



Correction Please!

Feds Overreach, Hand Down Bathroom Guidance

Item: *“Dear Colleague,” begins a joint letter, dated May 13, 2016, from the civil rights arms of the U.S. Department of Justice and U.S. Department of Education to interested parties. The notice begins in inimitable bureaucratese (albeit available in six languages other than English):*

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance. This prohibition encompasses discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status.

Item: *The Reuters wire service reported on May 16, 2016: “President Barack Obama said on Monday that his administration’s guidance on transgender issues is needed to help schools grapple with the sensitive topic and ensure that all children are treated fairly. Obama, in an interview with BuzzFeed news website broadcast live on Facebook and YouTube, said schools had been asking the Department of Education how they should handle questions they were facing with transgender youths. ‘We think it was important for schools who want to go ahead and, in a very practical way, try to deal with the school year — What are they going to be doing next year? How should we approach this? — that we give them our best judgment about how to approach it,’ Obama said.”*

Item: *President Obama, says Christian Science Monitor, has “focused the microscope of government on what has only recently emerged as a national concern: the right of Americans to bypass biology and determine their own gender.”*

The newspaper report, dated May 14, 2016, continues: “The transgender bathroom battle heated up as Republicans in North Carolina passed a state law in March barring transgender women from using the ladies’ room. But after North Carolina and the United States Department of Justice traded lawsuits this week, the fight went national on Friday, when the Department of Education and Justice Department sent what they called a “guiding” letter on transgender rights to the nation’s nearly 100,000 public schools.”

Correction: *There is a lot more involved here than the rights of perhaps 0.3 percent of the American population (no one really has accurate numbers). The “guiding” letter from Washington may not have any actual legal weight — as officials from the Obama administration do acknowledge — but it does come with an inherent extortionate threat to public schools: If you don’t knuckle down, we’ll cripple you with legal action and/or slash your money.*

Many states and localities are discovering that they made a Faustian deal when they took all that “free” federal funding. There’s a devilish blackmailer now at the door, and somebody is going to be hurt unless transgender students are allowed into the bathrooms of their choice.

The intimidating letter cites, in an attempt to justify its strong-arm tactics, Title IX of the Education Amendments of 1972. Its claim is specious. David Limbaugh, a lawyer and a columnist, rightly notes



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that when the U.S. Congress passed that measure, it

never intended “sex” to include “gender identity.” The purpose was to ensure women and girls equal treatment under the law. No one in his wildest imagination conceived that lawless public officials would later contort the statute to prevent discrimination against transgender people.

The administration proclaims, “Gender identity refers to an individual’s internal sense of gender.” So forget your biological makeup; if today you want to identify as a woman, men, you may, and if people refuse to go along with the ruse, they will be punished with the full force of federal law....

The Framers are rolling over in their graves, not just because of this inversion of moral standards but also because of the lawless manner in which this is being forced down the throats of the states, the American people and the public schools.

And it should be noted — because it has been repeatedly and wrongly reported — that the North Carolina law does not prohibit private-sector companies from adopting their own nondiscrimination policies or practices, as has been made clear by the office of Governor Pat McCrory. That office also points out (as part of what it calls a “facts vs. myth” release) that the state law in question does not take away existing protections for individuals in North Carolina. It does, however, “for the first time in state history,” establish a statewide anti-discrimination policy that “is tougher than the federal government’s.”

The North Carolina law also allows private businesses, if they so choose, to continue to allow transgender individuals “to use the bathroom, locker room or other facilities of the gender they identify with” or to “provide other accommodations.” For example, according to the governor’s office, if a privately owned “sporting facility wants allow attendees of sporting events to use the restroom of their choice, or install unisex bathrooms,” that facility can do that. “The law neither requires nor prohibits them from doing so.”

The facilities in North Carolina that are required to conform by an individual’s biological sex are those in government buildings. The feds — along with insatiable activists assisted by the echo chamber of the “progressive” media — cannot stand it if a state makes its own decisions and it is not consistent with left-wing orthodoxy.

There are many reasons why the Founders set up a federal system of government, with separation of powers. Some are commonsensical, including the fact that since state and local officials are closer to the problems of their areas, they should choose the policies seen as solutions. Federalism is also supposed to allow state governments to function independently, not under the thumb of Washington, in part to have a structure that ensures liberty. This not only allows for most government decision-making to be closer to the people, but also for competition among the states and innovation. States can also serve as a check against centralized foolishness or tyranny.

Federalism, of course, does not guarantee against local and state governmental idiocy. New York City has proven that point. Consider the “legal guidance” issued by that city’s Commission on Human Rights. The city’s “human rights law” requires, as the guidance says, that employers, landlords, and all businesses and professionals use the preferred name, pronoun, and title of employees, tenants, customers, or clients “regardless of the individual’s sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the individual’s identification.”



