LEGAL DEPARTMENT
LESBIAN GAY
BISEXUAL
TRANSGENDER &
AIDS PROJECT

March 1, 2017

Denise McNerney
Office of the Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Via UPS and email

RE: *Gloucester County School Board v G.G.*, No. 16-273

Dear Ms. McNerney,

Pursuant to the Clerk's request dated February 23, 2017, respondent respectfully submits this letter to address "how this case should proceed in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017."

This Court granted certiorari to address two questions:

1. Should *Auer* deference extend to an unpublished agency letter [dated January 7, 2015,] that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

2. With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33, be given effect?

In their merits briefs, petitioner and respondent both urge the Court, regardless of how it resolves Question One, to resolve the second question presented and determine whether, under "'the proper interpretation of Title IX and its implementing regulation,'" Pet. Br. 25 (quoting Pet. Reply 1), respondent has stated a claim upon which relief may be granted. *See* Pet. Br. 25; Resp. Br. 26. That question has been litigated widely in the lower courts; it is fairly encompassed in petitioner's second question presented; and it has been fully briefed before this Court.

The new "Dear Colleague" letter issued on February 22, 2017, makes resolution of that question more urgent than ever. The document simply notes that courts have reached different conclusions regarding the proper interpretation of Title IX and 34 C.F.R. § 106.33 and refrains from taking any affirmative position with respect to whether the statute and regulation do—or

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do not—allow schools to exclude boys and girls who are transgender from using the same restrooms as other boys and girls.

Without the opinion letter referenced in the first question presented, and without any other specific guidance on 34 C.F.R. § 106.33 left to defer to, the Court will inevitably have to settle the question by clarifying the proper interpretation of Title IX and 34 C.F.R. § 106.33. Delaying resolution of that question will only lead to further harm, confusion, and protracted litigation for transgender students and school districts across the country. Another few years of needless litigation would not help clarify the legal question facing the Court, and it would impose enormous costs on individual students until the Court provides additional clarity.

BACKGROUND

The underlying merits question in this case is whether the Gloucester County School Board's sweeping new policy, which prohibits the Board's own administrators from ever allowing a boy who is transgender to use the same restroom facilities that other boys use, violates Title IX's ban on sex discrimination. Petitioner asserts that 34 C.F.R. § 106.33, which allows schools to provide "separate toilet . . . facilities on the basis of sex," authorizes the Board's policy.

In the decision below, the Fourth Circuit deferred to the Department's views that the restroom regulation does not authorize schools to categorically exclude boys and girls who are transgender from using the common restrooms that other boys and girls use. The Department's interpretation was reflected not only in an unpublished opinion letter dated January 7, 2015, Pet. App. 121a-125a, but also in other enforcement actions, guidance documents, and amicus briefs beginning in 2013, *see* Resp. App. 5a-30a. The various guidance documents were based on exhaustive research and study over the course of six years. *Id.*

On February 22, 2017, the Department of Education (the "Department") and the Department of Justice jointly issued a "Dear Colleague" letter withdrawing the January 7, 2015 opinion letter referenced in the first question presented.[1]

[1] The February 22, 2017 Dear Colleague letter also withdraws a May 13, 2016, Dear Colleague letter issued jointly with the Department of Justice. That Dear Colleague letter was issued after the Fourth Circuit's decision in this case and the withdrawal of that letter has no direct impact on the Fourth Circuit's decision or the questions presented for this Court's review.

The new "Dear Colleague" letter explains that the Department decided to withdraw the January 7, 2015 letter because of conflicting decisions from the Fourth Circuit and the district court in *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016). The new document takes no position on the proper interpretation of 34 C.F.R. § 106.33.

The same day that the new "Dear Colleague" letter was issued, the Deputy Solicitor General filed a letter transmitting a copy of the document to the Court. The letter takes no position with respect to how the new "Dear Colleague" letter should affect this Court's resolution of the questions presented.

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ARGUMENT

The Court Should Resolve The Second Question Presented

The Court should resolve the second question presented and determine whether, under "'the proper interpretation of Title IX and its implementing regulation,'" Pet. Br. 25 (quoting Pet. Reply 1), respondent has stated a claim upon which relief may be granted. That question is fairly encompassed in the second question presented and has been fully briefed by the parties below and before this Court. *Cf. Daimler AG v. Bauman*, 134 S. Ct. 746, 760 n.16 (2014). The parties agree that resolution of that question is urgently needed. Pet. Br. 25; Resp. Br. 26. Without resolution, individual students will suffer severe consequences, and needless and protracted litigation will continue.

A. The Legal Question Before The Court Has Already Percolated In The Lower Courts.

The central merits question in this case has already percolated in the lower courts and is ready for this Court's resolution. When respondent filed an opposition to certiorari on September 13, 2016, he noted that similar litigation was already pending in half a dozen district courts. Cert. Opp. 21-22 n.12. Since then, five district courts have ruled (three in the context of Title IX and two in the context of Title VII) that excluding transgender people from using the same common restrooms that other students or employees use impermissibly discriminates against those individuals on the basis of sex. *See* Resp. Br. 21-22 n.20.

