

May 24, 2016

The Honorable Paul Ryan
Speaker of the House
H-232, The Capitol
Washington D.C. 20515

The Honorable Mitch McConnell
Senate Majority Leader
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Kevin McCarthy
House Majority Leader
H-107, The Capitol
Washington, D.C. 20515

The Honorable Harry Reid
Senate Democratic Leader
522 Hart Senate Office Building
Washington , DC 20510

The Honorable Nancy Pelosi
House Democratic Leader
H-204, The Capitol
Washington, DC 20515

Dear Senator McConnell, Senator Reid, Representative Ryan, Representative McCarthy, and Representative Pelosi:

On behalf of each of our organizations and the millions of Americans we represent, we write to express our grave concern over the threat posed to all public school children’s basic privacy and safety rights and to the right to equal opportunity in education for girls guaranteed in Title IX of the Education Amendments of 1972 (Title IX)¹ by the Obama Administration’s recent “guidance” to public schools.²

The Administration has unilaterally determined that Title IX applies to prohibitions on discrimination based on “gender identity,” as well as to students’ biological sex,³ despite lack of legislative history, textual, or judicial support for this conclusion. Though federal regulations declare that significant guidance documents issued by executive agencies are “non-binding [in] nature” and should not be “improperly treated as legally binding requirements,”⁴ the U.S. Department of Justice and U.S. Department of Education are threatening to condition every school district’s ability to receive federal education funding upon compliance with the Administration’s radical interpretation of Title IX.⁵ Thus, schools across the country are faced with an impossible situation—comply with the Administration’s lawless reinterpretation of Title IX and put the safety and privacy of their students at risk, or protect their students and risk losing hundreds of millions of dollars in federal funding.

As you are aware, executive agencies are not permitted to redefine a federal statute. Rather, legislative power is vested in the Legislative Branch.⁶ The Administration is clearly attempting to bypass the legislative process and ignore the original legislative intent, which did not intend to encompass claims of discrimination based on gender identity. Tellingly, the text of Title IX itself explicitly allows educational

¹ 20 U.S.C. § 1681.

² U.S. Dept. of Justice & U.S. Dept. of Education, Dear Colleague Letter: Transgender Students (May 13, 2016), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

³ *Id.*

⁴ 72 Fed. Reg. 3432, 3433, 3435 (Jan. 25, 2007).

⁵ U.S. Dept. of Justice & U.S. Dept. of Education, Dear Colleague Letter: Transgender Students, 2 (May 13, 2016), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

⁶ U.S. Const. art. I, § 1.

institutions to maintain “separate living facilities for the different sexes,” indicating binary, biological sex.⁷ Separating the sexes based on legitimate anatomical and biological differences—especially in the context of bathrooms, locker rooms and showers—has always been viewed as consistent with Title IX and other federal nondiscrimination statutes.

The Obama Administration’s reinterpretation of Title IX finds no basis in law or procedure. It appears that the Departments of Justice and Education are attempting to use the enforcement power of the Executive Branch to enforce a law that simply does not exist and are operating outside the bounds of authority granted to the Executive Branch by Article II of the United States Constitution.

Even worse than operating outside of their constitutional authority, the Obama Administration “guidance” threatens the ability of schools to provide an educational environment that protects the privacy and safety of their children, affording children less privacy protections than our country does prisoners.⁸ Already, sexual assault is a crime creating largely voiceless victims—68% of sexual assaults go unreported, and 44% of sexual assault victims are minors.⁹ When children are told that objecting to a member of the opposite sex seeing them in a state of undress in a vulnerable location such as a bathroom or locker room, regardless of the person’s intentions, is “intolerable discrimination,” schools charged with the responsibility to protect them instead place them at risk of becoming another voiceless statistic—too afraid or intimidated to speak up. As family-centered organizations, we simply cannot accept our children becoming voiceless victims for the sake of the Obama Administration’s lawless agenda.

Further, the Legislative Branch enacted Title IX to ensure that our young girls would have equal access to educational opportunities, as the Department of Justice correctly points out on its own website.¹⁰ Congress clearly recognized binary, biological sex in passing Title IX and aimed to correct past inequalities for the female sex. Ironically, the Obama Administration is now attempting to thwart the very purpose of that law by forcing biological females to once again have to compete against biological males for positions on athletic teams reserved for females, and for awards and recognitions reserved for females. The Obama Administration’s interpretation would render Title IX devoid of purpose.

We respectfully request that you use every legislative tool at your disposal to rein in the Obama Administration’s radical overreach, including:

- Introducing, co-sponsoring, and passing legislation curtailing the Administration’s “guidance” dated Friday May 13th as well as prior guidance documents redefining “sex”;

⁷ 20 U.S.C. § 1686.

⁸ See, e.g., *Arey v. Robinson*, 819 F. Supp. 478, 487 (D. Md. 1992) (finding that a prison violated prisoners’ right to bodily privacy by forcing them to use dormitory and bathroom facilities regularly viewable by guards of the opposite sex); *Miles v. Bell*, 621 F. Supp. 51, 67 (D. Conn. 1985) (recognizing that courts have found a constitutional violation where “guards regularly watch inmates of the opposite sex who are engaged in personal activities, such as undressing, using toilet facilities or showering” (quotation omitted)).

⁹ *Who Are the Victims?*, Rape, Abuse & Incest National Network (2009), <https://rainn.org/get-information/statistics/sexual-assault-victims>

¹⁰ “...Title IX began its congressional life in earnest when an amendment was introduced in the Senate by Senator Birch Bayh of Indiana, who explained that its purpose was to combat ‘the continuation of corrosive and unjustified discrimination against women in the American educational system.’ 118 Cong. Rec. 5803 (1972).” *Title IX Legal Manual*, U.S. Dept. of Justice (accessed May 17, 2016), <https://www.justice.gov/crt/title-ix#II>.

- Passing legislation to protect students’ privacy and safety, while supporting the rights of parents to direct their children’s upbringing and education;
- Passing legislation to reassure schools and parents that they will not lose federal education funding for ignoring the Administration’s Title IX “guidance”;
- Holding hearings to investigate the process by which the Obama Administration developed their Title IX “guidance” and to hold those responsible for the decision accountable for their overreach;
- Withholding funding for the Departments of Justice and Education that would otherwise be used to implement their administrative guidance to ensure agency enforcement of the law is based on the clear statutory text as passed by Congress and signed into law.

President Obama and his Administration are playing a dangerous political game, and our children’s privacy and safety (and their education) are being placed at risk. Our children must not be used as pawns.

Sincerely,

Paul Weber, President & CEO
Family Policy Alliance

Tony Perkins, President
Family Research Council

Jerry Cox, President
Arkansas Family Council

John Helmberger, CEO
Minnesota Family Council

Allen Whitt, Executive Director
Family Policy Council of West Virginia

Jim Minnery, President
Alaska Family Action

Len Deo, Founder & President
New Jersey Family Policy Council

Brad Snavelly, Executive Director
Michigan Family Forum

Julaine Appling, President
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Carroll Conley, Executive Director
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Dale Bartscher, Executive Director
Family Heritage Alliance of South Dakota

David Fowler, President
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Julie Lynde, Executive Director
Cornerstone Family Council, Idaho

Bob Vander Plaats, President & CEO
The FAMiLY LEADER (Iowa)

Gene Mills, President
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Nicole Theis, President
Delaware Family Policy Council

Phil Burress, President
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Rev. Jason J. McGuire, Executive Director
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Peter Wolfgang, President
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Cathi Herrod, President
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Joe Ortwerth, Executive Director
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John Rustin, President
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