



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 25, 2016

Re: “Significant guidance” regarding Title IX and intimate facilities in schools

Dear Colleague:

On May 13, 2016, schools across the country were told by the U.S. Department of Education and U.S. Department of Justice that, as a condition of receiving federal funds, they were now required to allow students to use intimate facilities corresponding to the gender they identify with (hereafter referred to as the “Guidelines”).<sup>1</sup> In response to this federal overreach, Texas and twelve other states challenged the validity of the Guidelines in federal court. On August 21, the federal district court assigned to the case issued a nationwide preliminary injunction blocking the federal defendants from enforcing those Guidelines.<sup>2</sup>

My office has received multiple inquiries on what the state of the law is in light of the injunction. Accordingly, I am writing this letter to you to provide guidance on the law and the injunction that my office obtained.

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The relevant portion of the injunction order states:

Defendants are enjoined from enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions. Further, while this injunction remains in place, Defendants are enjoined from initiating, continuing, or concluding any investigation based on Defendants’ interpretation that the definition of sex includes gender identity in Title IX’s prohibition against discrimination on the basis of sex. Additionally, Defendants are enjoined from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order. All parties to this cause of action must maintain the status quo as of the date of issuance of this Order and this preliminary injunction will remain in effect until the Court rules on the

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<sup>1</sup> Letter from Catherine E. Lhamon, U.S. Dep’t of Educ., and Vanita Gupta, U.S. Dep’t of Justice (May 13, 2016) *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (enjoined on preliminary grounds by Preliminary Injunction Order, *Texas v. United States*, No. 7:16-cv-00054-O (Aug. 21, 2016)).

<sup>2</sup> Preliminary Injunction Order, *Texas v. United States*, No. 7:16-cv-00054-O, at 36 (Aug. 21, 2016) (“The Court concludes this injunction should apply nationwide.”), *available at* [https://www.texasattorneygeneral.gov/files/epress/Texas\\_et\\_al\\_v.\\_U.S.\\_et\\_al\\_-\\_Nationwide\\_PI\\_\(08-21-16\).pdf](https://www.texasattorneygeneral.gov/files/epress/Texas_et_al_v._U.S._et_al_-_Nationwide_PI_(08-21-16).pdf).

merits of this claim, or until further direction from the Fifth Circuit Court of Appeals. This preliminary injunction shall be binding on Defendants and any officers, agents, servants, employees, attorneys, or other persons in active concert or participation with Defendants, as provided in Federal Rule of Civil Procedure Rule 65(d)(2).<sup>3</sup>

Which entities are protected by the injunction: Any entity that is subject to Title IX is now protected by the injunction. Because Title IX applies to all educational entities and programs that receive federal funding,<sup>4</sup> entities such as colleges and universities (as well as public schools) are also protected by the injunction. Therefore, educational institutions in Texas need not change their policies regarding intimate facilities to comply with the unenforceable federal Guidelines, so long as this injunction remains in place.

Which entities are bound by the injunction: The injunction binds the conduct of the federal defendants and their agents. The injunction does not require anyone else to do, or not do, anything. Thus, only the following individuals must comply with the injunction and not enforce the Guidelines in any way: the United States of America; the U.S. Department of Education; the U.S. Department of Justice; the U.S. Equal Opportunity Commission; the U.S. Department of Labor; Loretta Lynch, the Attorney General of the United States; John B. King, Jr., the United States Secretary of Education; Thomas E. Perez, the United States Secretary of Labor; Vanita Gupta, the head of the Civil Rights Division of the U.S. Department of Justice; Jenny R. Yang, the Chair of the U.S. Equal Employment Opportunity Commission; and David Michaels, the U.S. Assistant Secretary of Labor for Occupational Safety; as well as any of their officers, agents, servants, employees, attorneys, or other persons in active concert or participation with them.

Other requirements of state law: As explained above, educational institutions in Texas are under no legal obligation to change their policies to allow students to use whatever intimate facility they choose. A decision to make any such a policy change would be solely up to the institution itself and not compelled by another source.

If an institution intends to voluntarily make such a change in its policy, there are procedural and substantive obligations in Texas law the institution must comply with. Procedurally, a recent attorney general opinion identified provisions in State law that entrusts such policy decisions to elected boards rather than administrative staff.<sup>5</sup> For example, the Education Code provides that the “superintendent shall, on a day-to-day basis, ensure the implementation of the policies *created*

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<sup>3</sup> *Id.* at 37.

<sup>4</sup> Guidance Letter, *supra* note 1, at 2.

<sup>5</sup> Tex. Att’y Gen. Op. KP-100 at 4-5 (2016) (“When viewed as a whole, chapter 11 [of the Education Code] thus gives superintendents authority over the day-to-day management of the district, but it requires that boards of trustees adopt general policies for the district. Superintendents then implement those policies through the development of administrative regulations.”).

by the board.”<sup>6</sup> Other procedural requires, such as those in the Open Meetings Act, exist as well.<sup>7</sup>

State law also imposes substantive duties on educational institutions that school board policies should adhere to. For example, the Education Code repeatedly establishes the role of parental involvement in the public education of their child. It provides that, “[u]nless otherwise provided by law, a board of trustees, administrator, educator, or other person may not limit parental rights.”<sup>8</sup> And regarding student records, “[a] parent is entitled to access to all written records of a school district concerning the parent’s child.”<sup>9</sup> Additionally, a “parent is entitled to full information regarding the school activities of a parent’s child except as provided by Section 38.004.”<sup>10</sup> And “[a]n attempt by any school district employee to encourage or coerce a child to withhold information from the child’s parent is grounds for discipline.”<sup>11</sup> State law may impose other substantive constraints as well, all of which any Texas educational institution must fully comply with when considering any policy change on access to intimate facilities.

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To summarize: a federal court has concluded that the Guidelines promulgated by federal authorities is contrary to the actual law. The court issued an injunction that prevents those federal authorities from enforcing those Guidelines against anyone. Accordingly, while that injunction remains in place, no educational institution in Texas needs to change its policies regarding intimate facilities to comply with the unenforceable federal Guidelines. If an educational institution nonetheless voluntarily chooses to change its policies, the injunction does not prevent it from doing so—but it must comply with all applicable state laws when it makes that decision.

My office brought this lawsuit to stop the Defendants from rewriting the laws that have been enacted by the elected representatives of the people—and to stop the Defendants from threatening to take away federal funding from schools to force them to conform. The injunction granted does precisely that.

Very truly yours,



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<sup>6</sup> TEX. EDUC. CODE § 11.1512(a) (emphasis added).

<sup>7</sup> TEX. GOV’T CODE §§ 551.001 *et seq.*

<sup>8</sup> TEX. EDUC. CODE § 26.001(c).

<sup>9</sup> *Id.* § 26.004.

<sup>10</sup> *Id.* § 26.008.

<sup>11</sup> *Id.* § 26.008(b).