IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ARLINGTON SCHOOL BOARD, *Plaintiff*, v. LINDA McMAHON, in her official capacity as Secretary of Education of the United States; the UNITED STATES DEPARTMENT OF EDUCATION, *Defendants.*	)	Civil Action No. _____

COMPLAINT

Plaintiff, Arlington School Board ("ASB"),[1] through its undersigned attorneys, brings this action under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (the "APA") and the Declaratory Judgment Act, 28 U.S.C. § 2201, and alleges for its complaint as follows:[2]

INTRODUCTION

1. On August 19, 2025, the Department of Education (the "Department") issued a press release announcing that it was "placing . . . [APS] . . . in Northern Virginia on high-risk status" with the result that "all Department funds including formula funding, discretionary grants, and impact aid grants" will be "done by reimbursement only."[3]

[1] Plaintiff Arlington School Board operates, maintains, and supervises Arlington Public Schools ("APS").

[2] Fairfax County School Board ("FCSB") has filed against Defendants a similar action and motion for immediate issuance of an order for a temporary restraining order and preliminary injunction. Given the similar nature of the action and motions, ASB and FCSB request that the two actions and motions be consolidated.

[3] *See* Ex. A, Office of Comm'cns & Outreach, "U.S. Department of Education Places Five Northern Virginia School Districts on High-Risk Status and Reimbursement Payment Status for Violating Title IX," U.S. DEP'T OF EDUC. (Aug. 19, 2025), https://tinyurl.com/26kzwz3y.

2. The Department sought to justify this decision by a bare, and incorrect, assertion that APS (and four other Northern Virginia school districts) have been "in violation of Title IX of the Education Amendments of 1972."[4] Defendants assert that APS violates Title IX by maintaining a policy that permits students to access restrooms and locker rooms ("facilities") that align with their gender identity.

3. Later on August 19, 2025, Defendant McMahon sent a letter to APS notifying it of this change in status and asserting that it encouraged the Virginia Department of Education ("VDOE") to similarly withhold federal funds passed through state funding mechanisms to APS. Ex. B.

4. Defendants' action came a mere two business days after the U.S. Court of Appeals for the Fourth Circuit reaffirmed that its interpretation of Title IX in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), remains the law in Northern Virginia as well as the rest of the Circuit. In *Grimm*, the Fourth Circuit held that both the Equal Protection Clause and Title IX compel local school boards to provide students with access to facilities that correspond with their gender identity. As Fourth Circuit panel precedent, *Grimm* binds APS.

5. Defendants' placement of APS on "high-risk status" and conditioning its federal funding is a final agency action subject to APA review. Defendants' action cannot withstand that review, because it is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law. Accordingly, this Court must hold unlawful and set aside Defendants' action. 5 U.S.C. § 706.

6. The Court should separately declare that APS's policy does not violate Title IX because *Grimm* is controlling law in the Fourth Circuit.

[4] *Id*.

JURISDICTION AND VENUE

7. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including the APA, 5 U.S.C. §§ 701–06; the Declaratory Judgment Act, 28 U.S.C. § 2201; and Title IX.

8. Venue is proper in this district under 28 U.S.C. §§ 1391(b)(2) and (e)(1). Defendants Department of Education and Secretary McMahon are a United States agency and an officer of the United States sued in her official capacity. ASB is a public body operating in the Eastern District of Virginia. APS is a local government agency operating in the Eastern District of Virginia. A substantial part of the events or omissions giving rise to this Complaint occurred and continues to occur within this District.

PARTIES

9. Plaintiff ASB operates, maintains, and supervises APS.

10. APS is a school district within the Commonwealth of Virginia. APS is the independent branch of the Arlington County government that administers public schools in Arlington, Virginia.

11. Defendant the Department is an executive department of the United States. It is headquartered in Washington, D.C.

12. Defendant Linda McMahon is the United States Secretary of Education and is sued solely in that capacity. As Secretary of Education, Defendant McMahon is head of the DOE.

FACTUAL ALLEGATIONS

I. Title IX bars discrimination on the basis of sex.

13. This matter involves a dispute over the scope of Title IX of the Higher Education Amendments of 1972, Pub. L. No. 92-318, which provides in pertinent part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits

of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

14. Nothing in the text of Title IX prohibits schools from allowing transgender students from accessing school facilities that align with their gender identity. To the contrary, several U.S. Courts of Appeals—including the Fourth Circuit—have held that Title IX *requires* schools to *allow* such access.

15. To enforce Title IX, Congress "authorized and directed" every federal agency providing financial assistance to education programs or activities to "effectuate the provisions of [20 U.S.C. § 1681] . . . by issuing rules, regulations, or orders of general applicability." 20 U.S.C. § 1682.

16. Congress expressly declared that any action by the department or agency "terminating or refusing to grant or to continue financial assistance" is subject to judicial review under the APA, that "any State" may obtain judicial review, and that the federal agency's action "shall not be deemed committed to unreviewable agency discretion." 20 U.S.C. § 1683.

17. In a letter sent to APS on August 19, 2025, the Department has made clear that APS will not receive reimbursement unless it accedes to Defendants' interpretation of Title IX, which is not consistent with the interpretation that binds APS (and this Court). Accordingly, the Department's order placing APS on "reimbursement-only" status while APS complies with the Fourth Circuit's binding interpretation of Title IX constitutes in fact a refusal to continue federal financial assistance within the meaning of 20 U.S.C. §§ 1682 and 1683.

II. The Department's regulations echo Title IX's requirements.

18. The Department's regulations implementing Title IX are codified at 34 C.F.R. Part 106.

19. The Department's regulations require covered entities to "provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. They do not expressly address a student's ability to access facilities that align with their gender identity.

20. The Department's regulations adopt and apply the procedures for enforcing Title VI of the Civil Rights Act of 1964 to its Title IX regulations. 34 C.F.R. § 106.81 (adopting and applying 34 C.F.R. §§ 100.6–100.11).

21. These regulations require that the Department "shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part." 34 C.F.R. § 100.6(a).

22. If noncompliance is found, and it cannot be corrected by informal means, compliance "may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law." 34 C.F.R. § 100.8(a); *see also* 28 C.F.R. § 42.108.

23. Pursuant to the Department's procedures:

> [n]o order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part; and (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action.

34 C.F.R. § 100.8(c).

24. The Department's procedures also provide:

> Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

34 C.F.R. § 100.8(c).

III. The Fourth Circuit follows other Circuit Courts of Appeals in concluding that Title IX protects transgender individuals' access to facilities that correspond with their gender identity.

25. Defendants' action to suspend federal funds allocated to APS has no legal basis, as it relies upon an incorrect interpretation of Title IX that is flatly inconsistent with binding precedent in the Fourth Circuit.

26. In 2020, in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), the United States Court of Appeals for the Fourth Circuit considered the right of transgender students to access school facilities that correspond with their gender identity. In that case, a local Virginia school division, in response to backlash about a transgender male student's use of the boys' restroom, implemented a policy under which students could only use restrooms matching their "biological gender." *Grimm*, 972 F.3d at 593. The policy also required that "students with gender identity issues shall be provided an alternative appropriate private facility." *Id*. at 599. To effectuate this policy, a number of single-stall unisex restrooms were made available to all students. *Id*. at 600.

27. The court in *Grimm* analogized the facts at issue to those involved in *Bostock v. Clayton County,* 590 U.S. 644 (2020), in which the United States Supreme Court held that discrimination against a person for being transgender is discrimination "on the basis of sex," under Title VII of the Civil Rights Act. *Grimm*, 972 F.3d at 616–19. Following *Bostock*, the Court of

Appeals concluded that the policy discriminated against Grimm "on the basis of sex" under Title IX, reasoning that "Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender." *Id*. at 618. Accordingly, the court found Grimm's gender identity to be a protected status pursuant to Title IX, invalidating the school's restroom restriction. *Id*.

28. *Grimm* stands for the proposition that policies that prohibit transgender students from using the facilities that align with their gender identity constitute sex-based discrimination and violate Title IX. *Id.* The APS policy at issue is consistent with *Grimm* and therefore complies with, not violates, Title IX.[5]

29. Contrary to Defendants' assertions, *Grimm* remains binding law in the Fourth Circuit and has not been abrogated by *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), a case upholding a Tennessee law that prohibited certain medical interventions for minors with gender

[5] While most courts which have considered the issue of Title IX's application to gender identity have ruled consistent with the Fourth Circuit in *Grimm*, several courts have issued contrary rulings. *Compare Parents for Priv. v. Barr*, 949 F.3d 1210, 1227 (9th Cir. 2020) (affirming dismissal of lawsuit brought by plaintiffs who alleged a school district's policy permitting students to use facilities that match their gender identity violated Title IX and holding that a transgender student's normal use of facilities alone does not constitute actional "harassment" under Title IX even if some students felt subjectively harassed); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 533 (3d Cir. 2018) (rejecting argument that a school district's policy allowing transgender students to use facilities that align with their gender identity violated Title IX because the policy treated all students equally irrespective of sex); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046–50 (7th Cir. 2017), abrogated on other grounds as recognized by, *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020) (holding that a policy requiring students to use a bathroom that conforms with their gender identity punishes those students for their gender nonconformance and therefore violates Title IX), *with Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 816 (11th Cir. 2022) (en banc) (holding that a policy disallowing transgender students from using the bathroom that aligned with their gender identity did not violate Title IX). *See also Tennessee v. Dep't of Educ.*, 104 F.4th 577, 610–11 (6th Cir. 2024) (interpreting Title IX regulations "[w]ithout deciding any substantive merits questions").

dysphoria as constitutional under the Equal Protection Clause, or any other United States Supreme Court case.

30. Indeed, on August 15, 2025, the Fourth Circuit reaffirmed that "*Grimm* remains the law of this Circuit and is thus binding on all the district courts within it." *Doe v. South Carolina*, No. 25-1787, 2025 WL 2375386, at *8 (4th Cir. Aug. 15, 2025). The *Doe* case involved a challenge to a South Carolina statute that included a restriction on restroom access to students according to their gender assigned at birth—a policy identical to that struck down in *Grimm*. *Id.* at **2–3. Doe moved for a preliminary injunction, relying on *Grimm* in support of his assertion that the South Carolina statute violated Title IX. *Id.* at *5.

31. Applying the legal standard for a preliminary injunction, the court found that Doe had demonstrated a likelihood of success on the merits, as the South Carolina statute at issue was in direct conflict with the court's ruling in *Grimm*. *Id.* at **16–17. The court also found that Doe had demonstrated irreparable harm, observing that "state action infringing [on] constitutional rights generally constitutes irreparable harm." *Id.* at *8. Finally, the court found that the balance of equities supports the injunction, noting that "preventing the State from enforcing a policy that directly contradicts *Grimm*—a prior, binding decision of this [c]ourt"—was clearly in the public interest. *Id.* at *9.

32. In his concurrence to the court's opinion in *Doe*, Chief Judge Diaz directly addressed South Carolina's argument that *Grimm* had been abrogated by prior United States Supreme Court decisions. *Id.* at **10–11. He specifically noted that the Supreme Court's decision in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025) "has little to say about the issues *Grimm* addressed," given that it involved a statute prohibiting medical care that applied to all minors rather than a sex-based restriction on facility access. *Id.* at *10. Accordingly, Judge Diaz found that

"*Skrmetti* said nothing whatsoever to cause doubt as to the vitality of *Grimm's* Title IX holding." *Id*. at *9.

33. Similarly instructive is the concurrence of Judge Agee, who dissented in *Grimm.* Despite his disagreement with the Court's holding in *Grimm*, Judge Agee nonetheless stated that it remains binding authority in the Fourth Circuit. "*Grimm* binds all the judges of this Circuit, notwithstanding any expectation that the Supreme Court will adjust, if not overrule, the foundations of *Grimm* in a way that is likely to determine whether Doe will ultimately prevail in this action. The current law of this Circuit answers the question of whether Doe has satisfied the requirements for obtaining an injunction pending the appeal." *Id*. at *14.[6]

34. Unless and until either the *en banc* Fourth Circuit reconsiders the holding of *Grimm* or the U.S. Supreme Court decides whether transgender status is a protected class under Title IX, *Grimm* remains controlling in the Fourth Circuit.[7]

IV. Virginia's anti-discrimination law further requires APS to provide access to facilities that match individuals' gender identities.

35. Virginia law is consistent with *Grimm* and prohibits discrimination based on gender identity. In 2020, the Virginia General Assembly expanded the scope of the Virginia Human

[6] On August 28, 2025, the Defendants in *Doe* filed a petition for certiorari with the United States Supreme Court.

[7] The United States Supreme Court has agreed to hear a case involving the scope of Title IX as applied to transgender student participation in school sports in its upcoming term, a case that may but has not yet provided further guidance as to the scope of Title IX. The Court recently granted cert in *West Virginia v. B.P.J.*, a case involving a West Virginia law which limits participation in women's sports programs to students whose gender was female at birth. *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542, 550 (4th Cir.), *cert. granted sub nom. W. Virginia v. B. P. J.*, No. 24-43, 2025 WL 1829164 (July 3, 2025). The question for the Court in *B.P.J.* is whether Title IX and the Equal Protection Clause prevent a state from designating school sports teams based on biological sex. The Court's decision may provide clarity as to whether or not Title IX requires educational institutions to separate student resources by biological sex, without concern for transgender students.

Rights Act (VA. CODE ANN. § 2.2-3900–3909), by adopting the Virginia Values Act (the "Values Act").[8] The law "[s]afeguard[s] all individuals within the Commonwealth from unlawful discrimination because of . . . gender identity . . . in places of public accommodation, including educational institutions." VA. CODE ANN. § 2.2-3900. The Values Act defines "gender identity" as "the gender-related identity, appearance, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth." VA. CODE ANN. § 2.2-3901.

36. Virginia law also states that "[a] county may enact an ordinance prohibiting discrimination in . . . education on the basis of . . . gender identity." VA. CODE ANN. § 15.2-853.

37. In 2021, VDOE issued Model Policies for the Treatment of Transgender Students in Virginia Public Schools, which provided that "[s]tudents should be allowed to use the facility that corresponds to their gender identity" and advised that schools should provide all students access to single-user restrooms and private changing areas for those who would like more privacy.[9]

38. Upon the accession of Glenn Youngkin to the office of Governor of Virginia in 2022, the VDOE issued new guidance on the issue of transgender student access to school facilities. Despite the fact that there has been no change to the Virginia Code, VDOE issued the 2023 Model Policies to Ensure Privacy, Dignity, and Respect for All Students and Parents in Virginia's Public Schools, which state that a student "shall use bathrooms that correspond with his or her sex, except to the extent that federal law otherwise requires. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020)."

[8] S.B. 868, 161st Gen. Assemb. Reg. Sess. (Va. 2020).

[9] *Model Policies for the Treatment of Transgender Students in Virginia's Public Schools*, VIRGINIA DEPARTMENT OF EDUCATION (Mar. 2021), https://equalityvirginia.org/wp-content/uploads/2021/03/Transgender-Student-Model-Policies-March-2021-final.pdf.

V. APS's J-2 PIP-2 Policy adheres to federal and state statutes and regulations.

39. Pursuant to VDOE's Model Policies, APS implemented J-2 PIP-2 in July 2019. Ex. C.

40. J-2 PIP-2 states:

a) "It is the responsibility of each Arlington Public Schools (APS) staff member to ensure that all students, including transgender students, have safe, supportive, and inclusive school environments. School-based procedures provide APS staff with guidance to ensure compliance with the School Board Policy J-2 Student Equal Educational Opportunities-Nondiscrimination. These procedures are detailed in this document and will be disseminated to staff through administrative processes and specific guidelines."

b) "'Gender Identity' is one's sense of self as male, female, or an alternative gender that may or may not correspond to a person's sex assigned at birth (American Psychological Association, 2015)."

c) "'Transgender' is an umbrella term used to describe individuals whose gender identity, expression, or behavior does not conform with that typically associated with the sex to which they were assigned at birth (National School Boards Association, 2017)."

d) "Access to facilities that correspond to a student's gender identity will be available to all students. Single user, gender neutral facilities will be made available to all users who seek privacy."[10] Ex. C.

[10] *See* APS J-2 PIP-2 Policy. Ex. C. All APS policies, bylaws, and regulations are publicly available at https://www.apsva.us/wp-content/uploads/sites/57/2024/08/APS-Handbook-2024-25-final.pdf.

VI. The Office of Civil Rights of the Department of Education investigates APS's policies.

41. Despite the clear authority which authorizes the APS policy at issue in this matter, the Office for Civil Rights ("OCR") of the United States Department of Education has launched an investigation which seeks to compel APS to change its policy in a manner contrary to law. On February 12, 2025, OCR issued a Notification Letter to APS indicating that a complaint had been filed alleging that APS's policy regarding use of sex-segregated facilities such as restrooms and locker rooms (J-2 PIP-2) violated Title IX by providing greater rights to students who are transgender than to those who are cisgender. *See* Ex. D. On February 24, 2025, OCR sent APS a Data Request Letter requesting a number of documents and responses. Ex. D.

42. The complaint was generated by America First Legal ("AFL"), a conservative nonprofit organization founded by White House Deputy Chief of Staff Stephen Miller.

43. APS promptly responded on March 20, 2025 with documents and a narrative response defending the policy. APS cited state law and the Fourth Circuit's *Grimm* opinion as the bases for its protection of transgender students' access to facilities aligned with their gender identity. Ex. E.

44. On July 25, 2025, OCR concluded its investigation by issuing a Findings Letter. Ex. F. In that letter, OCR asserted that the APS policies and similar facilities-access policies of four other school divisions in Northern Virginia—those for Fairfax, Loudoun, Prince William, and Alexandria Counties—violate Title IX and its implementing regulations. *Id.* Accompanying the Findings Letter, OCR delivered a draft Resolution Agreement, which requires that each division (1) modify its policy to ensure that access to restroom and locker room facilities will be limited by students' sex assigned at birth; and (2) ensure that all policies adopt OCR's definition of the terms "sex, female, male, girls, women, boys [and] men." Ex. G. OCR's definitions of these terms treat individuals exclusively according to the sex assigned them at birth. *Id.*

45. On July 29, 2025, counsel to all five of the impacted school divisions submitted a joint request to OCR for 90 days to respond to the July 25, 2025 Findings Letter, consistent with the timeframe for negotiated resolutions provided in the OCR Case Processing Manual. Ex. H.

46. On July 31, 2025, OCR's Regional Director Bradley Burke rejected the July 29th request for extension and instead imposed a deadline of August 15, 2025, for APS and the other impacted school divisions to notify OCR as to "whether or not [each Division] is willing to consider agreeing to the terms in the draft resolution agreement." Ex. I.

47. On August 15, 2025, APS submitted a response letter to OCR, stating that APS was bound by Fourth Circuit precedent and could not modify its policies or agree to the terms of the Resolution Agreement without exposing itself to a risk of litigation for violating federal and state law. Ex. J. APS proposed that OCR refrain from referring the matter to the DOJ until the Supreme Court has issued its decision in *West Virginia v. B. P. J.*, No. 24-43, 2025 WL 1829164 (certiorari granted July 3, 2025), which raises a related but distinct issue of Title IX transgender sex discrimination in athletic teams. *Id.*

48. On August 18, 2025, APS submitted a supplemental response letter to OCR, providing additional authority for APS's position that it is bound by Fourth Circuit precedent—the opinion issued on Friday, August 15 by the United States Court of Appeals in *John Doe v. State of South Carolina*, which makes clear that *Grimm* remains good law and controls the issue of student restroom access in the Fourth Circuit. Ex. K.

VII. Defendants designate APS as a "high-risk" entity and place APS in "reimbursement only" status.

49. On August 19, 2025, the Department "designated [APS] as a 'high-risk' entity, under all the programs administered by the Department for which [APS] receives funds" due to APS's purported "noncompliance with Title IX." Ex. B at 1.

