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NEPC REVIEW: *GENDER IDENTITY POLICIES IN SCHOOLS: WHAT CONGRESS, THE COURTS, AND THE TRUMP ADMINISTRATION SHOULD DO*

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May 2017

Summary of Review

This recent Heritage Foundation report argues that Title IX does not require schools to protect students from discrimination on the basis of gender identity. It criticizes the Obama Administration for issuing guidance and enforcing Title IX to protect transgender students, and it urges the Trump Administration and courts to keep gender identity protections out of federal laws. Oddly, transgender youth are at the center of, and yet somehow go wholly unexamined in, this report on gender identity policy. The report never acknowledges or addresses (a) legal opinions that gender identity discrimination is a form of sex discrimination; (b) the near-consensus within the medical, scientific, and educational communities concerning how transgender students should be treated; and (c) other research or literature shedding light on the appropriate care for and education of transgender youth. Additionally, the report erroneously asserts that transgender-inclusive policies will embolden men to enter women's facilities to assault or abuse them. What is entirely missing from this report — and what policymakers and educators urgently need — is guidance in an area that may be new or unfamiliar to them. Fortunately, many states and districts have adopted positive gender-identity-related laws, policies, and practices that answer questions and serve as useful guidance for other jurisdictions about how to successfully integrate transgender students in schools.¹



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This review is one of a series made possible in part by funding from the Great Lakes Center for Education Research and Practice.



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I. Introduction

Attention given to legal, policy, and health-related issues concerning transgender people has skyrocketed in recent years. There are an estimated 1.4 million transgender adults in the United States, including more than 200,000 between ages 18 to 24, as well as approximately 150,000 transgender youth (age 13 to 17).² The Heritage Foundation is a research institution whose mission is to “formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.”³ Policies related to transgender students are ostensibly the topic of the Heritage Foundation’s March 2017 report, *Gender Identity Policies in Schools: What Congress, the Courts, and the Trump Administration Should Do*.⁴ But the report does not really provide insight into actual gender identity policies in schools. Exploration of such policies would presumably cover a range of topics related not only to equitable access to school facilities, but also to the appropriate use of transgender students’ names and pronouns, school records, medical privacy, bullying or harassment, and participation in instruction or activities that might involve the separation of boys and girls.

Instead, this report coincides with and is consistent with the school board’s argument in a U.S. Supreme Court case involving a transgender student, *Gloucester County School Board v. G.G.*⁵ Oral arguments in this case were scheduled for March 28, 2017; on March 6, however, the Court sent the case back to the Fourth Circuit Court of Appeals in light of the decision by the Trump Administration, on February 22, to rescind federal guidance on transgender students issued by the Obama Administration that figured prominently in the Fourth Circuit’s earlier opinion in favor of the transgender student in the case. That now-rescinded guidance — opposition to which is at the heart of the Heritage Foundation report — stated that a student’s gender identity was to be treated as the student’s sex for purposes of enforcing and adhering to Title IX, and that schools must not treat a transgender student differently from the way they treat other students of the same gender identity.⁶

II. Findings and Conclusions of the Report

Gender Identity Policies in Schools is an advocacy-based document on the reach of federal law rather than a research-based document on establishing appropriate policies related to gender identity. It makes both legal and policy-based arguments to assert that the Obama Administration overreached in issuing its guidance on the rights of transgender students. On the legal side, it states:

When Congress passed Title IX of the Education Amendments, no one thought that “sex” meant “gender identity.” It did not mean it then, and it does not mean it now. Federal bureaucrats have unlawfully attempted to rewrite federal law. The term “sex” is not ambiguous and cannot be unilaterally redefined by executive branch agencies to mean “gender identity” (p. 2).

On the policy front, the report authors argue:

The Obama Administration turned the purpose of Title IX on its head and favored the concerns of students who identify as transgender while entirely ignoring the [safety, privacy, and equality] concerns of other students . . . States and local schools should take these concerns seriously and find solutions that respect *all* Americans (p. 2).

The report concludes with three recommendations: First, the U.S. Department of Education should explicitly return to the intended meaning of *sex* in Title IX, not only through rescission of prior guidance but through new guidance to prevent future “mischief.” Second, Congress should “ensure that Title IX will continue to protect girls and women” by specifying that *sex* does not mean *gender identity* in Title IX and other civil rights laws, such as Title VII and the Affordable Care Act, and directing federal agencies not to implement or enforce any new gender identity-related directives or regulations. Third, courts should not interpret *sex* to mean *gender identity* and should not “usurp the authority of the representative branches of government to make policy in this area” (p. 24) (although the report also strenuously objects to the Obama Administration’s exercise of policy authority in this area).

