July 14, 2016

Via Fax: 571-423-1067
Members
Fairfax County School Board
8115 Gatehouse Road, Suite 5400
Falls Church, VA 22042

Dear Sirs and Madams:

We are writing in connection with your consideration of proposed regulations governing students who identify as transgender. In particular, we understand that at least one member of your board has claimed that "the law" requires you to adopt the proposed regulations. As we will explain, that claim is wrong.

By way of background, we will briefly introduce ourselves. Mr. Cuccinelli served as the Attorney General of Virginia from 2010 to 2014 and as a state senator representing the 37th District in Fairfax County from 2002 to 2010. He is currently general counsel of the FreedomWorks Foundation. Mr. Whelan was a senior official in the United States Department of Justice from 2001 to 2004 and previously served as a law clerk to Supreme Court justice Antonin Scalia. He is president of the Ethics and Public Policy Center and has written extensively on the Fourth Circuit's April 2016 ruling in *G.G. v. Gloucester County School Board* and on the Obama administration's efforts to rewrite Title IX.

G.G. v. Gloucester County School Board

We understand that at least one member of your board has claimed that the Fourth Circuit's April 2016 ruling in *G.G. v. Gloucester County School Board* requires you to adopt the proposed regulations. That claim rests on a serious misunderstanding of the (admittedly complicated and convoluted) opinion that the two-judge panel majority issued in that case.

In that case, G.G., a girl who identifies as male, sued for the right to use the boys' restrooms at her high school in Gloucester County, Virginia. In denying her request for preliminary injunctive relief, the district court relied on a federal Department of Education regulation dating from 1975 that states (in relevant part) that a school "may provide separate toilet, locker room, and shower facilities on the basis of sex."

The Fourth Circuit majority ruled that the district court was wrong to rely on that 1975 regulation as a sufficient basis for denying G.G.'s request for preliminary injunctive relief. Under the special rules that apply to judicial review of an agency's interpretation of its own regulations, it held that it was obligated to defer to the Department of Education's current interpretation of that regulation, under which the term "sex" *in that regulation* supposedly means "gender identity" for students who identify as transgender. (See slip op. at 16-26.) But it's one thing to hold, as the Fourth Circuit majority did, that the 1975 regulation did not, by itself, *justify* the district court's *denial* of preliminary injunctive relief to G.G.; it would be quite another thing to misread that *permissive* regulation as somehow *entitling* G.G. to injunctive relief. In this regard, it's

noteworthy that the Fourth Circuit panel merely remanded the case to the district judge for further proceedings. (On remand, the district judge granted preliminary injunctive relief.)

What is most relevant for present purposes is that the Fourth Circuit majority never even reached, much less ruled on, what the word "sex" means *in Title IX* and whether Title IX requires that schools receiving federal funds treat students who identify as transgender according to their gender identity. (To our knowledge, not even the Obama administration has claimed that the Fourth Circuit ruled on these questions.) There is therefore no existing Fourth Circuit precedent on these questions, and those who claim that Fourth Circuit "law" requires the adoption of the pending regulations are, at best, very confused.

The Obama Administration's Dear Colleague Letter

On May 13, 2016, a joint "Dear Colleague" letter from officials in the U.S. Department of Justice and the U.S. Department of Education purported to summarize "a school's Title IX obligations regarding transgender students." We do not know whether any member of your board claims that this letter sets forth an interpretation of Title IX that legally binds your board. If so, any such claim would be badly mistaken.

For starters, the Obama administration has failed to comply with basic requirements of administrative law. As Harvard law professor Jeannie Suk wrote in a *New Yorker* essay, "the Dear Colleague letter is not law, because it wasn't enacted through legal procedures, involving public input, that federal agencies must follow when making law." See Jeannie Suk, "The Transgender Bathroom Debate and the Looming Title IX Crisis," *The New Yorker*, May 24, 2016. Yale law professor Peter H. Schuck made the same point in a *New York Times* op-ed, dated May 18, 2016, and the issue is currently being litigated.

Further, it is clear that the Obama administration's re-interpretation of Title IX, unlike the Department of Education's interpretation of its own regulation, is not entitled to receive any deference from the courts. The straightforward legal question for the courts is whether Title IX's bar on discrimination "on the basis of sex" somehow requires that schools allow boys who identify as female to use the girls' restrooms, locker rooms and showers, to play on girls' sports teams, and to be housed with girls on overnight trips (and vice versa for girls who identify as male). It would be strange indeed if the courts were to rule that assigning boys and girls to single-sex facilities and programs*irrespective* of their gender identity were somehow to discriminate*on the basis of* gender identity. For present purposes, we will limit ourselves to the simple proposition that there is no binding ruling on Title IX that requires your board to accept the Obama administration's inventive rewriting of that law.

In sum, nothing in "the law" requires you to adopt the proposed regulations.

Sincerely,

Ken Cuccinelli

Edward Whelan