50. The Department also stated that it has designated APS as a "high-risk" entity in accordance with 2 C.F.R. §§ 200.208 and 3474.1. Ex. B at 2–3. The factors set forth in § 200.208 that the Department is required to consider include (1) "[r]eview of OMB-designated repositories of government-wide data [] or review of its risk assessment;" (2) APS's "history of compliance with the terms and conditions of Federal awards;" (3) APS's "ability to meet expected performance goals as described in § 200.211;" or (4) "a determination of whether [APS] has inadequate financial capability to perform the Federal award." 2 C.F.R. § 200.208. The Department stated that it considered "the possible magnitude of the potential gross mismanagement of public funds while violating applicable laws," "the improper organizational management and operations that led to the problems discussed above," and "concerns regarding your division's lack of proper controls." Ex. B at 2–3.

51. The Department stated that it was "placing specific conditions on [APS's] use of funds in all grants it receives from the Department." *Id*. at 1–2. In particular, "[d]ue to the sizable amount of Federal grant funds that are provided to [APS], and concerns discussed in this letter, the Department will place all of [APS's] grants on reimbursement payment status." *Id*. at 2. "Under this specific condition, [APS] will, when it submits a request to drawdown [*sic*] funds for a particular obligation it intends to charge to a Department grant, submit to the Department or the appropriate State division detailed documentation establishing that the expenditure in question can be allowably charged to the grant and has already been paid for by [APS] with non-Federal funds." *Id*. at 3.

52. Further, the Department demanded that "within 30 days of the date of this letter" APS would comply with two further "specific conditions":

a) "[APS] must submit plans for compliance with all federal laws, and provide detailed information that identifies and discusses the steps [APS] will take to ensure that grant funds will be spent in accordance with all appliable [*sic*] laws (this could include committing to implementing the resolution agreement sent to [APS] on July 25, 2025, with OCR's findings)." Ex. B at 3.

b) "[APS] must submit a corrective action plan (as noted above, this could include committing to implement the OCR resolution agreement) that shows all steps taken to be in compliance with the applicable laws and assurances, that compliance will be properly maintained, that includes a proposed schedule to monitor the implementation of the corrective actions, and, if appropriate, a schedule of when the corrective actions will be completed and by whom (the responsible division representative). If deemed necessary, the Department may require additional actions to be included in the plan." *Id*. at 3.

53. The Department's August 19, 2025 letter makes clear that APS will not receive reimbursement unless it accedes to the Department's and OCR's interpretation of Title IX, which is not consistent with the interpretation that binds APS (and this Court). Accordingly, Defendants' order placing APS on "reimbursement-only" status while APS complies with the Fourth Circuit's binding interpretation of Title IX constitutes a refusal to continue federal financial assistance within the meaning of Title IX and the Department's regulations implementing it.

54. Defendants' challenged actions are agency actions within the meaning of the APA because they constitute the entireties or parts of agency orders or sanctions, or the equivalent thereof. *See* 5 U.S.C. § 551(13).

55. Defendants' challenged actions are final agency actions because they represent the culmination of Defendants' decision-making process on specific conditions imposed on APS due to APS's legally mandated facilities-access policies. Further, Defendants' action has immediate legal and real-world effects—namely, they purport to have adjudicated APS to be in violation of Title IX and they have altered the conditions under which APS may receive funding to which it is otherwise entitled. Indeed, because APS cannot—consistent with the law that binds it—alter those facilities-access policies without risking litigation, and because Defendants have conditioned reimbursement on APS altering those policies, Defendants have in fact refused to continue providing federal funds to APS.

VIII. APS has suffered irreparable harm and the balance of equities weighs in its favor.

56. Defendants' action constitutes irreparable harm to APS. Because Defendants have conditioned APS's receipt of federal funds on requirements APS cannot lawfully satisfy, APS has in fact lost access to those funds.

57. APS relies on approximately $23 million in federal funding to execute its budget.

58. The largest portion—about $8.6 million—funds food and nutrition services, which allows APS to pay the salaries of the food services staff and provide high-quality meals that meet federal nutrition standards. APS receives an additional $6 million in IDEA grants to provide one-on-one special education instructional assistants for students needing extraordinary supports in the education setting. This money also funds positions for student support coordinators, who conduct Individualized Education Plan ("IEP") meetings, and transition coordinators, who prepare students with IEPs as they transition to jobs and adult learning programs after leaving APS.

59. While APS's injury is primarily economic, money damages are unavailable as against the Federal Government due to federal sovereign immunity. *See Mountain Valley Pipeline, LLC v. W. Pocahontas Props. Ltd. P'ship*, 918 F.3d 353, 366 (4th Cir. 2019) ("economic damages

may constitute irreparable harm where no remedy is available at the conclusion of litigation"); *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 430 (4th Cir. 2019) ("The APA waives the federal government's sovereign immunity for a limited set of suits, brought by 'a person suffering legal wrong because of agency action' to obtain relief 'other than money damages.'") (quoting 5 U.S.C. § 702).

60. The Department and Defendant McMahon, as appendages of the federal Executive Branch, are bound by the President's duty to "take Care that the Laws be faithfully executed." U.S. CONST. art II, § 3. Accordingly, none of the Defendants can have any protectable interest in enforcing the Department's unlawful order, which is based on the Department's express refusal to follow precedent that binds APS, this Court, and Defendants.

61. APS has an interest in providing its students with "an educational program of high quality" in accordance with its duties under the Virginia Constitution. *See* VA. CONST. art. VIII, § 1.

62. APS further has an interest in ensuring that its students are afforded all constitutional and legal protections they are due, including those established by binding interpretations of federal anti-discrimination statutes such as Title IX.

63. APS also has an interest in ensuring that its own actions comply with all legal requirements.

64. Accordingly, the balance of equities and the public interest weigh in favor of injunctive relief.

CAUSES OF ACTION

Count I – under the Administrative Procedure Act (against Defendants McMahon and the Department)

65. ASB repeats and realleges paragraphs 1–64 as though fully set forth herein.

66. Defendants Secretary McMahon and the Department's constructive termination of or refusal to continue federal funds owed to APS based on Defendants' assertion that APS violated Title IX constitutes a final agency action reviewable under the APA. 20 U.S.C. § 1683.

67. The APA requires that the Court "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

68. Defendants' action designating APS as a "high-risk" entity is not based on any identifiable factor or factors set forth in 2 C.F.R. § 200.208. Though Defendants claim to have considered APS's "potential gross mismanagement of public funds," "improper organizational management and operations," and "lack of proper controls," the Department has provided no evidence to support these findings. APS has never been notified of a failed audit, mismanagement of specific funds, or issues regarding its internal controls prior to receiving this designation. Accordingly, designating APS as "high-risk" based on the Department's purported "consideration" of the § 200.208 factors is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

69. Defendants' action constructively terminating or refusing to continue funds owed to APS is not in accordance with the law set forth in *Grimm*. The refusal to continue funds was premised on APS's alleged violation of Title IX as a result of its implementation of J-2 PIP-2, but that policy merely codifies the holding of *Grimm*, which interpreted Title IX with binding effect on APS, this Court, and Defendants.

70. Defendants' action imposes unwarranted penalties on APS not because APS has violated any law but because APS is bound to follow and is following the Fourth Circuit's precedent, which is binding within APS's geographical area (and which, moreover, binds this

Court). Defendants' action is accordingly an abuse of discretion, and contrary to law. 5 U.S.C. § 706(2)(A).

71. Defendants' action targeting APS (and four other Northern Virginia schools) is arbitrary and capricious because it singles out APS, while ignoring similarly situated districts in Virginia and across the country that have similar policies regarding student access to facilities. Defendants have not articulated a sufficient and substantiated reason to explain why APS is subject to this action while others are not. This disparate treatment, without a rational basis, violates the fundamental principal that agency action must be based on reasoned decision-making. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Agency discretion is not unbounded, and selective enforcement without justification renders Defendants' action arbitrary and capricious and an abuse of discretion. 5 U.S.C. § 706(2)(A); *see Kirk v. Comm'r of SSA*, 987 F.3d 314, 321 (4th Cir. 2021) ("'Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.'") (quoting *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005)).

Count II – under the Administrative Procedure Act and the Spending Clause (against Defendants McMahon and the Department)

72. ASB repeats and realleges paragraphs 1–71 as though fully set forth herein.

73. Separately, the Court must "hold unlawful and set aside agency action, findings, and conclusions found to be … contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

74. The federal government may not compel states to enact or administer federal regulatory programs. *New York v. United States*, 505 U.S. 144, 188 (1992).

75. Congress's power to legislate is constrained by Article I, and its power to spend the public fisc does not carry with it authority to commandeer the separate sovereign states legislative or administrative apparatus for federal purposes. *Printz v. United States*, 521 U.S. 898, 933 (1997).

76. The executive's power with respect to the laws of the United States extends only to the power to "take care that [they] be faithfully executed." U.S. CONST. art. II, § 3. The executive, when executing Congress's laws, accordingly may not do by executive action what Congress is constrained not to do by the Constitution's limitations.

77. To the contrary, exercising powers beyond those expressly granted to the executive and legislative branches would invade the powers reserved to the states and to the people. U.S. CONST. arts. I, II; U.S. CONST. amend. X.

78. Here, the executive seeks to pervert Congress's spending power to compel APS and other school divisions in Northern Virginia to enact and administer the executive's administrative program with respect to transgender individuals.

79. Because the executive's action seeks to commandeer power reserved to the Commonwealth and its people, it is contrary to Constitutional power and must be held unlawful and set aside. 5 U.S.C. § 706(2)(B).

Count III – under the APA, the Declaratory Judgment Act, and the Spending Clause: Lack of Notice
(against Defendants McMahon and the Department)

80. ASB repeats and realleges paragraphs 1–79 as though fully set forth herein.

81. The Court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

82. Defendants' action interprets Congress's grant of funding to APS in a manner that would violate the Spending Clause of the U.S. Constitution because APS did not have clear notice

that any federal funding would be conditioned on (1) rescinding J-2 PIP-2 and categorically banning students from accessing facilities in accordance with their gender identity or (2) issuing public statements regarding the meaning of Title IX or the definition of sex, female, male, girls, women, boys, or men.

83. Article I of the U.S. Constitution specifically grants Congress the power "to pay the Debts and provide for common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

84. Incident to the spending power, "Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). However, any conditions must be imposed "unambiguously" to enable "States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). "There can, of course, be no knowing acceptance if a [recipient] is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, 451 U.S. at 17.

85. Defendants' sole authority with respect to the laws of the United States is to "take care that [they] be faithfully executed." U.S. CONST. Art. II § 3; *see also* U.S. CONST. Amend. X (reserving to the states and the people those powers not delegated to the federal government by the Constitution). Where Congress may not impose ambiguous or unlawful conditions, the Executive similarly may not interpret acts of Congress to impose those conditions consistent with its duty to take care that the laws be faithfully executed.

86. APS accepted federal funding with the understanding that it was required to comply with Title IX and binding judicial precedent interpreting Title IX.

87. Congress has not clearly stated, and no court has found, that Title IX prohibits APS from maintaining its challenged policies. To the contrary, J-2 PIP-2 complies with and codifies governing Fourth Circuit precedent as set forth in *Grimm*, which holds that excluding transgender students from restrooms consistent with their gender identity violates Title IX and the Equal Protection Clause. *See also* Am. Order, *Doe v. S. Carolina*, No. 25-1787, 2025 WL 2375386 (4th Cir. Aug. 15, 2025).

88. Defendants have nonetheless conditioned APS's receipt of essential federal funds on its agreement to abandon its policies in exchange for Defendants' policies and adhere to a new, extratextual interpretation of Title IX that is directly contrary to prior agency interpretation and governing precedent.

89. Therefore, conditioning the Department funding to enforce a categorical ban on student access to facilities violates this limitation on spending power, because, *inter alia*, APS did not have "clear notice" of such a condition. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

90. Because Defendants' action is contrary to Congress's constitutional power and to APS's constitutional power reserved under the Tenth Amendment, Defendants' action must be held unlawful and set aside. 5 U.S.C. § 706(2)(B).

91. ASB is separately entitled to a judicial declaration that Defendants' action is contrary to the federal government's power under the Spending Clause. 28 U.S.C. § 2201.

Count IV - under the Administrative Procedure Act, the Declaratory Judgment Act, and the Spending Clause: Unconstitutional Coercion
(against Defendants McMahon and the Department)

92. ASB repeats and realleges paragraphs 1–91 as though fully set forth herein.

93. The Court must "hold unlawful and set aside agency action, findings, and conclusions found to be … contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

94. Pursuant to the Spending Clause of the United States Constitution, "spending-power conditions are legitimate only if the [recipient's] acceptance of them is in fact voluntary." *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2232 n.4 (2025) (citing *NFIB v. Sebelius*, 567 U.S. 519, 581–82 (2012)).

95. The Spending Clause permits the federal government to "encourage[]" compliance through funding conditions, not to punish or impose sanctions absent statutory authorization. *Sebelius*, 567 U.S. at 581. The federal government may not wield its spending power as a "gun to the head." *Id.*

96. Defendants' sole authority with respect to the laws of the United States is to "take care that [they] be faithfully executed." U.S. CONST. Art. II, § 3; *see also* U.S. CONST. Amend. X (reserving to the states and the people those powers not delegated to the federal government by the Constitution). Where Congress may not impose arbitrary or unlawful conditions, the Executive similarly may not interpret acts of Congress to impose those conditions consistent with its duty to take care that the laws be faithfully executed.

97. APS receives federal education funds under several federal statutes including Title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. §§ 6301 *et seq*.) and the Individuals With Disabilities Education Act (20 U.S.C. §§ 1400 *et seq*.). These funds are critical to APS's ability to provide state and federally-mandated, education-related services to its students, particularly its most vulnerable students. Loss of these funds is existential.

98. Defendants' decision to designate APS as "high-risk," place of all federal funds on reimbursement status, and urge state entities to do the same because APS did not agree with Defendants' unilateral interpretation—directly at odds with binding legal precedent—that the District's policies violate Title IX.

99. By designating APS as "high-risk" unless and until APS agrees with Defendants' interpretation of Title IX and rescinds J-2 PIP-2, Defendants are conditioning essential federal funding on APS's capitulation to Defendants' extralegal demands.

100. "Appeal" of APS's "high-risk" status to Defendants is futile and does not afford it meaningful review, as Defendants have made clear that compliance with their demands is the only pathway for APS to continue to receive essential federal funding.

101. This threat amounts to unconstitutional coercion under the Spending Clause. *Sebelius*, 567 U.S. at 581. Placing APS on "high-risk" status and withholding all federal funding, including State-administered funds earmarked for the APS's most vulnerable students, until APS accepts Defendants' demands, leaves APS with no meaningful choice but to comply. And this is so even when acceptance of Defendants' terms means that APS must surrender local control over its lawful policies, violate state law, eschew controlling judicial precedent, and expose itself to liability for violating the rights of students under that precedent. This funding threat compels capitulation, not voluntary agreement. *See Medina*, 145 S. Ct. at 2232 n.4.

102. Because Defendants' action is contrary to Congress's constitutional power and to APS's constitutional power reserved under the Tenth Amendment, Defendants' action must be held unlawful and set aside. 5 U.S.C. § 706(2)(B).

103. APS is separately entitled to a judicial declaration that Defendants' action is contrary to the federal government's power under the Spending Clause. 28 U.S.C. § 2201.

Count V – *Ultra Vires*
(against Defendants McMahon and the Department)

104. ASB repeats and realleges paragraphs 1–103 as though fully set forth herein.

105. An agency cannot take any action that exceeds the scope of its constitutional or statutory authority.

106. Federal courts possess the power in equity to "grant injunctive relief . . . with respect to violations of federal law by federal officials." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015). The Supreme Court has repeatedly allowed equitable relief against federal officials who act "beyond th[e] limitations" imposed by federal statute. *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689 (1949).

107. Defendants have no authority under the Constitution or any statute to demand that APS rescind J-2 PIP-2 based on their erroneous interpretation of Title IX in order for APS to receive federal funding.

108. Pursuant to 28 U.S.C. § 2201(a), ASB is entitled to a declaration that Defendants acted *ultra vires* by demanding that ASB rescind its policy in order for APS to receive federal funding.

Count VI – under the Declaratory Judgment Act
(against Defendants McMahon and the Department)

109. ASB repeats and realleges paragraphs 1–108 as though fully set forth herein.

110. An actual and justiciable controversy exists between the parties with respect to the enforceability of *Grimm*. Defendants have asserted, and continue to assert, that *Grimm* has been abrogated, and therefore, APS's implementation of J-2 PIP-2 is in violation of Title IX.

111. ASB's position—and that of the Fourth Circuit, *see Doe*, 2025 WL 2375386—is that *Grimm* remains binding law in the Fourth Circuit and APS is bound to follow that law. As such, J-2 PIP-2 is not only constitutional, but compelled by federal law.

112. Accordingly, ASB and Defendants have adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment on the disputed matters raised herein.

113. ASB is therefore entitled to a declaration pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure that J-2 PIP-2 does not violate Title IX.

114. ASB is further entitled to a judicial declaration that Defendants' action is arbitrary, capricious, an abuse of discretion, and contrary to law.

PRAYER FOR RELIEF

For relief, ASB requests that the Court:

a) Pursuant to 5 U.S.C. § 706 and 28 U.S.C. § 2202, vacate and set aside Defendants' decision to designate APS as "high-risk";

b) Pursuant to 5 U.S.C. § 706 and 28 U.S.C. § 2202, vacate and set aside Defendants' action constructively denying funds allocated to APS and any other further actions taken by Defendants to implement their freeze on federal funds allocated to APS;

c) Pursuant to 28 U.S.C. § 2201, issue a judicial declaration that Defendants' conditioning and freezing of federal funds allocated to APS is an unlawful act violative of the APA;

d) Pursuant to 28 U.S.C. § 2201, issue a judicial declaration that Defendants' conditioning and freezing of federal funds allocated to APS is an unlawful act violative of the Spending Clause;

e) Pursuant to 28 U.S.C. § 2201, issue a judicial declaration that the legal principles and holdings announced in *Grimm* and reaffirmed in the Fourth

Circuit's August 15, 2025 Amended Order in *Doe*, 2025 WL 2375386, remain valid and binding legal precedent;

f) Pursuant to 28 U.S.C. § 2201, issue a judicial declaration that J-2 PIP-2 does not violate Title IX;

g) Pursuant to 28 U.S.C. § 2201, issue a judicial declaration that federal funds are not conditioned on compliance with Defendants' demands, including prohibiting students from accessing facilities in accordance with their gender identity;

h) Preliminarily and permanently enjoin Defendants (including any officers, employees, and agents thereof) from taking enforcement action on the ground that J-2 PIP-2 violates Title IX;

i) Preliminarily and permanently enjoin Defendants from conditioning, terminating, freezing, or otherwise impeding access to federal funds allocated to APS based on APS's violation of Title IX;

j) Require that Defendants immediately pay to APS any funds that have been denied pursuant to Defendants' August 19, 2025 letter, Ex. B, and/or Defendants' belief that APS and/or J-2 PIP-2 violate or have violated Title IX;

k) Award ASB its reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and

l) Grant all other such relief as this Court deems appropriate, just, and proper.