III. The Report’s Rationale for Its Findings and Conclusions

The report authors’ primary legal argument is that Title IX was designed specifically to reduce sex discrimination against women and that the concepts of gender identity or transgenderism were never contemplated by Congress in its design; therefore, any attempt to interpret Title IX to cover gender identity goes impermissibly beyond the original meaning and purpose of the statute (pp. 2, 9). They aver that “[t]o this day, the term ‘sex’ is not ambiguous and therefore cannot legitimately be redefined by executive branch agencies to mean “gender identity” (p. 9). They state that “the fact that [Title IX’s] implementing regulations allowed separate toilet, locker room, and shower facilities for the different sexes shows

that Title IX was to be implemented on the basis of biological sex and that it acknowledged legitimate differences between the sexes with respect to privacy concerns” (p. 10). To underscore the separateness of sex and gender identity, the report cites examples in which federal agencies and Congress have listed gender identity and sex separately as distinct categories for protection — for example, in the Violence Against Women Reauthorization Act of 2013 and the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 (p. 12). Therefore, the authors reason — despite also explaining that gender identity did not emerge as a concept until much later than 1972, when Title IX was enacted — “if Congress had intended to include gender identity protections within the scope of Title IX, it could have specified their inclusion, but it did no such thing” (p. 12).

The authors further assert that requiring schools to protect students on the basis of gender identity violates the bodily privacy rights of non-transgender students who would then be forced to interact with persons of the opposite sex in intimate settings such as restrooms and locker rooms. They remind the reader that it is reasonable for people not to want to see, or be seen by, people of the opposite sex in a state of undress (p. 15). They include accounts from particular categories of individuals, including minors and victims of sexual abuse and sexual assault, for whom this privacy interest is especially vital (pp. 16-18). They cite law enforcement and crime experts who believe that gender identity protections would discourage sexual assault survivors from reporting their abuse out of fear of being accused of bigotry toward transgender persons (p. 19). (This solicitude toward women and sexual assault survivors is noteworthy in light of the Heritage Foundation’s other recent publications arguing that the government has gone *too far* to protect sexual assault survivors at the expense of accused students,⁷ that the U.N. Conventions on Women’s and Children’s Rights are detrimental,⁸ and that the Violence Against Women’s Act is “flawed” and made worse by recent amendments that support domestic violence programs.⁹) And they provide news accounts and a list of criminal acts occurring in women’s restrooms by men posing as women as a policy reason to keep transgender women out of women’s restrooms (pp. 20-21).

IV. The Report’s Use of Research Literature

The report is advocacy-oriented in nature and therefore relies almost exclusively on court opinions, news articles, and non-legal materials, submitted pursuant to litigation, that support its position. The report cites journal articles in an effort to demonstrate that concepts of gender and gender identity did not emerge until after Title IX’s enactment and are distinct from the concept of sex (pp. 11-12). The report does not analyze or give weight to any legal opinions and sources that support the countervailing argument that gender identity discrimination is a form of sex discrimination.¹⁰ It also fails to explore or consider any of the positions of or literature by any established organizations of health- and school-based professionals (such as the American Academy of Pediatrics, the American Psychological Association, the National Association of School Psychologists, the National Association of Secondary School Principals, the National Association of Elementary School Principals, or the

American School Counselor Association) that indicate a near-consensus within the medical, scientific, and educational communities concerning how transgender students should be treated.¹¹ Nor does it cite any other research or literature — including articles by school-based experts, child or adolescent psychologists, physicians, or social scientists specializing in gender studies or human development — that could shed further light on the appropriate care for and education of transgender youth.¹² In sum, transgender youth are at the center of, and yet somehow go wholly unexamined in, this report on gender identity policy.

V. Review of the Report's Methods

The report authors seem not to grasp the depth of the barrier posed by transgender-exclusionary policies when they argue, at one point, that such policies are not discriminatory at all: “to discriminate on the basis of gender identity would be to say that students who identify with their biological sex can use the school water fountains, but students who identify as transgender cannot” (p. 13). Here, the report authors belie a lack of understanding of the transgender experience; it’s as if they assume that transgender students may simply choose not to use facilities that correspond to biological sex out of stubbornness or caprice.

