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May 16, 2016

Patricia S. Connor, Clerk
United States Court of Appeals for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
Richmond, VA 23219

Re: G.G., by his next friend and mother, Deirdre Grimm v. Gloucester
County School Board
Record No. 15-2056

Dear Ms. Connor:

Pursuant to FRAP Rule 28(j), the Gloucester County School Board addresses supplemental authorities on the issues briefed in the School Board's Petition for Rehearing *En Banc* ("Petition"), Doc. 76, pages, 6-9, 10-14.

On May 13, 2016, the Department of Education ("DOE") and Department of Justice ("DOJ") released a "Dear Colleague" Letter on Transgender Students, characterizing it as significant guidance. The letter defines "sex" under Title IX, advising that schools risk federal funding by not treating transgender students consistent with their gender identity instead of their biological sex.¹ The DOE

¹ "[DOE] treat[s] a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations." The guidance, however, is internally inconsistent by treating transgender students consistent with their biological sex for purposes of certain athletics.

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letter illustrates that this case concerns a matter of exceptional importance justifying *en banc* review.

DOE and DOJ weigh in on the very issues raised in the School Board's Petition. *See, e.g.*, Doc 76, pages 9-10. The letter does not support granting *Auer* deference in interpreting the term "sex" as gender identity. *Gonzales v. Oregon*, 546 U.S. 243, 257, 126 S. Ct. 904, 915 (2006) held *Auer* deference is only appropriate where an agency interprets an ambiguity that is "a creature of the Secretary's own regulations." Deference does not protect regulations that merely repeat or paraphrase a statute.² "An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Id.* at 257.

The efforts of DOE and DOJ to change the meaning of the statutory term "sex" under the guise of interpreting the same term in the regulations "cannot be considered an interpretation of the regulation." *Id.*

Very truly yours,

/s/ David P. Corrigan
David P. Corrigan

DPC

cc: Gail Deady, Esq.
Joshua A. Block, Esq.
Leslie Cooper, Esq.
Rebecca K. Glenberg, Esq.

² See e.g., the guidance provides that schools must allow transgender students to live in housing consistent with their gender identity even though Title IX states "nothing contained herein shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 16th day of May, 2016, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all counsel that are registered CM/ECF users.

/s/ David P. Corrigan
Counsel for Appellee