Dated: August 29, 2025

Respectfully submitted,

/s/ *Timothy Heaphy*

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Attorneys for Arlington School Board

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ARLINGTON SCHOOL BOARD, *Plaintiff*, v. LINDA McMAHON, in her official capacity as Secretary of Education of the United States; the UNITED STATES DEPARTMENT OF EDUCATION, *Defendants.*	)	Civil Action No. _____

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2025, I electronically filed a true and correct copy of **PLAINTIFF'S COMPLAINT** with the Clerk of Court using the CM/ECF system. A copy of the foregoing will be sent to the following parties:

U.S. Department of Education

Secretary Of Education Linda McMahon

Respectfully submitted,

/s/ *Timothy Heaphy*

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JS 44 (Rev. 03/24)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Arlington School Board

(b) County of Residence of First Listed Plaintiff Arlington County, Virginia
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Timothy Heaphy, Willkie Farr & Gallagher LLP, 1875 K Street NW, Washington, D.C. 20006-1238, (202) 303-1000

DEFENDANTS

U.S. Department of Education, and Linda McMahon, in her official capacity as U.S. Secretary of Education

County of Residence of First Listed Defendant N/A
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
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- ☐ 350 Motor Vehicle
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PERSONAL INJURY
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- ☐ 530 General
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- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

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- ☐ 690 Other

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- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
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- ☐ 791 Employee Retirement Income Security Act

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- ☐ 423 Withdrawal 28 USC 157

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- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

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- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
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- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
5 U.S.C. §§ 701 et seq. and 28 U.S.C. § 2201

Brief description of cause:
Violation of the Administrative Procedure Act

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): *Fairfax County School Board v. McMahon* -- Filed simultaneous with the instant action

JUDGE _____ DOCKET NUMBER _____

DATE
August 29, 2025

SIGNATURE OF ATTORNEY OF RECORD
/s/ *Timothy Heaphy*

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

EXHIBIT A

PRESS RELEASE

U.S. Department of Education Places Five Northern Virginia School Districts on High-Risk Status and Reimbursement Payment Status for Violating Title IX

AUGUST 19, 2025

Today, the U.S. Department of Education (the Department) announced it is placing Alexandria City Public Schools, Arlington Public Schools, Fairfax County Public Schools, Loudoun County Public Schools, and Prince William County Public Schools (the Divisions) in Northern Virginia on high-risk status with the condition that all federal funding flowing to these districts is done by reimbursement only. This action is being taken after all five Divisions have been found in violation of Title IX of the Education Amendments of 1972 (Title IX). The Department found the Divisions in violation of Title IX last month for their policies allowing students to occupy intimate facilities based on "gender identity," not biological sex. The Divisions refused to sign the Department's proposed Resolution Agreement to voluntarily resolve their Title IX violations by last Friday's (August 15th) deadline and have instead chosen to remain in violation of Title IX.

As a result of the Divisions' rejection of the Resolution Agreement, the Department is commencing administrative proceedings seeking suspension or termination of federal financial assistance to the Divisions.

Additionally, to ensure that grantees expend federal funds consistent with federal law, the Department is placing these Divisions on reimbursement status for all Department funds including formula funding, discretionary grants, and impact aid grants, totaling over $50 million. The Divisions will now be required to pay their education expenses up front and then request reimbursement for expenditures to access funds obligated by the Department.

To indicate that the Divisions have failed to uphold the conditions of their federal grant agreements by violating federal law, the Department will classify the five Divisions as "high-

risk" within the federal grant system.

"States and school districts cannot openly violate federal law while simultaneously receiving federal funding with no additional scrutiny. The Northern Viriginia School Divisions that are choosing to abide by woke gender ideology in place of federal law must now prove they are using every single federal dollar for a legal purpose," **said U.S. Secretary of Education Linda McMahon.** "We have given these Northern Virginia School Divisions every opportunity to rectify their policies which blatantly violate Title IX. Today's accountability measures are necessary because they have stubbornly refused to provide a safe environment for young women in their schools."

Pursuant to its regulatory authority, the Department may place grantees on high-risk status and impose High-Risk Specific Conditions on all grants for the Divisions' failure to comply with conditions of their grant agreements by violating federal law. Such restrictions are imposed to ensure that a grantee is spending federal funds consistent with the terms and conditions of the grant program and in conformity with federal law.

Background:

On July 25, the Department's Office for Civil Rights (OCR) concluded its investigation of the Divisions and found that they violated Title IX by allowing students to occupy intimate facilities based on "gender identity," not biological sex. OCR generously granted the Divisions' request for an extension to reach a voluntary resolution with OCR, or agree to the government's proposed Resolution Agreement, to resolve their Title IX violations, which the Divisions rejected last Friday.

The "high-risk" designation in the federal grant system alerts all federal agencies of the entity's failure to comply with the terms of their federal grant agreements.

Title IX prohibits discrimination on the basis of sex in educational programs or activities receiving federal financial assistance.

CONTACT

Press Office | (202) 401-1576 | press@ed.gov

Office of Communications and Outreach (OCO)

Page Last Reviewed: August 19, 2025

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EXHIBIT B

THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

August 19, 2025

Francisco Duran
Division Superintendent
Arlington Public Schools
2110 Washington Blvd
Arlington, VA 22204
Sent via email to superintendent@apsva.us

Re: High Risk Designation and Specific Conditions on Grants

Dear Superintendent Duran,

This letter is to inform you that the U.S. Department of Education (Department) has designated Arlington County Public School District as a "high-risk" entity, under all of the programs administered by the Department for which your division receives funds, in accordance with 2 C.F.R. §§ 200.208 and 3474.10, for the reasons discussed below. This follows the Department's July 25, 2025, Title IX noncompliance findings and proposed resolution agreement. On August 15, 2025, your division refused to sign the resolution agreement sent to you by the Office for Civil Rights (OCR) and remains in noncompliance with Title IX.

In this letter, we delineate the nature of our concerns with your division's administration of these grants; the reasons the information provided to the Department up to now by your division does not address these concerns; our determination to designate your division as a Department-wide "high-risk" entity; and the specific conditions we are imposing on all grants your division is receiving from the Department.

BACKGROUND

As you are aware, the U.S. Department of Education generously granted an extension for your school division (your division) and four other school divisions in Virginia to come into compliance with Title IX of the Educational Amendments of 1972 (Title IX), and related requirements. Unfortunately, the additional time did not result in a successful outcome in compliance with federal law.

On August 15, 2025, your division stated it does not intend to make the necessary policy changes to come into compliance with Title IX.

It is the Department's fiduciary duty to ensure taxpayer dollars are not being spent on illegal activity. Therefore, the Department is designating your division as a Department-wide "high-risk" entity and placing specific conditions on your division's use of funds in all grants it

receives from the Department.

The Department's prior communications with your division identified systemic organization-wide concerns regarding lack of compliance with applicable law as your assurances for receiving the grant funds had indicated. Thus, the Department is concerned with your division's inability to administer and/or manage Department grants properly with appropriate controls in place. These concerns are with all grants your division currently receives, administers, or manages.

In addition, the Department is identifying all the State-administered funds your division receives as a subgrantee from the Virginia Department of Education and any other State division, including under Title I of the Elementary and Secondary Education Act of 1965, as amended, and the Individuals with Disabilities Education Act. The Department expects to urge those entities to take similar actions to those being taken by the Department with regard to those funds. Representatives of the Virginia Department of Education have already agreed to take those steps.

Due to the sizable amount of Federal grant funds that are provided to your division, and concerns discussed in this letter, the Department will place all of your division's grants on reimbursement payment status until your division demonstrates to the Department's satisfaction that the following High-Risk Specific Conditions, specified below, are fully met, and that proper measures to address the problems noted in this letter are taken and are working well for a sustained period of time.

I. YOUR DIVISION's DESIGNATION AS "HIGH-RISK"

Given these serious and deeply systemic concerns, the Department is taking immediate action to help safeguard public funds with regard to your division's activities with the Department's grants in accordance with statutory and regulatory requirements and the terms of approved grant applications, and with grants for which your division is a primary grantee or subgrantee.

The Department is designating your division as a "high-risk" entity in accordance with 2 C.F.R. §§ 200.208 and 3474.10. As part of this "high-risk" designation, we are imposing High-Risk Specific Conditions (noted below) on all of your division's grants. In making this determination and designation, the Department has taken into consideration several factors (some of which are mentioned above), which include, but are not limited to:

- the possible magnitude of the potential gross mismanagement of public funds while violating applicable laws;
- the improper organizational management and operations that led to the problems discussed above; and
- concerns regarding your division's lack of proper controls.

II. HIGH RISK SPECIFIC CONDITIONS

Your division's grants and subgrants from the Department are being placed on a reimbursement method of payment. Under this specific condition, your division will, when it submits a request to drawdown funds for a particular obligation it intends to charge to a Department grant, submit to the Department or the appropriate State division detailed documentation establishing that the expenditure in question can be allowably charged to the grant and has already been paid for by your division with non-Federal funds.

In addition, within 30 days of the date of this letter:

1. Your division must submit plans for compliance with all federal laws, and provide detailed information that identifies and discusses the steps your division will take to ensure that grant funds will be spent in accordance with all appliable laws (this could include committing to implementing the resolution agreement sent to your division on July 25, 2025, with OCR's findings);

2. Your division must submit a corrective action plan (as noted above, this could include committing to implement the OCR resolution agreement) that shows all steps taken to be in compliance with the applicable laws and assurances, that compliance will be properly maintained, that includes a proposed schedule to monitor the implementation of the corrective actions, and, if appropriate, a schedule of when the corrective actions will be completed and by whom (the responsible division representative). If deemed necessary, the Department may require additional actions to be included in the plan.

The objectives of these specific conditions are to ensure that your division establishes the policies, procedures, and personnel in place to manage its grants and subgrants properly, including adherence to all pertinent federal civil rights laws that apply to your division's grants and subgrants. The Department may impose additional or modified specific conditions at any time through a subsequent letter. If your division is unable to satisfactorily address these concerns, the Department will consider additional enforcement actions, including the possible termination of all or some of the Department's grants, and may require the recovery of funds.

III. REMOVAL OF REIMBURSEMENT, HIGH-RISK CONDITIONS AND HIGH-RISK DESIGNATION

The reimbursement specific condition will remain in place until the Department has (1) determined that your division has put into place adequate corrective actions, which could include actions laid out in the OCR proposed resolution agreement, and (2) concluded that the corrective actions have been working appropriately for a period of time that reasonably demonstrates assurance of effective compliance.

IV. REQUEST FOR RECONSIDERATION

Consistent with 2 C.F.R. § 200.208(d)(5), your division may request reconsideration of its designation as "high-risk", and the specific conditions set forth in this letter, by submitting a written request for reconsideration within ten business days of the date of this letter. Any request for reconsideration must be submitted via e-mail to Lindsey Burke of the Department, at lindsey.burke@ed.gov. In a request for a reconsideration, you should include appropriate supporting documentation.

The Department remains committed to working with your division to help with the positive resolution of these concerns. Lindsey Burke is available to answer any questions on the High-Risk Specific Conditions, as well as to help facilitate any necessary support or assistance regarding the status of your grants or subgrants from the Department.

Sincerely yours,

Linda E. McMahon

CC: Emily Anne Gullickson, Virginia State Superintendent

EXHIBIT C

It is the responsibility of each Arlington Public Schools (APS) staff member to ensure that all students, including transgender students, have safe, supportive, and inclusive school environments. School-based procedures provide APS staff with guidance to ensure compliance with the School Board Policy J-2 Student Equal Educational Opportunities-Nondiscrimination. These procedures are detailed in this document and will be disseminated to staff through administrative processes and specific guidelines.

All Arlington Public Schools staff shall be periodically trained on topics relating to transgender students. School staff members are responsible for taking prompt and effective steps to prevent and respond to harassment of any kind, including that which is based on gender identity and, as appropriate, remedy its effects.

Definitions
"Gender identity" is one's sense of self as male, female, or an alternative gender that may or may not correspond to a person's sex assigned at birth (American Psychological Association, 2015).

"Transgender" is an umbrella term used to describe individuals whose gender identity, expression, or behavior does not conform with that typically associated with the sex to which they were assigned at birth (National School Boards Association, 2017).

Bathrooms and Locker Rooms
Access to facilities that correspond to a student's gender identity will be available to all students. Single user, gender neutral facilities will be made available to all users who seek privacy.

Co-curricular and Extra-curricular Activities and Athletic Team Student Participation
Students may participate in any co-curricular or extra-curricular activity consistent with their gender identity. Athletic participation regulated by the Virginia High School League (VHSL) and the Virginia Scholastic Rowing Association (VASRA), as well middle school athletics, shall be in compliance with rules outlined by that organization. Any uniform required for participation in a co-curricular or extra-curricular activity, including athletics, shall include options that are gender neutral. Awards designated by Arlington Public Schools for participation in any such activity will also be gender neutral.

Dress Code
All students must dress according to the constraints of the dress code as outlined within the school handbook. Information regarding appropriate attire for school day and school related activities shall be non-gender specific and enforced impartially regardless of a student's gender identity or gender expression.

Extended Instructional Field Trips or Athletic Events
APS is committed to providing a safe, welcoming school environment where students are engaged in learning because they feel accepted and valued. Additionally, APS respects the privacy rights of its students and parents and will maintain confidentiality of nonpublic information about students, releasing this information to third parties only when authorized by a parent or student as required by law. As part of this commitment to inclusion and equity, when

an instructional or extra-curricular or athletic event requires students to be accommodated overnight, students may be assigned to a room consistent with the student's gender identity.

Any student uncomfortable sharing a sleeping area, shower, bathroom, or any sex-segregated facility, shall, upon request, be provided with a designated safe, non-stigmatizing alternative. Arlington Public Schools staff shall not require a student to stay in a single-occupancy accommodation when such accommodations are not required of other students participating in the same event.

Names, Pronouns, and Classroom Records
Every student has the right to be addressed by names and pronouns that correspond to the student's gender identity. Regardless of whether a transgender student has legally changed their name or gender, schools will allow students to use a chosen name and gender pronouns that reflect their gender identity.

To ensure consistency, staff will update student classroom records (class rosters for substitutes, etc.) with the student's chosen name and, where applicable, appropriate gender markers.

Privacy and Educational Records
Information about a students' transgender status, legal name, or gender assigned at birth constitutes confidential personally identifiable and medical information. Disclosing this information to others by an Arlington Public Schools staff member may violate privacy laws, such as the Federal Family Educational Rights and Privacy Act (FERPA), as well as constitutional privacy protections and therefore, the information will not be disclosed unless in accordance with these laws.

Permanent records for students, including a student's gender, may only be changed with the submission of a legal document such as a birth certificate, passport, or court order. The process for changing any element of a student's permanent record including a student's name and gender must follow the process outlined in School Board Policy J-5.3.30 Admissions and Placement and School Board Policy J-15.30 Privacy Rights and Regulations, and state law. APS graduates may change their permanent records under the same requirements as current APS students. Appeals to a decision made regarding a change to a student's permanent record must be made in writing to the Assistant Superintendent of Teaching and Learning.

References
Policy J-5.3.30 Admissions and Placement
Policy J-15.30 Privacy Rights and Regulations
Policy J-6.8.1 Student Safety - Bullying Harassment Prevention
Virginia High School League Student Eligibility Requirements
Family Educational Rights and Privacy Act
Education Amendments Act of 1972, 20 U.S.C. §§1681 – 1688 (Title IX)

Policy Implementation Procedure Adoption and Revision History
Adopted July 1, 2019; Effective July 1, 2019

EXHIBIT D

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW
WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

February 24, 2025

By email only to superintendent@apsva.us

Dr. Francisco Durán
Superintendent
Arlington Public Schools
2110 Washington Boulevard
Arlington, VA 22204

Re: Case No. 11-25-1306
Arlington Public Schools

Dear Dr. Durán:

On February 12, 2025, the U.S. Department of Education, Office for Civil Rights (OCR), notified you that OCR was opening an investigation of Arlington Public Schools (the Division) under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 et seq., and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any program or activity receiving federal financial assistance. As explained in that letter, OCR will investigate whether the Division's "Transgender Students in Schools" policy, which relates in part to the use of intimate, sex segregated facilities, including restrooms and locker rooms, violates Title IX.

As an initial data request, please submit the items listed below to OCR **by March 17, 2025**. Please note that OCR may request supplemental data and documents relevant to the investigation.

1. The name and contact information of the individual who will serve as OCR's contact person during the investigation of this complaint.

2. The Division's narrative response to the allegation under investigation and all documents or records referenced in the narrative response.

3. The Division's Title IX grievance procedures, and where those procedures are published.

4. The name and contact information of the Division's Title IX Coordinator.

5. The Division's policies and procedures regarding student access to and use of sex-segregated restrooms, locker rooms, and/or other intimate facilities in its schools.

6. A list of any formal or informal complaints the Division has received during the 2024-2025 school year alleging sex discrimination with regard to students' access to, or use of, school restrooms, locker rooms, and/or other intimate facilities. For each complaint, please note:

the date of the complaint; the identity of the complainant (e.g. parent, student, teacher); any school(s) named in the complaint; a summary of the complaint; and a brief description of the Division's response to the complaint.

7. Any additional information the Division believes may be helpful in resolving this complaint.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

We look forward to your cooperation during the resolution of this complaint. If you have any questions, please contact me at 202-245-8014 or Dan.Greenspahn@ed.gov.

Sincerely,

DAN GREENSPAHN

Digitally signed by DAN GREENSPAHN
Date: 2025.02.24 11:21:41 -05'00'

Dan Greenspahn
Team Leader, Team 1
District of Columbia Office
Office for Civil Rights

Data Request Instructions

If any item in our request is unclear, or if you experience any difficulty complying with this request, please contact the staff member(s) identified above prior to the due date. OCR requests that you submit information electronically, if feasible. Upon request, OCR may create a secure external sharing site for you to upload the submission. You may contact us for more information about this option. Please do not provide the information via an electronic cloud format such as Google Docs. If any of the requested information is available to the public on the Internet, you may provide the website address. If any responsive documents contain Social Security numbers, please redact them before producing the documents to OCR.

The Department of Education's regulation implementing Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 100.6(c), which is incorporated by reference in the Title IX regulation at 34 C.F.R. § 106.81, gives OCR the authority to request this information. In addition, in accordance with the regulation implementing the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, at 34 C.F.R. § 99.31(a)(3)(iii), and the Title VI regulation at 34 C.F.R. § 100.6(c), OCR may review personally identifiable records without regard to considerations of privacy or confidentiality. OCR will take all proper precautions to protect the identity of any individuals named in the records.

OCR may request supplemental data and documents that are relevant to the allegation under investigation. If the Division obtains any additional information or documents responsive to this data request or otherwise relevant to the allegations in this case, the Division must promptly inform OCR of its existence and supplement the data response within 15 days of its discovery. OCR reminds the Division that a failure to provide requested information may be considered a denial of access in violation of the regulations cited above. Please ensure that Division employees preserve all data and documents that are relevant to the allegation under investigation until OCR closes this case.

EXHIBIT E

WILLKIE FARR & GALLAGHER LLP

1875 K Street, N.W.
Washington, DC 20006-1238

Tel: 202 303 1000
Fax: 202 303 2000

March 20, 2025

Dan Greenspahn, Esq.
U.S. Department of Education
Office for Civil Rights
District of Columbia Office
400 Maryland Avenue, SW
Washington, D.C. 20202-1475

Re: OCR Case No. 11-25-1306 - Arlington Public Schools

Dear Mr. Greenspahn:

On February 12, 2025, Arlington Public Schools ("APS") received a letter from the District of Columbia Office for Civil Rights ("OCR") regarding Case No. 11-25-1306 (the "Notification Letter"). APS subsequently received a Data Request Letter from OCR on February 24, 2025 (the "Request"). The Notification Letter indicates that a complaint was filed with OCR alleging that APS's "Transgender Students in Schools" policy ("J-2 PIP-2") violates Title IX of the Educational Amendments of 1972 ("Title IX") by providing greater rights to students who are transgender than to those who are not in regards to the use of intimate, sex-segregated facilities such as restrooms and locker rooms (collectively, "facilities"). The Notification Letter does not identify the complainant or whether the complaint is made on behalf of any individual APS students or in regard to any specific incident at APS.[1]

As you are aware, I represent APS in this matter. On March 17, 2025, we produced documents and information responsive to OCR's Requests 1, 3, 4, 5, and 6 contained in the February 24 Request Letter. Those documents included:

- APS Policy J-2 PIP-2;
- a declaration from Title IX Coordinator, Sedrick Ross, certifying that APS has not received any Title IX complaints regarding the Policy; and

[1] A press release from the America First Legal Foundation claims that this investigation, as well as similar investigations into four neighboring Virginia school divisions, was opened in response to an administrative complaint submitted by that organization. This press release and a copy of the Request for Investigation Letter it references does not indicate that the complaint was made on behalf of any individual APS students or in regards to any specific incidents at APS. *See* America First Legal, *VICTORY — In Response to AFL's Complaint, the U.S. Department of Education Office for Civil Rights Opens Investigation into Five Northern Virginia K-12 Schools Illegal "Gender Identity" Policies*, (Feb. 14, 2025), https://aflegal.org/victory-in-response-to-afls-complaint-the-u-s-department-of-education-office-for-civil-rights-opens-investigation-into-five-northern-virginia-k-12-schools-illegal-gender/.

