

NEWS ADVISORY
Luther Strange
Alabama Attorney General



FOR IMMEDIATE RELEASE
May 27, 2016

For More Information, contact:
Mike Lewis (334) 353-2199
Joy Patterson (334) 242-7491
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**ATTORNEY GENERAL STRANGE ISSUES LETTER TO STATE BOARD OF
EDUCATION REGARDING FEDERAL TRANSGENDER RESTROOM DIRECTIVE**

(MONTGOMERY) – In response to numerous inquiries from educators about the recent federal “significant guidance letter” on school restroom access for transgender students, Attorney General Luther Strange has written the Alabama State Board of Education with his view of the legality of the federal directive.

Attorney General Strange told the State Board of Education the federal guidance letter is an attempt to rewrite federal law and should therefore be ignored until the issue is settled in federal court.

“Although the (federal guidance) letter states that it ‘does not add requirements to applicable law,’ it clearly purports to change the law by redefining the word ‘sex’ in Title IX of the Education Amendments of 1972 to mean ‘gender identity,’” Attorney General Strange wrote.

“...Title IX is about discrimination ‘on the basis of sex,’ not gender identity.”

“On May 25, I filed suit on behalf of Alabama, along with officials from ten other States, to prevent the Department of Justice and Department of Education from enforcing the guidance letter. This lawsuit will determine whether the Department of Justice and Department of Education have the authority to implement the policy announced in the guidance... Until the lawsuit is resolved, I would encourage educators to simply ignore the guidance letter.”

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A copy of AG Strange’s letter is attached

[Link to AG Strange’s lawsuit release](#)

501 Washington Avenue • Montgomery, AL 36104 • (334) 242-7300

www.ago.alabama.gov





STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

LUTHER STRANGE
ATTORNEY GENERAL

501 WASHINGTON AVENUE
MONTGOMERY, AL 36130
(334) 242-7300
WWW.AGO.ALABAMA.GOV

May 26, 2016

Via Email

Board Members
Alabama State Board of Education
50 North Ripley Street
Montgomery, Alabama 36104

Re: Dear Colleague Letter on Transgender Students

Dear Members of the Board of Education:

My Office has received numerous inquiries from educators and others about the “significant guidance letter” issued by the United States Department of Education and Department of Justice on May 13, 2016. Although the letter states that it “does not add requirements to applicable law,” it clearly purports to change the law by redefining the word “sex” in Title IX of the Education Amendments of 1972 to mean “gender identity.”

It is my understanding that principals and teachers in Alabama have considerable discretion in how to accommodate transgendered students. The question of how to accommodate a transgendered student is presently resolved on a case-by-case basis in consultation with the student’s parents, teachers, and principals. But it appears that the most frequent accommodation is to encourage the student to use a single-occupancy bathroom. Unfortunately, that commonsense practice would be inconsistent with the “significant guidance letter,” which states that “a school may not require transgender students . . . to use individual-user facilities.”

In my opinion, the guidance letter is based on a legally erroneous interpretation of Title IX. Title IX forbids disparate treatment “on the basis of sex.” 20 U.S.C. § 1681(a). But Title IX provides that “nothing contained herein shall be construed to prohibit any education institution . . . from maintaining separate living facilities for the different sexes.” 20 U.S.C. § 1686. Similarly, the 1975 regulation that implements Title IX expressly authorizes “provid[ing] separate toilet, locker room, and shower facilities on the basis of sex.” 33 C.F.R. § 106.33.

In other words, Title IX is about discrimination “on the basis of sex,” not gender identity. Unlike subjective gender identity, sex is an objective biological reality. The American Psychological Association defines “sex” as “a person’s biological status” based on indicators such as “sex chromosomes, gonads, internal reproductive organs,

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and external genitalia.” Gender, on the other hand, “connotes cultural or attitudinal characteristics distinctive to the sexes, as opposed to their physical characteristics.” *Hopkins v. Baltimore Gas & Elec Co.*, 77 F.3d 745, 749 n.1 (4th Cir. 1996).

To redefine “sex” as “gender identity,” the guidance letter erroneously relies on judicial decisions that are distinguishable and unpersuasive. Judicial decisions in which transgender plaintiffs have been allowed to pursue discrimination claims have involved penalizing the transgendered person for failing to look, act, or dress the way “real” men or women are culturally expected to. Most of these cases did not even mention bathroom usage, and none of them turned on bathroom-related claims. The guidance letter ignores, however, the numerous courts that have held that schools may provide separate bathrooms on the basis of biological sex differences. *E.g.*, *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994); *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 477 S.W.3d 185, 187 (Mo. Ct. App. 2015); *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 670 (W.D. Pa. 2015); *Doe v. Clark Cty. Sch. Dist.*, No. 206-CV-1074-JCM-RJJ, 2008 WL 4372872 at * 4 (D. Nev. Sept. 17, 2008). Because the guidance letter is based on an erroneous view of Title IX, I believe the threat that schools will lose federal funding for failing to comply with the guidance is ultimately an empty one.

On May 25, I filed suit on behalf of Alabama, along with officials from ten other States, to prevent the Department of Justice and Department of Education from enforcing the guidance letter. This lawsuit will determine whether the Department of Justice and Department of Education have the authority to implement the policy announced in the guidance. I have attached a copy of our complaint to this letter. Until the lawsuit is resolved, I would encourage educators to simply ignore the guidance letter.

Sincerely,



Luther Strange
Attorney General

LS:klg

Enclosure

cc: Dr. Philip Cleveland, Interim State Superintendent
Juliana T. Dean, Esq., General Counsel