The report’s assertion that transgender-inclusive policies will embolden and give permission to men to enter women’s facilities to assault or abuse them is misguided (pp. 22-23). First, it is transgender people who are far more likely to be victimized in public facilities.¹³ Second, the crime argument conflates men impersonating women and transgender women, and would hold the rights of the latter hostage to the actions of the former. In any event, it is a red herring: law enforcement can prosecute criminal behavior in restrooms now, regardless of the gender identity policy in effect or the gender identity of the perpetrator. While crime experts cited in the report acknowledge that transgender people are not, in fact, the ones responsible for criminal behavior in bathrooms, they nevertheless warn of the impending quagmire among both law enforcement and victims in distinguishing between transgender people and criminals impersonating the opposite sex. But this quagmire is fueled by two misconceptions or assumptions. The first is that being transgender involves nothing more than a donning a costume and declaring oneself transgender — which makes it impossible to distinguish between a transgender person and a cross-dressing impostor. The second is that anyone born male who wants to access women’s bathrooms must have nefarious or sexual intent — which negates the actual motivation of transgender women in women’s facilities: to use them. Together, these misconceptions fuel the judgment, superficially validated by crime experts who have been identified to support a particular outcome in litigation, that transgender-inclusive policies heighten the risk of crime, when a truer understanding of the lives of transgender people might lead to a very different perception of risk.

A puzzling aspect of the report is its focus on religion-based exemptions from Title IX (pp. 2-3, 8-9, 23). Title IX does not apply to an educational institution that is controlled by a religious organization to the extent that application of Title IX would be inconsistent with

the religious tenets of the organization.¹⁴ In recent years, the Department of Education has publicized which institutions have applied for and received a Title IX exemption.¹⁵ The report authors seize on this, decrying advocacy groups' use of the publicized information to produce "shame lists" of religiously affiliated schools. The report appears to suggest that the interpretation of Title IX to protect students based on gender identity causes, or is even driven by, hostility toward religiously affiliated institutions (pp. 8-9, 23).

VI. Validity of the Findings and Conclusions

The report's central legal conclusion — that gender identity discrimination falls outside of Title IX — is shared by some courts but not others.¹⁶ The fact that Title IX is silent on transgender people or gender identity doesn't prove much; laws never include every topic or dispute that they might one day help adjudicate. And nothing in transgender-inclusive policies contravenes Title IX's allowance for sex-segregation in some contexts or places. As the Fourth Circuit in *Gloucester* stated: "Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms."¹⁷

The report does raise a legitimate practical concern, which is that some students or parents do feel discomfort and anxiety with transgender-inclusive policies and transgender students in general. Although the presence of such feelings should not, as the report intimates, weigh in favor of denying access or civil rights to transgender persons, school officials must be prepared to address them sensitively as they work to provide access and privacy options for all students. Interestingly, the report provides helpful fodder for dialogue and education among those in the school community when it cites a non-transgender student who says she does not want to feel ostracized by being required to use a separate changing room away from her classmates, in order to avoid transgender students (p. 17). That student's feeling is not dissimilar to what the transgender student in *Gloucester* said he felt when forced to use facilities separate from other students.¹⁸ Therein lies a teachable moment.

VII. Usefulness of the Report for Guidance of Policy and Practice

Gender Identity Policies in Schools does not explore any of the specific concerns among transgender students or the school officials responsible for their education that are central to the crafting of gender-identity-related policies in schools. It therefore has little use in terms of guiding actual policy and practice in the area. Instead, the report serves a broader political goal of shrinking the federal footprint in civil rights and other areas in favor of state and local autonomy. What is entirely missing from this report — and what state and local policymakers and educators urgently need — is information and guidance in an area that may be new or unfamiliar to them. Fortunately, many states and districts have adopted pos-

itive gender-identity-related laws, policies, and practices that answer questions and serve as useful guidance for other jurisdictions about how to successfully integrate transgender students in schools.¹⁹

Notes and Sources

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Document Reviewed: Gender Identity Policies in Schools: What Congress, the Courts, and the Trump Administration Should Do

AUTHOR: Ryan Anderson and Melody Wood

PUBLISHER/THINK TANK: Heritage Foundation

DOCUMENT RELEASE DATE: March 23, 2017

REVIEW DATE: May 2, 2017

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SUGGESTED CITATION:

Kim, R. (2017). *Review of "Gender Identity Policies in Schools: What Congress, the Courts, and the Trump Administration Should Do."* Boulder, CO: National Education Policy Center. Retrieved [date] from <http://nepc.colorado.edu/thinktank/review-gender>