- the APS Title IX grievance procedures and training materials provided to the Title IX Coordinator.

With this letter, we provide additional information responsive to Data Requests 2 and 7.[2] As discussed below, APS denies that J-2 PIP-2 violates Title IX. J-2 PIP-2 provides *all* students the option of using facilities consistent with their gender identity or access to private restroom or locker room facilities. This regulation complies with binding state and federal law governing the use of facilities in Virginia and all other localities within the jurisdiction of the United States Court of Appeals for the Fourth Circuit and has been implemented without disruption or controversy in our schools. Accordingly, OCR should not issue a finding of a Title IX violation or take other enforcement action in this matter.

I. APS Policies

J-2 PIP-2 went into effect on July 1, 2019 after it was approved by the Arlington School Board. The provision relevant to this OCR investigation states as follows:

> "**Bathrooms and Locker Rooms**
> Access to facilities that correspond to a student's gender identity will be available to all students. Single user, gender neutral facilities will be made available to all users who seek privacy."

Following APS implementing its policy, the Virginia General Assembly passed House Bill 145 and Senate Bill 161 during the spring 2020 session. Those bills modified the Virginia Code to state that the "Department of Education shall develop and make available to each school board model policies concerning the treatment of transgender students in public elementary and secondary schools that address common issues regarding transgender students," including students' "use of school facilities."[3] In 2021, the Virginia Department of Education ("VDOE") issued its Model Policies for the Treatment of Transgender Students in Virginia Public Schools, which provided that "[s]tudents should be allowed to use the facility that corresponds to their gender identity" and advised that schools should provide all students access to single-user restrooms and private changing areas for those who would like more privacy.[4]

Upon the election of Governor Glenn Youngkin in 2021, the Virginia Department of Education issued new guidance on the issue of transgender student access to school facilities. Despite the fact that there has been no change to the Virginia Code, VDOE issued the 2023 Model Policies to Ensure Privacy, Dignity, and Respect for All Students and Parents in Virginia's Public Schools, which state that "[s]tudents shall use bathrooms that correspond with his or her sex, except to the extent that federal law otherwise requires. *See Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020)." As described more fully below, the Fourth Circuit in the *Grimm* case held that requiring students to use facilities that align with their biological gender violates Title IX. The citation to *Grimm* confirms that the VDOE guidance continues to require Virginia schools to facilitate student access to facilities that correspond to their gender identity. Accordingly, APS

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[2] Unless otherwise noted, all documents referenced in this letter were produced on March 17, 2025.
[3] VA. CODE ANN. § 22.1-23.3.
[4] *Model Policies for the Treatment of Transgender Students in Virginia's Public Schools*, Virginia Department of Education (Mar. 2021), https://equalityvirginia.org/wp-content/uploads/2021/03/Transgender-Student-Model-Policies-March-2021-final.pdf.

continues to adhere to both federal law and VDOE guidance in facilitating student access to facilities according to their gender identity.

II. Legal Analysis

The policy at issue in this inquiry is facially neutral and provides the same access to APS facilities to all students, regardless of gender identity. APS is governed by Virginia and Fourth Circuit law which requires that all individuals within the Commonwealth are safeguarded from unlawful discrimination because of gender identity in places of public accommodation, including educational institutions. Taking any steps to ban transgender students from using the facilities that align with their gender identity would violate Virginia and Fourth Circuit law.

A. APS Policy J-2 PIP-2 provides equal access to facilities to all students.

The February 12 letter indicates that OCR has received a complaint alleging that J-2 PIP-2 "provides great rights to those students whose 'gender identity' does not match their biological sex than it does to students whose 'gender identity' matches their biological sex." *See* Notification Letter at 1. We strongly deny the allegation that the regulation affords any individual student, regardless of gender identity, greater rights than any other. J-2 PIP-2 allows *all* students the option of using a locker room or restroom consistent with their gender identity—providing no more or no less access to transgender students as that provided any others. The peers of transgender boys are other boys, and the peers of transgender girls are other girls. If a transgender girl wants to use the girls' facilities, she is allowed to do so. If any other girl wants to use those same facilities, she has the right to do so as well.

J-2 PIP-2 also provides an alternative facility option to any student to desires additional privacy, again regardless of gender identity. More specifically, that provision allows *any* student for *any* reason to request additional, reasonable privacy measures in their use of school facilities. This provision requires that, upon request, students shall be provided with an alternative private area or an alternative facility-use schedule that allows for increased privacy in a non-stigmatizing way. These accommodations are explicitly offered to all students and is not specially reserved for transgender students. This right could be invoked by a student recovering from an injury, illness or medical procedure, a student who has an implanted medical device such as a colostomy bag or insulin pump, or a student who deals with any of the myriad insecurities that present themselves to young people on their journey through their growth and development during K-12 education.

The facial neutrality of J-2 PIP-2 should end this inquiry, as it defeats any argument that some category of APS students is treated differently than another in violation of Title IX. Without some exclusion from an APS program or discriminatory impact of a policy, there is no basis on which OCR could find a violation. If APS were to change its policy and exclude access to facilities based on gender identity, that restriction would impermissibly deprive some students of a benefit and risk Title IX liability. As explained below, a change in policy would also directly contradict Virginia law and binding Fourth Circuit precedent.

B. Virginia requires APS to make facilities available without regard to gender identity.

In 2020, the Virginia General Assembly expanded the scope of the Virginia Human Rights Act[5] by adopting the Virginia Values Act (the "Values Act").[6] The law "[s]safeguard[s] all individuals within the Commonwealth from unlawful discrimination because of … gender identity … in places of public accommodation, including educational institutions."[7] The Values Act defines "gender identity" as "the gender-related identity, appearance, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."[8] This legislation is the culmination of years of advocacy by the Human Rights Campaign and Equality Virginia.[9] Prior to its passage, Virginia was one of just five states without meaningful protections in public accommodations for LGBTQ people. When he signed the Values Act, Governor Northam stated, "This legislation sends a strong, clear message—Virginia is a place where all people are welcome to live, work, visit, and raise a family. No longer will LGBTQ Virginias have to fear being fired, evicted, or denied service in public places because of who they are."[10] Speaker of the House, Eileen Filler-Corn, also added, "[W]e have made discrimination against our gay, lesbian and transgender friends, family, neighbors, and co-working in employment, housing and public accommodation illegal in the Commonwealth of Virginia."[11]

Virginia law also states that "[a] county may enact an ordinance prohibiting discrimination in … education on the basis of … gender identity."[12] This provision explicitly provides authority for J-2 PIP-2. The Arlington School Board has enacted a valid policy that protects access to facilities for all students, regardless of gender identity. This regulation is consistent with the Virginia Values Act and within the power of a local school board to enact policies that reflect the interests of their community. In short, the APS transgender policy was both compelled by Virginia law and within the school board's authority to promulgate.[13]

C. As determined by controlling federal authority, Title IX compels APS to make facilities available without regard to gender identity.

APS's decision to implement J-2 PIP-2 is not only consistent with Virginia law, it is also required by Title IX as determined by the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit has explicitly held that Title IX compels local school boards to provide students with access to

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[5] VA. CODE ANN. § 2.2-3900–3909.
[6] S.B. 868, 161st Gen. Assemb. Reg. Sess. (Va. 2020).
[7] VA. CODE ANN. § 2.2-3900.
[8] *Id.* at § 2.2-3901.
[9] *See* Nick Morrow, *Virginia Values Act Signed Into Law–Extending Long-Delayed, Critical Protections to LGBTQ Virginians*, Human Rights Campaign (Apr. 11, 2020), https://www.hrc.org/news/virginia-values-act-signed-into-law-extends-protections-to-lgbtq-virginians; *Frequently Asked Questions: The Virginia Values Act*, Equality Virginia (Feb. 2021), https://equalityvirginia.org/wp-content/uploads/2021/02/FAQ_-The-Virginia-Values-Act.pdf.
[10] Tyler Thrasher, *Gov. Northam signs Virginia Values Act, providing anti-discrimination protections for LGBTQ people*, abc8NEWS (Apr. 12, 2020), https://www.wric.com/news/politics/gov-northam-signs-virginia-values-act-providing-anti-discrimination-protections-for-lgbtq-people/.
[11] *Id.*
[12] VA. CODE ANN. § 15.2-853.
[13] The Arlington County Board has also adopted the Human Rights Ordinance. The ordinance, like J-2 PIP-2, extends protections against discrimination on the basis of gender identity to the greater Arlington community. *See* Arlington Cnty. Code § 31.1 et seq.

restroom facilities that correspond to their gender identity. As explained below, the Court of Appeals followed Supreme Court precedent in its baseline recognition of gender identity as a protected class under Title VII, which it then applied to the analogous provision of Title IX. Accordingly, any change in APS policy regarding transgender student access to facilities would violate federal law, as defined by the Fourth Circuit.

The Court of Appeals considered the right of transgender students to access school facilities that correspond with their gender identity in the case of *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020). In that case, a local Virginia school division, in response to backlash about a transgender male student's use of the boy's restroom, implemented a policy under which students could only use restrooms matching their "biological gender." *Id.* at 593. The policy also required that "students with gender identity issues shall be provided an alternative appropriate private facility." *Id.* at 599. To effectuate this policy, a number of single-stall unisex restrooms were made available to all students. *Id.* at 600. This is precisely the type of facility access policy that the OCR complaint believes is required by APS and seeks to compel.

Gavin Grimm, a transgender student, sued the Gloucester School Board, arguing that the restroom policy violated his rights under Title IX. *Grimm*, 972 F.3d at 593. Grimm prevailed on his Equal Protection Clause and Title IX claims at the summary judgment stage. *Id.* at 603. When the School Board appealed the Fourth Circuit created legal precedent for local public schools under its jurisdiction. The court analogized the facts in *Grimm* to those involved in *Bostock v. Clayton County,* 590 U.S. 644 (2020), in which the Supreme Court held that discrimination against a person for being transgender is discrimination "on the basis of sex," under Title VII of the Civil Rights Act. *Grimm*, 972 F.3d at 616–19. The court read *Bostock* to require that Grimm's gender identity was a similarly protected status pursuant to Title IX of that same statute. *Id.*

Having made the threshold finding that Grimm was a member of a protected class according to *Bostock*, the Court of Appeals went on to uphold the district court's decision. *Grimm*, 972 F.3d at 619-20. First, the court held that the school board policy at issue constituted "sex-based discrimination," violating Grimm's equal protection rights. *Id.* at 613. The court dismissed the Board's argument that the policy was substantially related to its goal of protecting students' privacy, noting that the Board "cite[d] to no incident, either in Gloucester County or elsewhere" and "ignore[d] the growing number of school districts across the country who are successfully allowing transgender students such as Grimm to use the bathroom matching their gender identity, without incident." *Id.* at 614. Next, the Court of Appeals concluded that the policy discriminated against Grimm "on the basis of sex" under Title IX, reasoning that "Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender." *Id.* at 618.[14] In affirming the district court's judgment, the Fourth Circuit stated that it was "left without a doubt that the Board acted to protect cisgender boys from

[14] The Fourth Circuit also held that the School Board violated Title IX when it refused to update Grimm's sex listed in his school records. *Grimm,* 972 F.3d at 619. The court determined that the Board "based its decision . . . on his sex," which "harmed Grimm." *Id.* The discrimination was unlawful because "it treat[ed] him worse than other similarly situated students, whose records reflect their correct sex." *Id.*

Gavin's mere presence—a special kind of discrimination against a child that he will no doubt carry with him for life." *Id.* at 620.[15]

Grimm established that a policy that prohibits a transgender student from using facilities that corresponds to their gender identity and instead forces them to use the opposite sex facilities or a separate unisex facility is discriminatory under Title IX in the Fourth Circuit. *Grimm* is dispositive here and supports APS policy at issue in the instant investigation. Modification of J-2 PIP-2 in a manner requested by the complaint would constitute a violation of federal law. APS's policy protects transgender students from the type of unlawful sex discrimination found in *Grimm* by allowing them to use the facilities that correspond with their gender identity and prohibiting their assignment to a separate single-use facility. If APS decided to rescind such policy and require that transgender students use the bathroom that corresponds with their sex assigned at birth, APS would violate Virginia state and federal law.

III. Formal and Informal Title IX Complaints Regarding J-2 PIP-2

Consistent with the experience of numerous school districts across the country, including districts within Virginia, APS has implemented this policy without disruption or controversy. APS has not received a single formal or informal Title IX complaint about the Policy in the 2024-2025 school year or any school year since the policy was implemented. *See* Attestation of Title IX Coordinator, Sedrick Ross, ARLINGTON_OCR_1306_00000094. Nor has the Title IX office or the Office of Division Counsel received any formal or informal complaints during the 2024-2025 school year. It is highly unlikely that the Title IX office or the Office of Division Counsel would not be made aware of the existence of such a complaint, given the charged nature of the issue.

Regulation J-2 PIP-2 has enjoyed broad support among students, parents, and other stakeholders in Arlington. At the January 30, 2025 Arlington School Board meeting, a high school student thanked the Board for its continued commitment to allowing "students to be themselves at schools" and shared how J-2 PIP-2 has fostered a supportive environment for transgender students.[16] During this meeting, a litany of seven other members of the community, including APS parents and administrators, expressed appreciation for J-2 PIP-2 and urged the Board to continue its commitment to supporting transgender students.[17] Similarly, at the February 13 meeting, a parent of a transgender student that graduated from an APS school in 2024 explained how J-2 PIP-2 facilitated a positive environment for his son while he transitioned as a freshman.[18] The February 27 meeting told a similar story. Five community members spoke before the Board to share that J-2 PIP-2 reflects the values of the community, and that the policy is working well in APS schools.[19]

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[15] As a result of the *Grimm* decision, the Gloucester County school division was required to pay $1.3 million in the plaintiff's attorneys fees and costs, in addition to what was certainly a significant amount of its own legal expenses to fight the case. On June 28, 2023, the Supreme Court denied the school board's petition for a writ of certiorari.

[16] School Board Meeting January 30, 2025, https://www.apsva.us/post/school-board-meeting-january-30-2025/, at 52:29.

[17] *Id.* at 1:12:20, 1:26:15, 1:27:32, 1:30:19, 1:34:19, 1:37:32, 1:38:41.

[18] School Board Meeting, February 13, 2025, https://www.apsva.us/arlington-school-board/school-board-meetings/watch-school-board-meetings/, at 2:00:21.

[19] School Board Meeting, February 27, 2025, https://www.apsva.us/arlington-school-board/school-board-meetings/watch-school-board-meetings/, at 50:07, 59:59, 1:11:26, 1:40:14, and 1:46:02.

IV. Conclusion

The policy at issue in this complaint is working well and will not be modified by the Arlington School Board. The policy is compelled by Virginia law and consistent with binding Fourth Circuit precedent. Moreover, it has been implemented without disruption and generated minimal opposition within the APS division. Changing the policy would fly in the face of these practical benefits and legal requirements. A policy requiring students to use the bathroom facility that correspond to their gender at birth would create an undue danger of harm to certain APS students and expose APS to substantial litigation risk. Accordingly, the policy will remain in place unless some additional authority requires that it be changed.

If you have questions or need additional verification of the matters set forth in this letter, please feel free to reach me at the number below.

Sincerely,

/s/ Timothy J. Heaphy

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EXHIBIT F

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

July 25, 2025

By email only to: robert.falconi@acps.k12.va.us; jcafferky@bklawva.com; jstalnaker@bklawva.com; christine.smith@apsva.us; THeaphy@willkie.com; jefoster@fcps.edu; edkennedy@fcps.edu; Wesley.Allen@lcps.org; LMarshall@mcguirewoods.com; HSiegmund@mcguirewoods.com

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Re: Case No. 11-25-1305 – Alexandria City Public Schools
Case No. 11-25-1306 – Arlington Public Schools
Case No. 11-25-1307 – Fairfax County Public Schools
Case No. 11-25-1308 – Loudoun County Public Schools
Case No. 11-25-1309 – Prince William County Public Schools

Dear Dr. Kay-Wyatt, Dr. Durán, Dr. Reid, Dr. Spence, and Dr. McDade:

The U.S. Department of Education, Office for Civil Rights (OCR) has completed its investigation of the complaints filed against Alexandria City Public Schools, Arlington Public Schools, Fairfax County Public Schools, Loudoun County Public Schools, and Prince William County Public Schools (the Divisions). The complaint alleges that the Divisions' anti-discrimination policies pertaining to "trans-identifying" students "provide greater rights to students whose 'gender identity' does not match their biological sex than it does to students whose 'gender identity' matches their biological sex." Specifically, the complaint alleges that the Divisions' policies related to the use of intimate, sex-segregated facilities, including restrooms and locker rooms, violate Title IX.[1]

OCR enforces Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106,[2] which prohibit discrimination on the basis of sex in any program or activity receiving federal financial assistance. As recipients of federal financial assistance from the Department of Education, the Divisions must comply with this law and its implementing regulations.

In reaching a determination, OCR reviewed publicly available information, information provided by the Complainant, and documents provided by the Divisions. After carefully considering all of the information obtained during the investigation, OCR finds that the Divisions are in violation of Title IX and its implementing regulations. OCR's findings, analysis, and conclusions are discussed below.

I. Factual Background

The Divisions currently maintain the following policies, each of which include similarities with respect to access to intimate facilities for students whose "gender identity" does not correspond to his/her sex.

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[1] The terms bathrooms and restrooms throughout this letter are used interchangeably.

[2] This matter cites to the Title IX regulations that are currently in force and that took effect August 14, 2020 (85 Fed. Reg. 30,026-30,579 (May 19, 2020). *See Tennessee v. Cardona*, 762 F. Supp. 3d 615, 626-28 (E.D. Ky. 2025).

- Alexandria City Public Schools: "Policy JB: Nondiscrimination in Education"
  This policy states, in part, that the Division must "[p]rovide[] access for all students to facilities, such as restrooms and locker rooms, that correspond to a student's gender identity." The policy defines "gender identity" as "[a] person's internal sense of their own identity as a boy/man, girl/woman, another gender, no gender, or outside the male/female binary" and adds that it "is an innate part of a person's identity and can be the same or different from society's expectations with the sex they were assigned at birth." The policy notes that the Division must make single-user or gender-inclusive facilities or other reasonable alternatives available upon request to any student who seeks privacy that will be non-stigmatizing and will minimize lost instruction.

- Arlington County Public Schools: "Policy Implementation Procedure J-2 PIP-2: Transgender Students in Schools"
  This policy states that "[a]ccess to facilities that correspond to a student's gender identity will be available to all students." It defines "gender identity" as "one's sense of self as male, female, or an alternative gender that may or may not correspond to a person's sex assigned at birth." The policy also requires single-use, gender-neutral facilities for individuals seeking privacy.