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Eugene Volokh, a professor at the UCLA School of Law, recently noted in his blog (as republished in the *Washington Post*) what that actually means in that jurisdiction:

We have to use “ze,” a made-up word that carries an obvious political connotation (endorsement of the “non-binary” view of gender). We have to call people “him” and “her” even if we believe that people’s genders are determined by their biological sex and not by their self-perceptions — perceptions that, by the way, can rapidly change, for those who are “gender-fluid” — and that using terms tied to self-perception is basically a lie.

Where is the outrage about this requirement and its hefty legal liability? Are the powers-that-be in Washington scandalized and infuriated at such lunacy? Of course not. These are “progressives” with selective anger.

Still, as Professor Volokh has written, this does not just apply to the “government as employer, requiring its employees to say things that keep government patrons happy with government services. This is the government as sovereign, threatening ‘civil penalties up to \$125,000 for violations, and up to \$250,000 for violations that are the result of willful, wanton, or malicious conduct’ if people don’t speak the way the government tells them to speak. Nor is this likely to stay in New York City: The New York officials are arguing that this is just what the New York gender identity discrimination ban requires.”

American taxpayers should begin to wonder what they are getting with the \$156,000 that is paid for each child (on average) from kindergarten through high school. What if the public glommed what is going on with public education in many areas? (While the enrollment in public schools increased nine percent between 1970 and 2015, the number of non-teaching staff jumped 133 percent, as cited by a recent Heritage Foundation study.)

As it happens, there is relatively little to show — in a positive fashion, that is — for the fact that the federal government has almost tripled (in real terms) its education expenditures per pupil. And it has been doing that over five decades — intervening in what should be a local and state matter. So it is convenient to have a new hot issue to talk about that muddies the waters.

Along the way, *Time* gets to parade a sexy cover (festooned with multi-colored, cause-appropriate toilet paper, no less), even as youngsters in public schools continue to get the sticky end. Meanwhile, overreaching Obamacrats act as if they were a federal school board.

To repeat: The issue goes beyond who showers where and whose bathroom should be used; it’s a constitutional issue. And guess what? “Gender identity” is nowhere to be found in the Constitution. David French, a lawyer writing for *National Review*, has commented on the transformation of the battle:

In its zeal to advance the sexual revolution, the Obama administration has defied the will of Congress, unilaterally rewritten federal law without even bothering to go through a statutory rulemaking process, and now seeks to bring a sovereign state to heel through a combination of threats and lawsuits.

Let’s make this simple. Title VII prohibits private and public employers (including state governments) from discriminating on the basis of “race, color, religion, sex, and national origin.” Title IX prohibits federally funded educational institutions from discriminating on the basis of “sex.” Neither statute prohibits sexual-orientation or gender-identity discrimination. For more than 20 years, LGBT activists have sought to amend federal law through the so-called Employment Non-Discrimination Act, a bill that would essentially add sexual orientation and gender identity as protected classes within federal



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nondiscrimination law. For more than 20 years, LGBT activists have failed. ENDA hasn't passed even when Democrats controlled the presidency and both houses of Congress.

Who needs a stinkin' law when you have a presumptuous power structure? As French recounts, "Federal regulators and lawless federal judges have incrementally changed it by executive and judicial fiat, steadily expanding the scope of Title VII." The Equal Employment Opportunity Commission unilaterally amended the statute last year. The commission just published a document entitled, "What You Should Know about EEOC and Enforcement Protections for LGBT Workers." In that, notes French, the commission just declared that it interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation. "In a stroke, the EEOC decided that it was going to essentially enforce ENDA — a statute that doesn't exist."

For his part, Education Secretary John King publicly castigated state laws that prohibit public school students from using bathrooms designated for the opposite sex. He termed them "hateful." And Attorney General Loretta Lynch likened the North Carolina measure to Jim Crow laws of decades ago.

Such power plays were slammed by the *Wall Street Journal* in mid-May, when the editors observed the Obama administration clearly "intends to obliterate what is left of federalism, the principle that states retain powers not delegated to the national government. How else can one interpret Friday's 'guidance' on bathrooms, locker rooms and sports teams to public grade schools and high schools, long considered a symbol of local control?"

Texas Lt. Governor Dan Patrick, the *Journal* continued, "has raised the possibility that his state may forfeit its \$10 billion of annual federal funding for its schools. We hope Texas follows through and is joined by other states. There is more at stake here than sexual identity, not least the self-identity of the United States."

We've come to a sad pass when the head of the Department of Justice, ostensibly the chief law-enforcement officer of the country; the secretary of the Department of Education; and the nation's chief executive are all steering a major campaign to compel states, cities, and public schools to grant so-called transgender males access to the locker rooms and restrooms of American women and girls.

This is not a federal case. It is, however, time for the American public to man up on the issue.



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