law." In order to clarify any confusion, please answer the following question: **What existing statute, regulation, or binding court decision mandates that schools receiving federal funding must "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations"?**

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[1] 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/2007/012507_good_guidance.pdf.

[2] *Id.*

[3] The recent decision by two judges on the U.S. Court of Appeals for the Fourth Circuit in *G.G. v. Gloucester County School Board* did not address the legality of a federal edict as sweeping as the letter. Moreover, that decision is still subject to challenge; indeed, nine States filed a brief last week supporting further review by all fifteen judges on that court.

Fourth, your letter defines "gender identity" as "an individual's ***internal sense of gender***" (emphasis added). Your letter also explains that "[t]he Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity." We understand this to mean that in your view, schools are bound by each student's subjective statement of their "gender identity" with respect to defining that student's "sex." And once a student notifies the school that their "internal sense of gender" has changed, the school must immediately change the way it administers its programs with respect to that student. As your letter indicates, this would require the school to immediately require all staff to refer to the student as "he" instead of "she" (or vice versa), and to allow the student to use the bathroom and locker room for the sex opposite of that which they previously "identified," and even to let the student play sports for a team of the sex opposite of that which they previously "identified" (unless, apparently, there is "sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport."). In order to clarify any confusion, please answer the following question: **Is it now a requirement of Title IX that schools administer their programs according to each student's subjective "internal sense of gender," and that Title IX bars schools from requiring any sort of objective verification of a student's sex?**

Fifth, most schools understandably require that boys use the boy's restroom/locker room and that girls use the girl's restroom/locker room. Your letter states that once a student's "internal sense of gender" changes, that student must be allowed to use the bathroom of their choosing. It would be an odd result if this requirement meant that a transgender student could use *either* the boy's or the girl's restroom/locker room, whereas other students would remain bound to use one or the other. Indeed, it would conflict with your statement that "a school must not treat a transgender student differently from the way it treats other students of the same gender identity," since non-transgendered students would have less access to fewer restrooms/locker rooms than transgendered students. We assume, therefore, that a school could *require* the student to use only the bathroom for the gender with which the student at that moment in time identify. In order to clarify any confusion, please answer the following question: **May a school require that a student use *only* the bathroom/locker room for the gender with which that student identifies?**

We seek responses to these important clarifying questions by no later than close of business on May 24, 2016.

Sincerely,

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