- Fairfax County Public Schools: "Regulation 2603.2 – Gender-expansive and Transgender Students"
  This regulation states, in part, that "[g]ender-expansive and transgender students shall be provided with the option of using a locker room or restroom consistent with the student's gender identity." The regulation adds that these students "may also be provided with the option of using the facilities that correspond to the student's sex assigned at birth." A corresponding document, entitled "Regulation 2603-Gender-Expansive and Transgender Students Guidance Document," defines gender-expansive (among other terms) as "convey[ing] a wider, more flexible range of gender identity and expression than typically associated with the social construct of binary (two discreet and opposite categories of male and female) gender system." It further defines "transgender" as "an individual whose gender identity is different from that associated with the individual's sex assigned at birth." The regulation states that any student who wishes for privacy must be provided with "a reasonable, non-stigmatizing alternative such as the use of a private area (e.g., a nearby restroom stall with a door, an area separated by a curtain, or a nearby health or single-us/unisex bathroom), or with a separate changing schedule (e.g., using the locker room that corresponds to a student's gender identity before or after other students)." These alternatives are intended to minimize the impact on lost instructional time.

- Loudoun County Public Schools: "Policy 8040 – Rights of Transgender and Gender-expansive Students"
  This policy states, in part, that "[s]tudents should be allowed to use the facility that corresponds to their consistently asserted gender identity. While some transgender students will want that access, others may want alternatives that afford more privacy. Taking into account existing school facilities, administrators should take steps to designate gender-inclusive or single-use restrooms commensurate with the size of the school." A corresponding regulation, "Regulation 8040-REG," defines gender-expansive (among

other terms) as "convey[ing] a wider, more inclusive range of gender identity and/or expression than typically associated with the social construct of binary (two discreet and opposite categories of male and female) gender system." It further defines "transgender" as "[a] self-identifying term that describes a person whose gender identity is different from their sex assigned at birth." The policy states that the Division will modernize its restrooms and locker rooms to improve privacy and that it will have single-user restrooms.

- Prince William County Public Schools: "Regulation 738-5 – Treatment of Transgender and Gender Nonconforming Students"
  This regulation states that "[a]ll students shall have access to facilities (e.g., restrooms and locker rooms) that correspond to their gender identity." It defines gender identity as "[a]n internal sense of one's own identity as a boy/man, girl/woman, something in between, or something outside the male/female binary," adding that it is "an innate part of a person's identity and can be the same as, or different from, the sex assigned at birth." The regulation states that the Division must make single-user or gender-inclusive facilities or other reasonable alternatives available upon request to any student who seeks privacy that will be non-stigmatizing and will minimize lost instruction.

These policies are an outgrowth of model policies issued by the Virginia Department of Education on July 18, 2023, entitled "Model Policies on Ensuring Privacy, Dignity, and Respect for All Students and Parents in Virginia's Public Schools." These model policies state, in part, that "[s]tudents shall use bathrooms that correspond to his or her sex, except to the extent that federal law otherwise requires. *See Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir 2020)."[3]

[3] In *Grimm*, the Fourth Circuit held that a School Board could not prohibit a female student who "consistently and persistently" identified as male from using a high school's sex-separated male bathroom under both the Equal Protection Clause and Title IX. 972 F.3d at 619-20. The court found "that transgender persons constitute a quasi-suspect class" and applied heightened scrutiny to reach its equal-protection holding. *Id.* at 613.

In a recent seminal decision, however, the Supreme Court rejected an equal-protection challenge to a State's child-protection law that prohibits providing controversial medical interventions to minors to address "gender dysphoria." *United States v. Skrmetti*, 145 S. Ct. 1816, 1837 (2025). While acknowledging that trans-identification does not (indeed, cannot) change one's sex, *id.* at 1830 n.2, the Court concluded that the challenged law was subject to rational-basis review because it did not classify based on sex or "transgender status," *id.* at 1829-37. The law, the Court explained, easily passed the rational-basis standard because of the "'medical and scientific uncertainty'" surrounding interventions for "gender dysphoria." *Id.* at 1836-37. Further, several justices of the Supreme Court signaled that "transgender status" or "gender identity" is not a category or characteristic warranting heightened scrutiny under the Equal Protection Clause due to the mutability of the concept of "transgender" or "gender identity." *See id.* at 1851-52 (Barrett, J., concurring) (explaining that trans-identification is not "definitively ascertainable at the moment of birth," that "transgender status does not turn on an immutable characteristic," that "the transgender population [is not] a discrete group," and that the group's "boundaries … are not defined by an easily ascertainable characteristic that is fixed and consistent across the group" (cleaned up)); *id.* at 1861 (Alito, J., concurring in part and in the judgment) ("Transgender status

Since on or about the start of the 2024-2025 school year, two Divisions (Alexandria and Arlington) reported to OCR not having received any complaints alleging sex discrimination with regard to students' access to, or use of, school restrooms, locker rooms, or other intimate facilities. Fairfax County Public Schools informed OCR that one student filed a lawsuit just before the start of the 2024-2025 school year, which was subsequently joined by three additional students, alleging that Regulation 2603.2 violated their free speech, free exercise, due process, and equal protection rights because it required students to share a restroom with someone who is trans-identifying or, alternatively, use single-use restrooms. According to an Amended Petition for Declaratory, Injunctive, and Additional Relief submitted by the Petitioners to the court and reviewed by OCR, as a result of the Division's regulation, one of the students "avoided using school restrooms and only did so when absolutely necessary." Loudoun County Public Schools asserted that it received two informal complaints about a male student's presence in a female locker room making female students uncomfortable; one complaint from a female student of bullying and harassment in the male locker room; and three complaints related to the female student's presence in the male locker room, making the three complaining male students feel "discomfort, embarrassment, and vulnerability." As to the two informal complaints about a male student in the female locker room, the complaint stated that the male student made sexual jokes, momentarily touched other students, and watched female students changing in the locker room. Lastly, Prince William County Public Schools reported to OCR that it received one complaint of a female student's presence in a male locker room, and a second anonymous complaint that a boy dressed as a girl was in a female locker room, making the complaining student feel uncomfortable.

II. Legal Standard

A. Title IX prohibits discrimination on the basis of sex.

Title IX of the Education Amendments of 1972 (Title IX) states a general prohibition on sex discrimination in education programs or activities that receive federal funding:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

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is not 'immutable,' and as a result, persons can and do move into and out of the class. Members of the class differ widely among themselves, and it is often difficult for others to determine whether a person is a member of the class."); *id.* at 1866-67 (similar). Maintaining sex-separated facilities would thus need only pass rational-basis review under constitutional scrutiny, and schools have a legitimate interest in separating males from females in intimate spaces.

Moreover, *Skrmetti*'s relevance is clearly beyond laws or policies involving medical interventions. Indeed, the Supreme Court has granted, vacated, and remanded numerous cases, including a case involving birth certificates. *See, e.g.*, *Stitt v. Fowler*, No. 24-801, 2025 WL 1787695, at *1 (U.S. June 30, 2025) ("The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *United States v. Skrmetti*, 605 U. S. —— (2025).").

20 U.S.C. § 1681(a).[4] After that general ban on sex discrimination, Title IX lists various sex-based practices that the statute does not forbid. Recipients of federal funding, for example, may have traditionally sex-separated schools (*id.* § 1681(a)(5)), fraternities and sororities (*id.* § 1681(a)(6)), Boys and Girls State conferences (*id.* § 1681(a)(7)), and scholarships for "beauty" pageants (*id.* § 1681(a)(9)). Schools may also have father-daughter dances if they provide "reasonably comparable activities" for "the other sex." *Id.* § 1681(a)(8). And Title IX's ban on sex discrimination cannot be "construed" to prohibit "separate living facilities for the different sexes." *Id.* § 1686.

Title IX also empowers and directs Federal departments and agencies to issue and enforce regulations to effectuate the provisions of Title IX. *See id.* § 1682. The relevant department has exercised this authority from the beginning, issuing regulations making clear that schools may have sex-separate bathrooms, athletics, among other things. *See* 40 Fed. Reg. 24,128, 24,141-43 (June 4, 1975).

One Title IX regulation states the general prohibition on sex discrimination under Title IX:

> (a) General. Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance.
>
> (b) Specific prohibitions. Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:
>
> (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
>
> (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
>
> (3) Deny any person any such aid, benefit, or service;
>
> (4) Subject any person to separate or different rules of behavior, sanctions, or

[4] Title IX defines "Education institution" as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department." 20 U.S.C. § 1681(c). And Title IX's implementing regulation defines "program or activity" to include: "[a] department, agency, special purpose district, or other instrumentality of a State or local government"; "[t]he entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government"; and "[a] college, university, or other postsecondary institution, or a public system of higher education." 34 C.F.R. § 106.2.

> other treatment;
>
> . . .
>
> (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. § 106.31.

Another Title IX regulation provides that recipients of federal funding may have sex-separated bathrooms and locker rooms as long as those facilities are comparable:

> Comparable facilities. A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

34 C.F.R. § 106.33.

B. Under Title IX, "sex" means biological sex and does not include "gender identity."

Title IX and its implementing regulation use the term "sex." The term "sex" is an objective factor. Title IX and its implementing regulations use the term "sex" to mean biological sex. "Sex" does not mean, and has never meant, "gender identity."

When Congress passed Title IX in 1972, contemporaneous dictionaries defined "sex" as what the term has always meant: biological sex. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F. 4th 791, 812-13 (11th Cir. 2022) (en banc) (consulting nine contemporary dictionaries for definitions); *see id.* at 812-15 (finding Title IX refers to biological sex).

What dictionaries establish, Title IX's context confirms. "Title IX and its implementing regulations include provisions that presuppose sex as a binary classification, and provisions in the Department's current [and longstanding] regulations … reflect this presupposition." *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026, 30,178 (May 19, 2020). Section 1681(a)(2), for example, distinguishes between "institution[s] which admi[t] only students of one sex" and "institution[s] which admi[t] students of *both sexes*." 20 U.S.C. §1681(a)(2) (emphasis added). Section 1681(a)(8) similarly refers to sex in binary terms: If father-son or mother-daughter activities are provided for "one sex," then "reasonably comparable activities" must be provided for "the other sex." *Id.* § 1681(a)(8). And Title IX's implementing regulation on bathrooms, like other regulations, use the term "sex" in binary and biological terms. *See, e.g.*, 34 C.F.R. § 106.33 (authorizing "separate toilet, locker room, and shower facilities on the basis of sex" and making clear that "such facilities provided for students of one sex shall be comparable to such facilities provided to students of the other sex"); 85 Fed. Reg. at 30,178 ("In promulgating regulations to implement Title IX, the Department expressly acknowledged physiological differences between the male and female sexes."). Thus, all indicators of ordinary meaning show that "sex" in Title IX means biological sex and does not include "gender identity." *See Alabama v. U.S. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994, at *4 (11th Cir. Aug. 22, 2024) ("the term 'sex' in Title IX 'unambiguously' referred to 'biological sex' and not 'gender identity'").

Consistent with "sex" meaning biological sex in Title IX, the President of the United States issued two Executive Orders that reaffirm the meaning of the term "sex" in Title IX:

> (a) "Sex" shall refer to an individual's immutable biological classification as either male or female. "Sex" is not a synonym for and does not include the concept of "gender identity."
>
> (b) "Women" or "woman" and "girls" or "girl" shall mean adult and juvenile human females, respectively.
>
> (c) "Men" or "man" and "boys" or "boy" shall mean adult and juvenile human males, respectively.
>
> (d) "Female" means a person belonging, at conception, to the sex that produces the large reproductive cell.
>
> (e) "Male" means a person belonging, at conception, to the sex that produces the small reproductive cell….

Executive Order 14168, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, 90 Fed. Reg. 8,615-16 (Jan. 30, 2025); *see* Executive Order 14201, *Keeping Men Out of Women's Sports*, 90 Fed. Reg. 9,279 (Feb. 11, 2025) (incorporating Executive Order 14168's definitions). And following the Executive Order 14168, the U.S. Department of Health and Human Services published definitions of "sex" and related words (such as "female" "male" "girl" "woman" "boy" "man"), stating that "sex" means "a person's immutable biological classification as either male or female."[5]

Title IX and its implementing regulations never use the term "gender identity," let alone define this seemingly undefinable term. The term "gender identity" is, at best, a subjective factor, "reflect[ing] a fully internal and subjective sense of self, disconnected from biological reality and sex and existing on an infinite continuum, that does not provide a meaningful basis for identification and cannot be recognized as a replacement for sex." Executive Order 14168, 90 Fed. Reg. at 8,616. Indeed, as some courts have explained, "gender identity" is not a "'discrete'" category but "can describe 'a huge variety of gender identities and expressions.'" *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 487 (6th Cir.), *aff'd sub nom.*, 145 S. Ct. 1816 (2025). According to some, "gender identity" is "a three-dimensional 'galaxy.'" *United States v. Varner*, 948 F.3d 250, 257 (5th Cir. 2020); *see Skrmetti*, 145 S. Ct. at 1851-52 (Barrett, J., concurring). And according to a once blindly followed but now discredited partisan organization, World Professional Association for Transgender Health (WPATH), someone can be "more than one gender identity simultaneously or at different times (*e.g.*, bigender)," "not have a gender identity or have a neutral gender identity (*e.g.*, agender or neutrois)," "have gender identities that encompass or blend elements of other genders (*e.g.*, polygender, demiboy, demigirl)," or "have a gender that changes over time (*e.g.*, genderfluid)." *Standards of Care for the Health of Transgender and Gender Diverse People*, World Prof. Ass'n Transgender Health, S80 (8th ed. 2022); *see, e.g.*, Executive Order 14187, *Protecting Children From Chemical and Surgical*

[5] https://womenshealth.gov/article/sex-based-definitions (U.S. Department of Health and Human Services).

Mutilation, 90 Fed. Reg. 8,771, (Jan. 28, 2025) (noting that WPATH "lacks scientific integrity"); *Eknes-Tucker v. Governor of Alabama*, 114 F.4th 1241, 1261 (11th Cir. 2024) (Lagoa, J., concurring) ("But recent revelations indicate that WPATH's lodestar is ideology, not science. For example, in one communication, a contributor to WPATH's most recent Standards of Care frankly stated, 'our concerns, echoed by the social justice lawyers we spoke with, is that evidence-based review reveals little or no evidence and puts us in an untenable position in terms of affecting policy or winning lawsuits.'" (alteration omitted)); *Skrmetti*, 145 S. Ct. at 1848 (Thomas, J., concurring) ("WPATH appears to rest [its conclusions] on self-referencing consensus rather than evidence-based research."); *id.* at 1849 (WPATH and other "prominent medical professionals … have built their medical determinations on concededly weak evidence" and "have surreptitiously compromised their medical recommendations to achieve political ends."). The ACLU even contends that trans-identifying individuals include anyone not matching their sex-stereotype. *See* ACLU, *Transgender People and the Law*, at 19-20 ("transgender" means "a broad range of identities and experiences that fall outside of the traditional understanding of gender").[6]

Simply put, "gender identity" is not "ascertainable at the moment of birth" or really at any period of time. *L.W.*, 83 F.4th at 487; *see Skrmetti*, 145 S. Ct. at 1851-52 (Barrett, J., concurring) (explaining that trans-identification is not "definitively ascertainable at the moment of birth," that "transgender status does not turn on an immutable characteristic," that "the transgender population [is not] a discrete group," and that the group's "boundaries … are not defined by an easily ascertainable characteristic that is fixed and consistent across the group" (cleaned up)); *id.* at 1861 (Alito, J., concurring in part and in the judgment) ("Transgender status is not 'immutable,' and as a result, persons can and do move into and out of the class. Members of the class differ widely among themselves, and it is often difficult for others to determine whether a person is a member of the class."); *id.* at 1866-67 (similar). Or as the Department of Health and Human Services has explained, "[i]t may be true that a person's gender identity is subjective[,] … but the more critical point is that no tolerably clear definition of 'gender identity' has been offered in the first place."[7]

In short, Title IX is not a statute about "gender identity," but sex discrimination. As many courts have rightly concluded, "the term 'sex' in Title IX 'unambiguously' refer[s] to 'biological sex' and not 'gender identity.'" *Alabama*, 2024 WL 3981994, at *4; *accord, e.g.*, *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *2 (6th Cir. July 17, 2024); *Adams*, 57 F.4th at 814-15; *Kansas v. U.S. Dep't of Educ.*, 739 F. Supp. 3d 902, 920 (D. Kan. 2024); *Tennessee v. Cardona*, 737 F. Supp. 3d 510, 530-36 (E.D. Ky. 2024); *Louisiana v. U.S. Dep't of Educ.*, 737 F. Supp. 3d 377, 399-400 & nn.48-49 (W.D. La. 2024); *Carroll Indep. Sch. Dist. v. U.S. Dep't of Educ.*, 741 F. Supp. 3d 515, 520-25 (N.D. Tex. 2024).

C. Title IX's prohibition against sex discrimination does not include discrimination based on "gender identity."

Bostock v. Clayton County's interpretation of Title VII does not defeat this straightforward reading of Title IX's text, context, and history. 590 U.S. 644 (2020). *Bostock* itself made clear that

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[6] https://www.aclu.org/sites/default/files/field_pdf_file/lgbttransbrochurelaw2015electronic.pdf.

[7] *Treatment for Pediatric Gender Dysphoria: Review of Evidence and Best Practices*, U.S. Department of Health and Human Services (May 1, 2025), https://opa.hhs.gov/gender-dysphoria-report, at p. 34.

it did not "prejudge" the interpretation of other statutes like Title IX and did not "purport to address bathrooms, locker rooms, or anything else of the kind" under the statute it did interpret. 590 U.S. at 681. And for good reason: *Bostock*'s "text-driven reasoning applies only to Title VII," as "many subsequent cases make clear." *L.W.*, 83 F.4th at 484; *accord Tennessee*, 2024 WL 3453880, at *2 ("*Bostock* is a Title VII case."). "As many jurists have explained, Title VII's definition of discrimination, together with the employment-specific defenses that come with it, do not neatly map onto other areas of discrimination" like Title IX. *Id.* (collecting cases). *Bostock* "bears minimal relevance to cases involving a different law and a different factual context," as is the case with Title IX. *Alabama*, 2024 WL 3981994, at *5 (cleaned up). While *Bostock* "involved employment discrimination under Title VII," Title IX "is about schools and children—and the school is not the workplace." *Id.* (cleaned up); *see Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("Title VII … is a vastly different statute from Title IX."). And "'Title IX, unlike Title VII, includes express statutory and regulatory carveouts for differentiating between the sexes,'" so "if *Bostock* applied, it 'would swallow the carve-outs,'" "'render them meaningless,'" and absurdly provide more protection for "gender-identity discrimination" than sex discrimination. *Alabama*, 2024 WL 3981994, at *5 (quoting *Adams*, 57 F.4th at 811 & 814 n.7). Thus, "Title VII's definition of sex discrimination under *Bostock* simply does not mean the same thing for other anti-discrimination mandates, whether under the Equal Protection Clause, Title VI, or Title IX." *Tennessee*, 2024 WL 3453880, at *2; *see, e.g.*, *Alabama*, 2024 WL 3981994, at *4-5 (collecting cases concluding the same); *cf. Dep't of Ed. v. Louisiana*, 603 U.S. 866, 867 (2024) (unanimously holding that "preliminary injunctive relief" was warranted to enjoin a rule extending *Bostock*'s reasoning to Title IX of the Education Amendments of 1972).