The Sixth and Seventh Circuits have also weighed in and denied school districts' motions to stay preliminary injunctions that allowed boys and girls who are transgender to use the common restrooms. *See id.* The Sixth Circuit explained its stay denial in a published opinion resting entirely on circuit

precedent and not *Auer* deference. *See Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016).

Moreover, the underlying principle that discrimination against transgender individuals is a form of discrimination on the basis of sex has been widely accepted in the lower courts for years. As Senior Judge Davis noted in his concurrence below, "[t]he First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution." Pet App. 78a (Davis, J., concurring).

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Even the new "Dear Colleague" letter appears to accept and reaffirm these precedents. While taking no position on the proper interpretation of 34 C.F.R. § 106.33, the new document states that Title IX requires that "all schools must ensure that all students, including LGBT students are able learn and thrive in a safe environment." Feb. 22, 2017 Dear Colleague Letter at 2.[2]

The legal questions in this case rest "on this long-settled jurisprudential foundation." Pet App. 78a (Davis, J., concurring).

B. Failing To Resolve Question Two Would Impose Severe Harms.

Delaying resolution would have severe consequences for transgender students. Those harms are extensively documented in respondent's brief, *see* Resp. Br. 12-15, 31-32, in the amicus briefs, *see, e.g.*, Amicus Br. of Am. Acad. of Pediatrics, *et al.*,; and in the cases currently pending across the country, *see, e.g.*, *Dodds*, 845 F.3d at 221 ("Highland's exclusion of Doe from the girls' restrooms has already had substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old child (i.e. multiple suicide attempts prior to entry of the injunction). These are not distant or speculative injuries."); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*, No. 16-

[2] The Department of Education has also not withdrawn several additional guidance documents explaining that transgender students are protected by Title IX and should generally be treated consistently with their gender identity. *See e.g.*, OCR, Questions & Answers on Title IX and Sexual Violence (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf ("Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation); OCR, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities (Dec. 1, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf ("Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.").

CV-943-PP, 2016 WL 5239829, at *1 (E.D. Wis. Sept. 22, 2016), *appeal docketed*, No. 16-3522 (7th Cir. Sept. 26, 2016) (attempts to avoid urination, depression, migraines, suicidal ideation). *See also* Amicus Br. of Nat'l PTA, *et al.* (explaining how transgender students dehydrate, fast, and develop infections to avoid using the restroom; suffer worse academic performance; experience serious depression; and face an increased risk of suicide). Indeed, according to media reports, the Secretary of Education resisted issuing the new "Dear Colleague" letter precisely "because of the potential harm that rescinding the protections could cause transgender students." Jeremy M. Peters, et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. Times (Feb. 22, 2017).

Without a ruling from this Court, "the costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved." *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013); *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015). There is no prudential reason for this Court to prolong those harms unnecessarily.

C. The New "Dear Colleague" Letter Makes Resolution of Question Two Even More Urgent.

The February 22, 2017 "Dear Colleague" letter only highlights the need for this Court to act. Without the assistance of the Department of Education in proactively addressing administrative complaints, more parents of transgender students will be compelled to turn to litigation as their only option. Absent prompt resolution by this Court, litigation will only increase.

The new "Dear Colleague" letter makes clear that the Department views the issues in this case as presenting a legal question for the courts. According to the document, the Department of Education's decision to rescind the January 7, 2017 letter was based on conflicting legal rulings among the lower courts—not on the agency's substantive, fact-based re-evaluation of its own policy. The "Dear Colleague" letter rescinds the two earlier letters, but does not take any position with respect to whether Title IX and 34 C.F.R. § 106.33 do—or do not—allow schools to exclude boys and girls who are transgender from using the same restrooms that other boys and girls use. As it rests entirely on disagreement among the lower courts, the new document practically calls out for this Court to provide the clarity the agency needs to move forward. *Cf. Nat'l Fed'n of Fed. Employees, Local 1309 v. Dep't of Interior*, 526 U.S. 86, 109 (1999).

Moreover, even if the Department were to issue new guidance at some future date, that new guidance would still not receive the benefit of *Auer* deference if it were to conflict with the Department's earlier position. *Thomas Jefferson*

Univ. v. Shalala, 512 U.S. 504, 515 (1994). Litigation will continue until this Court answers the second question presented and provides a definitive interpretation of Title IX and 34 C.F.R. § 106.33.

CONCLUSION

The new "Dear Colleague" letter abstains from providing any guidance with respect to 34 C.F.R. § 106.33 and makes resolution of Question Two even more urgent. That question has been fully developed in the lower courts, is fully briefed by the parties and amici before this Court, and is appropriate for resolution now. Delaying resolution would provide no benefit to the Court and would needlessly prolong harm to transgender students across the country awaiting this Court's decision.

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Respectfully submitted,

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