Contemporaneous post-enactment history confirms Title IX does not include discrimination based on "gender identity." Shortly after Title IX was enacted in 1972, Congress passed the Javits Amendment that directed the Department of Education's predecessor to create regulations "implementing … [T]itle IX." 88 Stat. 484, 612 (1974). The agency then issued regulations that allow sex separation in many contexts—including bathrooms and athletics. 40 Fed. Reg. 24,128, 24,141-43 (June 4, 1975).[8] Those contemporaneous regulations, nearly all of which still exist today, are strong evidence of Title IX's original public meaning. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024) ("[I]nterpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning."); *id.* at 370 ("Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment

[8] *E.g.*, 40 Fed. Reg. 24,137, 24,142-43 (July 4, 1975) (presently at 34 C.F.R. §106.41(b) ("a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport")); 40 Fed. Reg. at 24,141 (presently at 34 C.F.R. § 106.43 ("If use of a single standard of measuring skill or progress in physical education classes has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have that effect.")); 40 Fed. Reg. at 24,141 (presently at 34 C.F.R. § 106.32(b) (A recipient "may provide separate housing on the basis of sex" provided the housing provided "to students of one sex, when compared to that provided to students of the other sex, shall be" proportionate and comparable.)); 40 Fed. Reg. at 24,141 (presently at 34 C.F.R. § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.")).

of the statute and remained consistent over time."). In fact, that evidence is even stronger here because Congress got the chance to disapprove these regulations before they went into effect and chose not to. *See Grove City Coll. v. Bell*, 465 U.S. 555, 568 (1984); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530-35 (1982). Reading Title IX's bar on sex discrimination to wholesale include "gender-identity discrimination," as some wrongly claim, would eviscerate these accurate regulatory interpretations of Title IX, including the regulation on bathrooms and athletics. That "highly counterintuitive result" cannot be right. *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 594 U.S. 338, 360 (2021).

Congress's actions more than 50 years following Title IX's enactment further confirm that Title IX's bar on sex discrimination does not include "gender-identity discrimination." In other statutory contexts, Congress has acted affirmatively to address "gender-identity discrimination" as a distinct category separate from sex discrimination. For example, when Congress enacted the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, Div. E., 123 Stat. 2190 (2009), Congress found that the "incidence of violence motivated by the actual or perceived race, color, religion, national origin, *gender*, sexual orientation, *gender identity*, or disability of the victim poses a serious national problem." 34 U.S.C. § 30501(1) (emphases added). Similarly in 2013, Congress amended the Violence Against Women Act to create a federal government enforcement action that protected the separate bases of sex and "gender identity." *See* 34 U.S.C. § 12291(b)(13)(A) (2013), as amended by Pub. L. No. 113-4, § 3, 127 Stat. 56 (2013) (prohibiting discrimination in certain federally funded programs "on the basis of actual or perceived race, color, religion, national origin, *sex, gender identity* (as defined in [18 U.S.C. § 249(c)(4)]), sexual orientation, or disability" (emphasis added)). These post-Title IX enactments show that Congress knows how to prohibit discrimination based on "gender identity" when it wants to but did not do so in Title IX. *DHS v. MacLean*, 574 U.S. 383, 394 (2015).

Even if *Bostock* were relevant to Title IX's scope, it would not change the Department's reading of Title IX and its implementing regulations here. Under *Bostock*, Title IX permits sex separation in bathrooms and locker rooms. Indeed, *Bostock* makes clear that it requires a similarly situated analysis: "[D]iscrimination" means "treating [an] individual worse than others who are similarly situated." *Bostock*, 590 U.S. at 657. In other words, *Bostock* stressed that to determine whether a policy "discriminate[s]," a court must use a comparator—*i.e.*, compare the plaintiff to "others who are similarly situated." In *Bostock*, male and female employees were similarly situated because "[a]n individual's homosexuality or transgender status is not relevant to employment decisions." *Id.* at 660. That is not true here. Unlike in *Bostock*, males and females are not similarly situated when it comes to bathrooms or locker rooms; given their real biological differences, sex is relevant to such decisions. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) ("Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 468-69 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part); *Adams*, 57 F.4th at 814-17; *Bostock*, 590 U.S. at 725-28 (Alito, J., dissenting). And as explained below, Title IX not only allows sex-separate bathrooms but requires them.

III. Analysis

A. The Divisions have violated and are still violating Title IX and its implementing regulations.

As explained, Title IX is not a statute about "gender identity" or "gender-identity discrimination" but one about sex discrimination. "Sex" does not mean, and has never meant, "gender identity." Title IX and its implementing regulations never use the term "gender identity," let alone define this seemingly undefinable term. By allowing males to invade sensitive female-only spaces like bathrooms (and vice versa), the Divisions intentionally, or with deliberate indifference, endanger students' safety, privacy, and dignity; create a hostile environment for students; and deny them access to educational activities or programs. *See, e.g.*, *Tennessee*, 737 F. Supp. 3d at 561 ("ignoring fundamental biological truths between the two sexes deprives women and girls of meaningful access to educational facilities"). The Divisions are thus violating Title IX.

Title IX is consistent with longstanding tradition of sex-separated sensitive facilities like bathrooms. "[T]he privacy afforded by sex-separated bathrooms has been widely recognized throughout American history and jurisprudence. In fact, 'sex-separation in bathrooms dates back to ancient times, and, in the United States, preceded the nation's founding.'" *Adams*, 57 F.4th at 805. Unsurprisingly, "courts have long found a privacy interest in shielding one's body from the opposite sex in a variety of legal contexts," which is why "[t]he protection of students' privacy interests in using the bathroom away from the opposite sex and in shielding their bodies from the opposite sex is obviously an important governmental objective." *Id.* at 804-05; *see, e.g.*, WOMEN'S SPORTS POL'Y WORKING GRP., Access to Female Athletes' Locker Rooms Should Be Restricted to Female Athletes (Jan. 28, 2023), https://womenssportspolicy.org/access-to-female-athletes-locker-rooms-should-be-restricted-to-female-athletes-january-28-2023/ ("Women's locker rooms are designed to provide female athletes with a separate, safe, private place to shower, change clothes, and use the toilet.").

In line with this tradition, Title IX itself clarifies that its general sex-discrimination bar does not "prohibit any educational institution … from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. Further recognizing that sex separation is necessary to adhere to Title IX's requirements, one of Title IX's implementation regulation—which has existed since Title IX's enactment—expressly permits a recipient to provide separate toilet, locker room, and shower facilities based on sex. 34 C.F.R. § 106.33. The separate-living-facilities clarification (20 U.S.C. § 1686) and the separate-sensitive-facilities regulation (34 C.F.R. § 106.33) are grounded in students' privacy, safety, and dignitary interest in using the bathroom away from students of the opposite sex and in shielding their bodies from students of the opposite sex while changing in the locker room. Eliminating sex-separate bathrooms and locker rooms, as the Divisions have here, "render[s] the purpose of [Title IX] obsolete in terms of the privacy interests Congress sought to protect by permitting sex-based segregation in sensitive areas where separation has been traditional." *Tennessee*, 737 F. Supp. 3d at 559. And it creates a hostile educational environment that denies students educational opportunities.

Although self-evident, a recently released report finds requiring girls to undress or use the bathroom in the presence of boys, causes distress in girls, violates their right to privacy, and can deny girls equal access to benefits of educational programs and activities. *See* Reem Alsalem, *Special Rapporteur on Violence Against Women and Girls, Its Causes and Consequences*, U.N.

Doc. A/79/325 at 5/24 (August 27, 2024), https://docs.un.org/en/A/79/325. The report indicates that policies denying female students sex-separated intimate facilities increases the risk of sexual harassment, assault, voyeurism, and physical and sexual attacks in unisex locker rooms and toilets. *Id*.; *see Tennessee*, 737 F. Supp. 3d at 562 ("the risk of 'inappropriate sexual behavior' toward other students would certainly be heightened too"). Thus, "ignoring fundamental biological truths between the two sexes deprives women and girls of meaningful access to educational facilities." *Id.* at 561.

This harm is not hypothetical. The Divisions' policies affect real students. For example, OCR learned that since the start of the 2024-2025 school year, Fairfax County Public Schools was subject to a lawsuit filed on behalf of a student—and later joined by three additional students—alleging that sharing a restroom with students of the opposite sex violated, among other things, the students' equal-protection rights. In that filing, the petitioners alleged that one of the students avoided using school restrooms whenever possible because of the Division's regulation. Loudoun County Public Schools also received five reports from both male and female students about a student of the opposite sex's presence in the locker rooms, resulting in, as one complaint put it, "discomfort, embarrassment, and vulnerability." In two of those complaints, female students alleged that a male student made sexual jokes, momentarily touched other students in an inappropriate manner, and watched female students changing in the locker room. And Prince William County Public Schools reported two complaints about the presence of individuals of the opposite sex in the locker rooms, resulting in students' discomfort.

Students at school have enough to worry about; worrying about whether it is safe to use the bathroom or change in a locker room cannot be one of them. The Divisions' bathroom, locker room, and sex-segregated intimate facilities policies or regulations violate Title IX and its implementing regulations because they permit access to intimate facilities that correspond with a student's "gender identity," which, in turn, requires students to use these intimate facilities in the presence of members of the opposite sex. In so doing, the Divisions are facilitating the significant deleterious effects—including discomfort, embarrassment, psychological harm, and potential physical injury—that Title IX seeks to prevent. Put differently, the Divisions are creating a hostile education environment that denies students the benefits of an education program or activity based on sex, in violation of Title IX and its implementing regulations.

B. The Divisions' reliance on *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), does not shield it from liability under Title IX.

Grimm does not change the Department's conclusion that the Divisions have violated and are violating Title IX. The Supreme Court in *Skrmetti* abrogated *Grimm* and other Fourth Circuit precedents in key respects, showing that a sex-separated bathroom policy is permissible under Title IX and the Equal Protection Clause. Regardless, *Grimm*'s conclusions hinged on certain factual findings that, as the record shows, are debunked. Moreover, many of the Divisions' policies do not limit bathroom access to consistent or persistent assertions of a certain "gender identity" and thus are overbroad.

1. *Skrmetti* abrogated *Grimm* in key respects.

Key aspects of *Grimm* are no longer binding in light of *Skrmetti*. The Supreme Court granted, vacated, and remanded the Fourth Circuit's decision in *Kadel v. Folwell*, 100 F.4th 122 (4th Cir. 2024), which heavily relied on *Grimm*, showing that *Grimm* is out of step with Supreme

Court precedent. *See Folwell v. Kadel*, No. 24-99, 2025 WL 1787687, at *1 (U.S. June 30, 2025) ("The petition for writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *United States v. Skrmetti*, 605 U. S. —— (2025)."). And *Skrmetti*'s relevance is clearly beyond laws or policies involving medical interventions, especially given that the Supreme Court granted, vacated, and remanded cases outside the medical-intervention context, including in a case involving birth certificates. *See, e.g.*, *Stitt v. Fowler*, No. 24-801, 2025 WL 1787695, at *1 (U.S. June 30, 2025) ("The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *United States v. Skrmetti*, 605 U. S. —— (2025).").

First, *Grimm*'s Title IX ruling hinged on the correctness of its equal-protection analysis, specifically the conclusion that a sex-separated bathroom policy classifies based on sex. *See Grimm*, 972 F.3d at 618 ("*In light of our equal protection discussion above*, this should sound familiar: Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender. Unlike the other boys, he had to use either the girls restroom or a single-stall option. In that sense, he was treated worse than similarly situated students." (emphasis added)). But that analysis has been abrogated by the Supreme Court in *Skrmetti*. *Skrmetti* made clear that the key question is whether the policy "prohibit[s] conduct for one sex that it permits for the other." 145 S. Ct. at 1831. And that is not true for sex-separated bathrooms. Neither sex may use the bathroom of their choosing; both sexes must use the bathroom consistent with his or her sex.

Second, in *Grimm*, the Fourth Circuit relied heavily on *Bostock*, which it imported to Title IX with little analysis: "Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, it guides our evaluation of claims under Title IX." *Grimm,* 972 F.3d at 616 (cleaned up). But *Bostock* does not apply to Title IX. Even if it did*, Bostock* does not establish that a sex-separated bathroom policy discriminates based on sex in violation of Title IX.

To begin with, the Supreme Court has recently made clear that it has not "considered whether *Bostock*'s reasoning reaches beyond the Title VII context." *Skrmetti*, 145 S. Ct. at 1834. In so doing, however, the Supreme Court also made clear that *Bostock*'s "'because of' test" derived from Title VII's "because of" language, which "incorporates the traditional but-for causation standard." *Id.* As explained above, *Bostock* simply does not apply outside Title VII and does not apply to Title IX. *See, e.g.*, *Tennessee*, 2024 WL 3453880, at *2; *Alabama*, 2024 WL 3981994, at *4-5; *cf. Louisiana*, 603 U.S. at 867 (unanimously holding that "preliminary injunctive relief" was warranted to enjoin a rule extending *Bostock*'s reasoning to Title IX of the Education Amendments of 1972).

In any event, the Supreme Court has clarified *Bostock*'s analysis in *Skrmetti*, abrogating *Grimm*. According to *Skrmetti*, *Bostock* concluded that sex is a but-for cause when for similarly situated individuals, the entity "penalize[s] a member of one sex for a trait or action that it tolerates in members of the other." *Skrmetti*, 145 S. Ct. at 1834. That is not true for sex-separated bathrooms because "changing the [applicant's] sex … does not automatically change the operation of" the sex-separated bathroom policy. *See id.* at 1834-35. For example, if a female seeks to choose her own bathroom, a sex-separate bathroom policy prohibits her from doing so—and requires that her bathroom choice reflect biological reality, regardless of whether that reality matches the person's

asserted "gender identity." Change that person's sex from "female to male," *id.* at 1834, and the bathroom policy would still prohibit him from choosing his own bathroom—and would still require that his bathroom reflect biological reality, regardless of whether that reality matches the person's "gender identity." Thus, under such a policy, sex is not "the but-for cause" of one's inability to self-select a bathroom based on one's "gender identity." *Id.* A sex-separated bathroom policy does not "intentionally penalize[]" a male "for a trait" that the policy "tolerates" in a female, *id.*, so it does not discriminate based on sex under *Bostock*'s reasoning, as clarified by *Skrmetti*.

Third, the Fourth Circuit in *Grimm* alternatively concluded that a sex-separated bathroom policy triggered intermediate scrutiny under the Equal Protection Clause because it thought "transgender status" was a "quasi-suspect class" and that such a policy classifies based on "transgender status." *Grimm*, 972 F.3d at 613. Even if *Skrmetti* has not abrogated this analysis, *see* 145 S. Ct. at 1832-34 (state child-protection law did not classify based on trans-identification), it does not mean that the Divisions' overbroad policies follow Title IX, as explained below. In any event, the Fourth Circuit's conclusion that "trans-identification" is a quasi-suspect class is inconsistent with subsequent Supreme Court dicta. The Supreme Court "has not previously held that transgender individuals are a suspect or quasi-suspect class." *Skrmetti*, 145 S. Ct. at 1832. And rightly so. As three Justices explained in *Skrmetti*, "transgender status" or "gender identity" is not a class that warrants heightened scrutiny. *See id.* at 1855 (Barrett, J., concurring, joined by Thomas, J.) ("The Equal Protection Clause does not demand heightened judicial scrutiny of laws that classify based on transgender status," and, thus, "[r]ational-basis review applies."); *id.* at 1860 (Alito, J., concurring in part and in the judgment) ("[T]ransgender status does not qualify under our precedents as a suspect or 'quasi-suspect' class.").

To start, "transgender status is not marked by the same sort of obvious, immutable, or distinguishing characteristics as race or sex." *Id.* at 1851 (Barrett, J., concurring) (cleaned up); *see id.* at 1861 (Alito, J., concurring in part and in the judgment) ("Transgender status is not 'immutable,' and as a result, persons can and do move into and out of the class."). It is not "definitively ascertainable," let alone "at the moment of birth," as "detransition[ers]" show. *Id.* at 1851 (Barrett, J., concurring) (cleaned up). It is not a "discrete group" because the category of trans-identifying individuals "is large, diverse, and amorphous" and "not defined by an easily ascertainable characteristic that is fixed and consistent across the group." *Id.* at 1851-52 (Barrett, J., concurring) (cleaned up); *see id.* at 1861 (Alito, J., concurring in part and in the judgment) ("Members of the class differ widely among themselves, and it is often difficult for others to determine whether a person is a member of the class."). And trans-identification, "unlike race and sex, is often not accompanied by visibly identifiable characteristics" because an individual's "'gender identity' is an 'internal sense,'" which does not "necessarily tend to 'carry an obvious badge' of their membership in the class that might serve to exacerbate discrimination." *Id.* at 1866-67. This alone "is enough to demonstrate that transgender status does not define a suspect class." *Id.* at 1853 (Barrett, J., concurring).

But there is more. The group has not, "as a historical matter, been subjected to discrimination." *Id.* (cleaned up). That is because this group has not "suffered a history of *de jure* discrimination." *Id.*; *see id.* at 1861 (Alito, J., concurring in part and in the judgment) ("[T]ransgender individuals have not been subjected to a history of discrimination that is comparable to past discrimination against the groups we have classified as suspect or 'quasi-suspect.'"). Indeed, "there is no evidence that transgender individuals, like racial minorities and

women, have been excluded from participation in the political process." *Id.* at 1866. To the contrary, "despite the small size of the transgender population, the members of this group have had notable success in convincing many lawmakers to address their problems." *Id.* This too separately shows "transgender status" does not warrant heightened scrutiny.

Thus, the Divisions' reliance on the Fourth Circuit's opinion in *Grimm* that "transgender status" or "gender identity" is a quasi-suspect class that is subject to heightened scrutiny, is wrong. Indeed, Justice Barrett specifically cited *Grimm* as an example of a lower court erroneously employing "sociological intuitions about a group's relative political power" while failing to rely upon "objective, legally grounded standard[s] that courts can apply consistently." *Id.* at 1855 (Barrett, J., concurring).

***Fourth*,** even if heightened scrutiny applied,[9] a sex-separate bathroom policy would easily satisfy that standard. In *Skrmetti*, the Supreme Court explained that "a law that classifies on the basis of sex may fail heightened scrutiny if the classifications rest on *impermissible* stereotypes." 145 S. Ct. at 1832 (emphasis added). Because sex-separate bathrooms are necessary to preserve students' privacy, safety, and dignity, they "do not themselves evince sex-based stereotyping." *Id.*; *see Skrmetti*, 83 F.4th at 486 ("Recognizing and respecting biological sex differences does not amount to stereotyping—unless Justice Ginsburg's observation in *United States v. Virginia* that biological differences between men and women 'are enduring' amounts to stereotyping.").

2. *Grimm* hinged on certain factual findings that are refuted based on the record in this investigation.

More fundamentally, *Grimm* is premised on factual findings and conclusions that are clearly distinguished from the facts in this investigation. *Grimm* does not apply to this investigation because the Department has developed a different record than the limited record in *Grimm*, and the "question [in *Grimm* was] limited to how school bathroom policies implicate the rights of transgender students who 'consistently, persistently, and insistently' express a binary gender." *See Grimm*, 972 F.3d at 596.

First, per *Grimm*, a female who identifies as a boy is "similarly situated" to a male because a trans-identifying female is somehow a boy. *See Grimm*, 972 F.3d at 610 n.10 ("To avoid a conclusion that Grimm was similarly situated to other boys, the dissent fails to meaningfully reckon with what it means for [Grimm] to be a transgender boy. We have been presented with a strong record documenting the modern medical understanding of what it means to be transgender, and considering that evidence is definitively the role of this Court." (cleaned up)). Indeed, *Grimm*

[9] To the extent that *Grimm* is still binding, the Department preserves the right to challenge this precedent. At any rate, the writing on the wall is clear: The Supreme Court recently granted certiorari in two cases that clearly signals that whatever is left of *Grimm*, it will no longer be good law or, at the very least, shows that *Grimm* should be seriously reconsidered. *See W. Virginia v. B.P.J.*, No. 24-43, 2025 WL 1829164, at *1 (U.S. July 3, 2025); *Little v. Hecox*, No. 24-38, 2025 WL 1829165, at *1 (U.S. July 3, 2025). These cases will address whether Title IX or the Equal Protection Clause prevents a State from having sex-separated sports teams. The Supreme Court will also consider, among other things, whether *Bostock* extends to Title IX and whether classification based on "transgender status" is subject to heightened scrutiny.

claimed that a sex-separate bathroom policy defining "sex" to mean objective biological facts is based on nothing more than an "invented classification" and "discriminatory notion." *See, e.g.*, *id.* at 618-19.

But *Grimm*'s conclusions are refuted by the facts found in this investigation, which shows Grimm's conclusions are contrary to science and biological reality. *See, e.g.*, *supra* n.3. The Supreme Court in *Skrmetti* recognized that trans-identification does not (indeed, cannot) change one's sex. *See* 145 S. Ct. at 1830 n.2; *see also, e.g.*, *Virginia*, 518 U.S. at 533 ("Physical differences between men and women, however, are enduring: The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both." (cleaned up)). And as noted above, the President and the Department of Health and Human Services have also recognized that a trans-identifying male is not similarly situated to a female and that biological sex is not invented but based on scientific truth.

In claiming otherwise, the Fourth Circuit heavily relied on WPATH. *See, e.g.*, *Grimm*, 972 F.3d at 595-96 (claiming WPATH "represent[s] the consensus approach of the medical and mental health community" and relying on WPATH). But as explained, WPATH is a discredited, partisan advocacy group. *See, e.g.*, Amicus Brief of Alabama in *United States v. Skrmetti*, No. 23-477 (filed Oct. 15, 2024)[10]; The Cass Review: Independent Review of Gender Identity Services for Children and Young People (Apr. 2024).[11] WPATH's opinions are not based on appropriate evidence but rather the biased motivation to help "social justice lawyers." *Eknes-Tucker*, 114 F.4th at 1261 (Lagoa, J., concurring) (cleaned up).

Grimm's conclusion also ignores the physical reality of how humans use restrooms. Simply making male and female restrooms available to both sexes based on "gender identity" does not provide the same services to male and female students. As one court noted, "[i]f defendant provided 'identical' men's and women's restrooms … each containing two toilet stalls and seventeen urinals, few would argue that the facilities were functionally comparable notwithstanding their physical similarity. The benefits and services derived by one group would be substantially less than the benefits and services derived by the other*." Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 733 (D. Or. 1997), *supplemented*, 1 F. Supp. 2d 1159 (D. Or. 1998). Or as another court has explained, "[n]ot to be unduly technical, but transgender girls would use individual stalls because female restrooms do not contain urinals. And transgender boys cannot physically use urinals and would, therefore, also use individual stalls." *Roe ex rel. Roe v. Critchfield*, No. 1:23-CV-00315-DCN, 2023 WL 6690596, at *9 (D. Idaho Oct. 12, 2023), *aff'd*, 131 F.4th 975 (9th Cir. 2025). By ignoring objective biological facts, and instead basing bathroom policies on a subjective factor like "gender identity," the school divisions of Alexandria, Arlington, Fairfax, Loudoun, or Prince William engage in the different treatment of male and female students, in violation of Title IX.

[10] https://www.supremecourt.gov/DocketPDF/23/23477/328275/20241015131826340_2024.10.15%20-%20Ala.%20Amicus%20Br.%20iso%20TN%20FINAL.pdf.

[11] https://webarchive.nationalarchives.gov.uk/ukgwa/20250310143633/https://cass.independent-review.uk/wp-content/uploads/2024/04/CassReview_Final.pdf.

In short, common sense and overwhelming evidence establishes that a boy is a boy, and a girl is a girl, regardless if the boy or girl has undergone medical interventions, and that a boy and a girl are not similarly situated when it comes to bathrooms and other intimate facilities.

Second, contrary to *Grimm*, the privacy and security concerns of students are not "sheer conjecture and abstraction" but real and serious. *Grimm*, 972 F.3d at 614. There is evidence that "trans-identifying" individuals using bathrooms not in line with their sex has led to privacy, security, and dignitary harms. *Contra Grimm*, 972 F.3d at 614 ("The Board does not present any evidence that a transgender student, let alone Grimm, is likely to be a peeping tom, rather than minding their own business like any other student. Put another way, the record demonstrates that bodily privacy of cisgender boys using the boys' restrooms did not increase when Grimm was banned from those restrooms."). As noted above, students have filed lawsuits or complaints with some of the Divisions, alleging that students have suffered privacy and safety harms from these Divisions' bathroom policies.

The Virginia Attorney General recently released findings in an investigation conducted in March 2025, involving a female student who identified as a male student and was recording male students inside the boys' locker room and restroom in the Loudoun County Public Schools. The report indicates that when the boys expressed their concerns about sharing a locker room with a female student, the school division investigated the boys for voicing those concerns.

In 2021, public reports indicate a male student, who had conveyed to a classmate that he told his mother he was "pansexual," wore his hair in a bun, and would sometimes dress in a skirt and wear fishnet gloves, sexually assaulted a 15-year-old female classmate in a girls' restroom at Stone Bridge High School in Loudoun County Public Schools. That male was later adjudicated guilty of the assault in court. The same male student was then transferred to another school in the same division and sexually assaulted another female student less than six weeks after the first assault. He was adjudicated guilty of that assault as well.[12]

What has been seen in the Divisions has also been seen throughout the country. For example, on April 15, 2025, a high school track student athlete spoke during public comment at the Lucia Mar School District Board of Education in Arroyo Grande, California about the impact the Board's policy of allowing boys who identify as girls to use locker rooms and restrooms designated for girls, had on her. The student recounted how she had recently gone into the women's locker room at school to change for track practice. While she was changing her clothes, a male student was sitting in the locker room watching her and the other female students undress. The young lady stated the experience was traumatizing. She stated the male student had already dressed for track practice at the beginning of the day. The male student had no reason to be in a locker room other than to watch girls undress.

In June 2024, a 16-year-old female student at Stewartville High School in Minnesota expressed her experience having to share restroom and locker room facilities with boys at school,

[12] Report Regarding Investigation into Misconduct at Stone Bridge High School and Broad Run High School, December 31. 2021.

and the impact it had on her educational opportunities.[13] The young lady reported that she was in the locker room after gym class getting ready to change clothes and she heard a male's voice inside the women's locker room and when she turned to look, she saw a boy in the locker room. She indicated that she talked to her school principal about feeling uncomfortable about changing in the locker room in the presence of a boy, but he told her that students can "be whoever they want to be." She also indicated she is scared about boys pretending to be girls, then touching them or taking cellphone photos of girls in restrooms or locker rooms, and that other girls she knows share her concerns. The mother of two other female students spoke up raising similar concerns. Parents have also spoken out about school district policies allowing teen-age boys to share locker rooms and restrooms with teen-age girls at Rochester Public Schools in Minnesota. One parent indicated she had to move her daughters to another school district because of restroom and locker room policies allowing boys into restrooms and locker rooms designated for girls.[14]

Public reports indicate in March 2023, four 14-year-old freshman girls in the Sun Prairie Area School District in Wisconsin were showering in the girls' locker room when they were exposed to the genitalia of an 18-year-old senior male student who told the girls he was "trans."

There are unfortunately more examples. *See, e.g.*, Declaration of A.C. in *Sexuality and Gender Alliance v. Critchfield*, No. 1:23-cv-00315, Doc. 90-1 ¶¶ 4-7 (D. Idaho July 21, 2025) (girl student detailing how, at her school that allows boys into the girls' bathroom, a male was "masturbating in the adjacent stall" to hers in the girls' bathroom).

***Third*,** in *Grimm*, the Court stated "the heart of [the] appeal is whether equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender." 972 F.3d at 593. What is at the heart of this investigation, however, is an issue not considered by the Court in *Grimm*. This investigation is evaluating whether the Divisions are taking action that denies students who are not "transgender" equal access to education benefits and opportunities in programs and activities offered by the Divisions. In *Grimm*, the Court was concerned that Grimm practiced bathroom avoidance resulting in urinary tract infections and felt "unsafe, anxious, and disrespected" because of the Board's policy requiring students to use the restroom that corresponds to their sex. *Id.* at 600. Those same concerns are present for students who are not "transgender" and who are forced to share a restroom or locker room with a member of the opposite sex. The Divisions have an obligation under Title IX to all students in the provision of restrooms and locker rooms, not just students who identify as "transgender."

3. Regardless, many of the Divisions' policies are overbroad, showing that even applying *Grimm*, they violate Title IX.

Even if *Grimm* were still binding, four of the five school divisions at issue in this investigation (Alexandria, Arlington, Fairfax, and Prince Williams) violate Title IX by not limiting their intimate-facilities policies to students that "consistently and persistently" assert a "gender

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[13] https://www.dailysignal.com/2024/06/13/really-uncomfortable-16-year-old-girl-speaks-sharing-school-bathrooms-locker-rooms-males/.

[14] https://www.dailysignal.com/2024/06/11/concerned-daughters-safety-13-minnesota-school-districts-issue-transgender-guidelines-allowing-boys-girls-spaces/; https://alphanews.org/infuriating-minnesota-mom-slams-school-districts-radical-transgender-restroom-guidelines/.

identity."[15] *Grimm* was crystal clear that its decision was "limited to how school bathroom policies implicate the rights of transgender students who '*consistently, persistently, and insistently*' express a binary gender." 972 F.3d at 596 (emphasis added); *accord id.* at 610 ("Grimm, however, did not question his gender identity at all; he knew he was a boy."); *id.* at 619 ("Grimm *consistently and persistently* identified as male. He had been clinically diagnosed with gender dysphoria, and his treatment provider identified using the boys' restrooms as part of the appropriate treatment." (emphasis added)). In other words, these school divisions allow individuals that do not assert a consistent and persistent "gender identity" to use facilities of the opposite sex. Because Grimm is premised on this limitation, policies without that limitation cannot rely on *Grimm*. Thus, these four school divisions have overbroad policies that are not justified by *Grimm* and violate Title IX.

For these reasons, OCR concludes that *Grimm* does not apply and that, even assuming it does apply, would not change the outcome of this investigation. The Divisions' policies that allow teenage boys to share intimate facilities with teenage girls violate common sense, create unnecessary distress and risk of harm, and deny students the availability of sex-separated locker rooms and bathrooms. These policies result in hostile environments and a denial of the overall benefits of an education program or activity based on sex. The Divisions are thus violating Title IX and its implementing regulations.

IV. Conclusion

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the Divisions' compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied on, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. Individuals who file complaints with OCR may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the Division must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law or regulation enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law or regulation enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

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[15] *See,* https://go.boarddocs.com/va/acps/Board.nsf/files/DE62ZL049E89/$file/JB%20-%20Nondiscrimination%20in%20Education.pdf;https://go.boarddocs.com/vsba/arlington/Board.nsf/files/BDNQEE68DE84/$file/J-2%20PIP-2%20Transgender%20Students%20in%20Schools.pdf;https://go.boarddocs.com/vsba/fairfax/Board.nsf/files/CDPTV8792B2E/$file/R2603.pdf;https://go.boarddocs.com/vsba/pwcs/Board.nsf/goto?open&id=C3VP7R61926D.

This letter is accompanied by a draft resolution agreement that specifies the actions that, when taken by the Division, will remedy the violation of Title IX. Given the serious violation of Title IX, OCR will conclude that attempts to secure the Division's voluntary compliance are at an impasse unless the Division indicates a willingness to execute a resolution agreement within 10 days of the date of this letter.

If the Divisions have not indicated a willingness to execute an agreement by that date, OCR will issue a letter of impasse that confirms the Divisions' refusal to voluntarily come into compliance with Title IX and informs the Division that OCR will issue a letter of impending enforcement action 10 days following the letter of impasse.

Sincerely,

BRADLEY BURKE Digitally signed by BRADLEY BURKE
Date: 2025.07.25 10:21:48 -05'00'

Bradley R. Burke
Regional Director

Enclosure

EXHIBIT G

RESOLUTION AGREEMENT
Arlington Public Schools
OCR Case Numbers 11-25-1306

Arlington Public Schools (hereinafter referred to as "the Division") agrees to fully implement this Resolution Agreement to resolve the allegations investigated in Office for Civil Rights (OCR) Case Number 11-25-1306. This Agreement does not constitute an admission by the Division of a violation of Title IX of the Education Amendments Act of 1972 (Title IX), or any other law enforced by OCR.

Action Item 1 – Rescission of Policies, Regulations, and Corresponding Guidance

The Division will rescind any components of the following policy pertaining to access to intimate facilities: "Policy Implementation Procedure J-2 PIP-2: Transgender Students in Schools." The Division will also rescind any corresponding guidance documents, trainings, or other related documents pertaining to the components of the aforementioned policy that apply to intimate facilities.

Reporting Requirements:

a. By_____2025, the Division will provide OCR with documentation demonstrating that Action Item 1 has been fully implemented.

Action Item 2 – Issue Memorandum to Schools

The Division will issue a memorandum to each Division school regarding the rescission of the policies and/or regulations outlined in Action Item 1. The memorandum will inform the schools that any future policies related to access to intimate facilities must be consistent with Title IX.
The memorandum shall:

a. Specify that Title IX compliance means a school must not – on the basis of ***sex*** – exclude ***female*** students from participation in, deny female students the benefits of, or subject female students to discrimination under, any education program or activity including but not limited to the use of intimate facilities including locker rooms and bathrooms.

b. Specify that schools must provide intimate facilities such as locker rooms and bathrooms accessible to students strictly separated on the basis of sex and comparably provided to each sex.

The memorandum will further state that the words ***sex, female, male, girls, women, boys, men*** as used in the memorandum and as applicable in all practices, policies, and procedures adopted and implemented by the Division pursuant to or consistent with Title IX, mean the following:

Sex is a person's immutable biological classification as either male or female.
Female is a person of the sex characterized by a reproductive system with the biological function of producing eggs (ova).
Male is a person of the sex characterized by a reproductive system with the biological function of producing sperm.
Woman is an adult human female.

Girl is a minor human female.
Man is an adult human male.
Boy is a minor human male.

The memorandum will further state that the above meanings of words are to be understood in the context of the facts that *there are only two sexes (female and male) because there are only two types of gametes (eggs and sperm); and the sex of a human – female or male – is determined genetically at conception (fertilization), observable before birth, and unchangeable.*

The Division will post this memorandum in a prominent location on its website.

Reporting Requirements:

a. By _____2025, the Division will submit a copy of the draft memorandum to OCR for OCR's review and approval.

b. Within _____days of receiving OCR's approval, the Division will disseminate the memorandum to the Division schools and provide verification to OCR.

By signing this Agreement, the Division agrees to provide data and other information in a timely manner in accordance with the reporting requirements of the Agreement. During the monitoring of this Agreement, if necessary, OCR may visit the Division, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the Division has fulfilled the terms and obligations of this Agreement.

Upon OCR's acknowledgment of the Division's satisfaction of the commitments made under this Agreement, OCR will close the case.

The Division understands and acknowledges that OCR may initiate proceedings to enforce the specific terms and obligations of this Agreement and/or the applicable statute(s) and regulation(s). Before initiating such proceedings, OCR will give the Division written notice of the alleged breach and 60 calendar days to cure the alleged breach.

The Agreement will become effective immediately upon the signature of the Division's authorized official below.

By: _____ Date: _____
Name and Title
Recipient Name

EXHIBIT H

Confidential Treatment Requested

WILLKIE FARR & GALLAGHER LLP

1875 K Street, N.W.
Washington, DC 20006-1238

Tel: 202 303 1000
Fax: 202 303 2000

July 29, 2025

Bradley Burke
Regional Director
United States Department of Education
Office for Civil Rights

Re: Case No. 11-25-1305 – Alexandria City Public Schools
Case No. 11-25-1306 – Arlington Public Schools
Case No. 11-25-1307 – Fairfax County Public Schools
Case No. 11-25-1308 – Loudoun County Public Schools
Case No. 11-25-1309 – Prince William County Public Schools

Dear Mr. Burke,

We are in receipt of the Letter of Findings ("LOF") and accompanying draft resolution agreements that the U.S. Department of Education, Office for Civil Rights ("OCR") issued to Alexandria City Public Schools, Arlington Public Schools, Fairfax County Public Schools, Loudoun County Public Schools, and Prince William County Public Schools (the "Divisions") on July 25, 2025. As explained below, the Divisions respectfully request the opportunity to negotiate with OCR for up to 90 calendar days, as guaranteed by Section 303(f) of the OCR Case Processing Manual ("OCR Manual").

In February, 2025, OCR issued a Notification Letter and a Data Request Letter to the Divisions indicating that a complaint was filed with OCR alleging that the Divisions' policies violated Title IX by providing greater rights to students who are transgender than to those who are not in regards to the use of intimate, sex-segregated facilities such as restroom and locker rooms. The Divisions timely responded to the Data Request Letter and provided both documents and narrative responses in March 2025.

On July 25, OCR issued its LOF and accompanying draft resolution agreements. The LOF specifically provides: "Given the serious violation of Title IX, OCR will conclude that attempts to secure the Division's voluntary compliance are at an impasse unless the Division indicates a willingness to execute a resolution agreement within 10 days of the date of this letter. If the Divisions have not indicated a willingness to execute an agreement by that date, OCR will issue a letter of impasse that confirms the Divisions' refusal to voluntarily come into compliance with Title IX and informs the Division that OCR will issue a letter of impending enforcement action 10 days following the letter of impasse."

Pursuant to Section 303(f) of the OCR Manual: "From the date that the proposed resolution agreement is shared with the recipient, OCR and the recipient will have a period of up to 90 calendar days within which to reach final agreement." Section 303(h) of the OCR Manual further provides that "when it is clear that agreement will not be reached . . . OCR shall issue an Impasse Letter that informs the recipient that OCR will issue a letter of impending enforcement action in 10 calendar days if a resolution agreement is not reached within that 10-day period."

Your letter and the 10-day deadline it imposes for a response suggests that OCR believes the parties have reached an impasse, triggering the 10-day notice provision of Section 303(h). The Divisions disagree with that characterization of the status of negotiations, as we have only received OCR's LOF and draft resolution agreements less than two business days ago. The LOF contains a complex legal analysis of recent Supreme Court precedent. The draft resolution agreement demands substantial changes to school division policies and regulations and the redefinition of fundamental terms therein. It is premature to declare negotiations at an "impasse" when we have only just received OCR's LOF and demand for substantial changes to policies and/or regulations. The Divisions have not yet had an opportunity to evaluate, much less respond to those assertions. Accordingly, we believe that the 90-day period provided by Section 303(f) of the Manual applies, as the Divisions intend to engage in their respective good-faith discussions with OCR and attempt to negotiate a resolution agreement.

The Divisions will use the additional time to engage in an evaluation process, including by involving their respective elected school boards as appropriate, in order to respond to OCR's proposed resolution agreement. The policies at issue impact a wide array of stakeholders. Matters of policy as well as resolution of federal investigations often require the involvement of the elected school boards of each Division. As a practical constraint, given the summer recess, some of the Divisions' school boards will not reconvene for several weeks from now and must comply with Virginia public meetings law when scheduling meetings. It is not possible for the school boards to meet, evaluate the OCR LOF and draft resolution agreement, consider stakeholder feedback as appropriate, and make consequential decisions within 10 days.

Moreover, compliance with the proposed resolution agreement is more complex than simply rescinding the policies at issue, as some of the specific Division policies involved in this matter contain components that are not subject to the resolution agreement and will be impacted by the proposed changes. Just as these policies were not enacted within ten days, but rather over the course of an appreciable timeframe that allowed for thoughtful deliberation and consideration, reframing the policies to comply with the proposed resolution agreement cannot be done on the highly abbreviated timeframe provided by the OCR LOF. Ninety days will allow time for the Divisions to discuss and evaluate the LOF and proposed resolution agreements, solicit feedback from relevant invested parties as appropriate, and engage in negotiations with OCR in a good faith effort to resolve the matter.

For these reasons, the Divisions respectfully request that OCR honor the terms of the OCR Manual by providing the Divisions with a minimum of 90 days to negotiate with OCR.

Respectfully,

/s/ Timothy J. Heaphy
Timothy J. Heaphy
On behalf of Fairfax County Public Schools and Arlington Public Schools
Willkie Farr & Gallagher LLP
THeaphy@willkie.com
PH: 202-303-1069

cc:
Michelle C. Reid, Ed.D., Division Superintendent, FCPS
John Foster, Division Counsel, FCPS
Ellen Kennedy, Deputy Division Counsel, FCPS
Michael McMillin, Staff Attorney, FCPS

Francisco Duran, Ed.D., Superintendent, APS
Chrissy Smith, Division Counsel, APS

John F. Cafferky
On behalf of Alexandria City Public Schools and Loudoun County Public Schools
Blankingship & Keith PC
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PH: 703-279-7201
PH: 703-691-1235

cc:
Melanie Kay-Wyatt, Ed.D., Division Superintendent, ACPS
Robert M. Falconi, Division Counsel, ACPS
Aaron Spence, Ed.D., Division Superintendent, LCPS
Wesley Allen, Division Counsel, LCPS

/s/ Laura Colombell Marshall
Laura Colombell Marshall
Heidi Siegmund
On behalf of Prince William County Public Schools
McGuireWoods LLP
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HSiegmund@mcguirewoods.com
PH: 202-857-1700
PH: 804-775-1049

cc:
Dr. LaTanya D. McDade, Superintendent
Wade T. Anderson, Division Counsel

EXHIBIT I

Hemminger, Lindsay

From: Burke, Bradley <Bradley.Burke@ed.gov>
Sent: Thursday, July 31, 2025 2:25 PM
To: Heaphy, Timothy; jcafferky@bklawva.com; jstalnaker@bklawva.com; LMarshall@mcguirewoods.com; HSiegmund@mcguirewoods.com
Cc: Hemminger, Lindsay; Carroll, Fiona
Subject: RE: Letter of Findings - OCR case nos. 11251305; 11251306; 11251307; 11251308; and 11251309

Follow Up Flag: Follow up
Flag Status: Flagged

***** EXTERNAL EMAIL *****

Counsel,

I received your letter, dated July 29, 2025.

First, your letter incorrectly asserts that "OCR believes the parties have reached an impasse." We have not reached an impasse because your clients have contacted OCR within 10 days of our Letter of Finding and indicated a willingness to negotiate a resolution agreement in these cases. If your clients are, in fact, serious about coming into compliance with Title IX, we are all ears. But we expect to engage in discussions with dispatch. Every day that goes by without a satisfactory resolution agreement is a day that children in the five Northern Virginian school divisions are at risk of grave harm.

Second, your letter incorrectly asserts that OCR's Case Processing Manual (CPM) requires a 90-day period to engage in a resolution agreement negotiation. As a threshold matter, the CPM neither creates rights, nor is it governed by the Administrative Procedure Act. Relevant here, we refer you to CPM Section 303(g), which states that OCR "may end the negotiations period at any time prior to the expiration of the 90-calendar day period when it is clear that agreement will not be reached," including "the recipient's refusal to agree to a key resolution term." Given that your clients have indicated a willingness to negotiate in good faith about coming into compliance with Title IX, we have neither ended negotiations, nor reached an impasse.

Nevertheless, OCR's proposed resolution agreement was intentional and specific about its key resolution terms. And we do not intend to allow recipients who are not serious about coming into compliance with Title IX—including acknowledging that Title IX is a statute only about sex discrimination and that the term "sex" in Title IX refers only to biological sex and not gender identity—to drag out discussions unnecessarily. We are, therefore, asking counsel for each recipient to indicate whether or not your client is willing to consider agreeing to the terms in the draft resolution agreement. We are, of course, open to additional terms, but OCR is firm on these key terms. As a result, we expect a response to this specific inquiry no later than August 15, 2025.

Respectfully,
Brad Burke

Bradley R. Burke

U.S. Department of Education
Office for Civil Rights
Bradley.Burke@ed.gov

From: Heaphy, Timothy <THeaphy@willkie.com>
Sent: Wednesday, July 30, 2025 9:24 AM
To: Burke, Bradley <Bradley.Burke@ed.gov>; jcafferky@bklawva.com; jstalnaker@bklawva.com; LMarshall@mcguirewoods.com; HSiegmund@mcguirewoods.com
Cc: Hemminger, Lindsay <LHemminger@willkie.com>; Carroll, Fiona <FCarroll@willkie.com>
Subject: Re: Letter of Findings - OCR case nos. 11251305; 11251306; 11251307; 11251308; and 11251309

Thanks Brad.

_
On July 30, 2025 at 9:56:28 AM EDT, Burke, Bradley <Bradley.Burke@ed.gov> wrote:

Good morning Mr. Heaphy, and all.

Thank you for reaching out. I'll review your letter and respond shortly.

Respectfully,

Brad Burke

Bradley R. Burke
U.S. Department of Education
Office for Civil Rights
Bradley.Burke@ed.gov

Timothy J. Heaphy
Willkie Farr & Gallagher LLP
1875 K Street, N.W. | Washington, DC 20006-1238
Direct: +1 202 303 1068 | Mobile: +1 804 291 7369
theaphy@willkie.com | vCard | www.willkie.com bio

From: Heaphy, Timothy <THeaphy@willkie.com>
Sent: Tuesday, July 29, 2025 5:28 PM
To: Burke, Bradley <Bradley.Burke@ed.gov>; jcafferky@bklawva.com; jstalnaker@bklawva.com; LMarshall@mcguirewoods.com; HSiegmund@mcguirewoods.com
Cc: Hemminger, Lindsay <LHemminger@willkie.com>; Carroll, Fiona <FCarroll@willkie.com>
Subject: RE: Letter of Findings - OCR case nos. 11251305; 11251306; 11251307; 11251308; and 11251309

Mr. Burke,

On behalf of the 5 northern Virginia school districts referenced in the above-referenced OCR investigations, please see the attached letter. We request confidential treatment of this and other communications as the matter proceeds.

Thank you,

Tim Heaphy

Timothy J. Heaphy
Willkie Farr & Gallagher LLP
1875 K Street, N.W. | Washington, DC 20006-1238
Direct: +1 202 303 1068 | Mobile: +1 804 291 7369
theaphy@willkie.com | vCard | www.willkie.com bio

From: Burke, Bradley <Bradley.Burke@ed.gov>
Sent: Friday, July 25, 2025 11:31 AM
To: robert.falconi@acps.k12.va.us; jcafferky@bklawva.com; jstalnaker@bklawva.com; christine.smith@apsva.us; Heaphy, Timothy <THeaphy@willkie.com>; jefoster@fcps.edu; Kennedy, Ellen D <edkennedy@fcps.edu>; Wesley.Allen@lcps.org; LMarshall@mcguirewoods.com; HSiegmund@mcguirewoods.com
Subject: Letter of Findings - OCR case nos. 11251305; 11251306; 11251307; 11251308; and 11251309

Good morning,

Please see the attached Letter of Findings and draft Resolution Agreements in the above referenced cases.

Respectfully,

Brad Burke

Bradley R. Burke
Regional Director
U.S. Department of Education
Office for Civil Rights

Email: Bradley.Burke@ed.gov

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EXHIBIT J

WILLKIE FARR & GALLAGHER LLP

1875 K Street, N.W.
Washington, DC 20006-1238

Tel: 202 303 1000
Fax: 202 303 2000

August 15, 2025

Bradley Burke
Regional Director
U.S. Department of Education
Office for Civil Rights
Via email: Bradley.Burke@ed.gov

Re: OCR Case No. 11-25-1306 - Arlington Public Schools

Dear Mr. Burke,

We write in response to the Letter of Findings ("LOF") and accompanying draft resolution agreement (the "Resolution Agreement") that the U.S. Department of Education, Office for Civil Rights ("OCR") issued to Arlington Public Schools ("APS") on July 25, 2025.[1]

As explained below, APS cannot agree to the terms of the Resolution Agreement because rescission of Policy Implementation Procedure J-2 PIP-2 "Transgender Students in Schools" (the "Policy") would violate Fourth Circuit and Virginia state law. The Supreme Court's 2025 decision in *United States v. Skrmetti* did not "abrogate" the 4th Circuit authority of *Grimm v. Gloucester County School Board* that requires the current APS policy, as it involved both facts and law materially different from those involved in *Grimm*. The Supreme Court has accepted certiorari in *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542, 550 (4th Cir.), *cert. granted sub nom. W. Virginia v. B. P. J.*, No. 24-43, 2025 WL 1829164 (July 3, 2025), a case raising the precise legal issue at stake in the instant investigation. Given the looming guidance from the Court as to whether Title IX restricts or protects access to facilities based on gender identity, APS proposes that OCR stay this matter until the *B.P.J.* case is resolved.

I. Procedural History

In February 2025, OCR issued a Notification Letter and a Data Request Letter to APS indicating that a complaint was filed with OCR alleging that APS's policies violated Title IX by providing greater rights to students who are transgender than to those who are not with regard to the use of intimate, sex-segregated facilities such as restrooms and locker rooms. APS responded timely to the Data Request Letter and provided both documents and narrative responses in March 2025. On July 25, 2025, OCR issued its LOF and accompanying Resolution Agreement. On July 29, 2025, APS responded to OCR with a letter requesting additional time to evaluate the LOF and Resolution Agreement and engage in negotiations with OCR. On July 31, 2025, OCR clarified that the parties have not yet reached an impasse given APS's willingness to negotiate in good faith about the Resolution Agreement and provided APS with a deadline of August 15, 2025 to indicate whether APS is willing to consider agreeing to the Resolution Agreement's terms.

[1] This letter is submitted on behalf of Arlington Public Schools only and does not bind or represent the position of the other four public school divisions in Northern Virginia listed in the LOF. While our firm represents both APS and Fairfax County Public Schools in this matter, this letter is submitted solely on behalf of APS.

II. APS Policies Are Required by Virginia Law and Binding Authority in the Fourth Circuit

On March 24, 2025, we submitted a letter to Dan Greenspahn of OCR that addressed the issues raised in the Notification Letter. In that letter, we explained that both Virginia law and binding federal precedent require APS to provide access to facilities to students based on their gender identity. More specifically, we cited the Virginia Values Act (the "Values Act"),[2] which "[s]afeguard[s] all individuals within the Commonwealth from unlawful discrimination because of . . . gender identity . . . in places of public accommodation, including educational institutions."[3] Consistent with the Values Act, the Code of Virginia provides that "[a] county may enact an ordinance prohibiting discrimination in . . . education on the basis of . . . gender identity."[4] The Policy is consistent with the Virginia Values Act and within the power of a local school board to enact policies that reflect the interests of their community. It also reflects the important value that guides all APS polices—ensuring all students are able to learn in an inclusive environment free from all forms of discrimination.

The Policy is not only consistent with Virginia law, it is required by binding federal precedent that recognizes gender identity as a protected class pursuant to Title IX. As thoroughly described in our March 24, 2025 letter to Mr. Greenspahn, in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), the United States Court of Appeals for the Fourth Circuit explicitly held that Title IX requires local school boards to provide students with access to restroom facilities that correspond to their gender identity. We will not restate the facts involved in *Grimm* or explain its holding here, beyond noting that it continues to not only support but require the Policy at issue in the instant investigation. Any change in APS policy regarding transgender student access to facilities would violate federal law, as defined by the Fourth Circuit.

III. The Supreme Court Has Not Yet but Will Soon Resolve the Central Issue Raised by This Investigation -- Whether Title IX Requires Public Schools to Provide Students with Access to Facilities Based on Their Gender Identity

Contrary to OCR's position, the Supreme Court's decision in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025) does not abrogate the Fourth Circuit's decision in *Grimm*. The *Skrmetti* case involves materially distinct facts and does not involve a Title IX claim, distinguishing it from the issues resolved by the Fourth Circuit in *Grimm*. *Skrmetti's* lack of relevance to the issues involved here is emphatically demonstrated by the Supreme Court's decision to accept cert in *W. Virginia State Bd. of Educ. v. B.P.J.*, a case that will decide whether Title IX and the Equal Protection Clause of the Fourteenth Amendment prevent a state from designating schools sports teams based on biological sex. Until the Supreme Court issues its ruling in *B.P.J.*, *Grimm* remains binding law in the Fourth Circuit. Should APS agree to the Resolution Agreement's terms, APS would be in jeopardy of violating federal law.

[2] S.B. 868, 161st Gen. Assemb. Reg. Sess. (Va. 2020).
[3] VA. CODE ANN. § 2.2-3900.
[4] VA. CODE ANN. § 15.2-853.

A. The Supreme Court's decision in *Skrmetti* does not abrogate *Grimm,* which is binding authority in the Fourth Circuit.

The LOF states that *Grimm* is no longer good law because it was abrogated by the Supreme Court's June 2025 decision in *United States v. Skrmetti*, 145 S. Ct. 1816, 1837 (2025). The Court in *Skrmetti* considered whether a Tennessee law that prohibits certain medical interventions and procedures for minors with "gender dysphoria" is constitutional under the Equal Protection Clause. In holding that the law is constitutional, the Supreme Court rejected the plaintiff's argument that heightened scrutiny of the Tennessee statute is warranted given that the law relies on sex-based classifications. *Id*. at 1828–29. The Court stated that the law *does not* classify on the basis of sex or transgender status because it prohibits healthcare providers from administering puberty blockers or hormones to minors for certain medical uses, regardless of the minor's sex or transgender status. *Id*. at 1837. Accordingly, the Court applied rational basis review and found that the Tennessee law is supported by the legislature's policy goal of protecting public health. *Id*. at 1835–37.

Skrmetti differs from *Grimm* in several significant ways. It resolved the constitutionality of a specific Tennessee law prohibiting the use of certain treatments to children absent limited circumstances. The Court cited authority for the harms potentially done by the treatments prohibited by the Tennessee statute—a much different policy rationale than the facility access issues involved in *Grimm* and the instant investigation. The Court's consideration of the Tennessee law at issue in *Skrmetti* involved a Constitutional challenge rather than a Title IX claim as that involved in *Grimm*. The Court's discussion of the standard of review was commensurate with the legal basis for the challenge to the Tennessee law—the Equal Protection Clause. Title IX contains no such standard of review and flatly precludes classification based on sex absent certain limited circumstances defined by statute or regulation. While several Justices went beyond the Court's holding to observe that "gender identity" should not be viewed as a suspect class, the dicta in those concurrences is potentially inconsistent with the Court's holding in *Bostock v. Clayton County*, 590 U.S. 644 (2020), in which the Supreme Court held that employment actions based on sexual preference and gender identity constitute discrimination "on the basis of sex" under Title VII of the Civil Rights Act. In sum, *Skrmetti* is both factually and legally distinguishable from *Grimm* and does not overrule the Fourth Circuit's dispositive holding in that case.[5]

B. *Grimm* applies because the Supreme Court has not decided whether gender identity is protected by Title IX.

OCR's assertion that *Grimm* has been "abrogated" by *Skrmetti* is flatly inconsistent with the fact that the Supreme Court has accepted cert in a case that squarely raises the issue at stake in this matter—whether "gender identity" is protected by Title IX. As indicated above, the Supreme Court recently granted cert in *West Virginia v. B.P.J.*, a case involving a West Virginia law which limits participation in women's sports programs to students whose gender was female at birth. 98

[5] The continued viability of *Grimm* has been recognized by the Fourth Circuit in a recent Order granting a preliminary injunction in the case of *John Doe et al v. State of South Carolina*, 2:24-cv-06420-RMG. The plaintiffs in the *Doe* case moved to enjoin the enforcement of a South Carolina statute which requires schools to restrict restroom use to a student's gender assigned at birth. In asking the Court of Appeals to grant an injunction, the plaintiffs asserted that *Skrmetti* does not abrogate *Grimm*, given the different factual context and legal bases for that decision. On August 12, 2025, the Court of Appeals agreed, granting the preliminary injunction motion and indicating that "an opinion explaining the Court's action will follow."

F.4th 542, 550 (4th Cir.). Had the extent of legal protection based on "gender identity" been resolved by *Skrmetti* as the LOF suggests, the Court would not have been forced to resolve those issues in *B.P.J.* Contrary to OCR's position, the Court's decision to accept review in *B.P.J.* demonstrates that the circuit split on the important issues of transgender access under Title IX remains, necessitating Court resolution. If OCR's expansive view of *Skrmetti* were correct, *B.P.J.* would not be docketed for this next Supreme Court term.

When it hears the *B.P.J.* case next term, the Court will decide whether Title IX and the Equal Protection Clause prevent a state from designating school sports teams based on biological sex. *B.P.J.* raises the precise issues involved in the Policy at issue in the current investigation. Until this dispositive issue is conclusively resolved by the Supreme Court, *Grimm* remains controlling in the Fourth Circuit and mandates the Policy at issue.

IV. The Instant Investigation Should Be Paused Until the Court Resolves the Central Legal Issue that Controls the Policy at Stake

When the Supreme Court decides *B.P.J.*, it will answer the critical question of whether Title IX requires educational institutions to separate student resources by biological sex. Unless and until the Supreme Court places further restrictions on the reach of Title IX to exclude transgender students, *Grimm* is the governing law in the Fourth Circuit.

Should APS comply with the actions outlined in the LOF and draft Resolution Agreement, the district risks litigation based on a failure to follow governing Fourth Circuit law. Transgender students and their families would have a cognizable claim that a policy limiting their access to facilities that correspond to their gender at birth violates Title IX.

APS is committed to strict compliance with Title IX and other provisions of law. All APS policies also reflect the paramount value of equality and the protection of all students against discrimination of any kind. The specific contours of compliance with law and adherence to core values with respect to transgender student access to facilities will soon be made clear when the Supreme Court decides *B.P.J.* That case will be argued in the fall of 2025 and likely result in an opinion sometime in the first half of 2026. While that case is pending, *Grimm* remains good law and binds APS and its policies.

To resolve this dilemma, APS proposes that OCR stay this case until the Supreme Court issues its decision in *B.P.J.* Should the Court in that case find that gender identity is not protected by Title IX, *Grimm* will indeed be abrogated, necessitating a change in policy. If, however, the Court follows *Bostock* and extends to Title IX the protection for gender identity it recognized under Title VII, *Grimm* (and the Policy) will be upheld. APS will follow that clear precedent and make any necessary policy changes once *B.P.J.* is decided. A pause in the instant investigation is the only way for APS to resolve this matter without violating current binding authority in the Fourth Circuit. Accordingly, we respectfully request that OCR not refer this matter for enforcement action until the Court issues definitive guidance in *B.P.J.*

Thank you in advance for your consideration. If you have questions or want to schedule time to discuss the matter, please feel free to reach me at the number below.

Sincerely,

/s/ Timothy J. Heaphy
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cc:
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EXHIBIT K

WILLKIE FARR & GALLAGHER LLP

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August 18, 2025

Bradley R. Burke
Regional Director
United States Department of Education
Office for Civil Rights
Via e-mail: Bradley.Burke@ed.gov

Dear Mr. Burke,

On August 15, 2025, we submitted a letter setting forth our response to the Letter of Findings ("LOF") and accompanying draft resolution agreement (the "Resolution Agreement") that the U.S. Department of Education, Office for Civil Rights ("OCR") issued to Arlington Public Schools ("APS") on July 25, 2025. We write today to provide additional authority for our position– an opinion issued on Friday, August 15 by the United States Court of Appeals in *John Doe v. State of South Carolina*, No. 25-1787, which makes clear that *Grimm* remains good law and controls the issue of student restroom access in the Fourth Circuit.

The *Doe* case cited above involves a challenge to a South Carolina statute that seeks to enforce a rule identical to that contained in the Resolution Agreement you have demanded our client enter with OCR – a restriction on restroom access to students according to their gender assigned at birth. Doe, a 9th grader in Berkeley County, South Carolina public school, challenges that law and moved for a preliminary injunction against its enforcement. On August 12, 2025, the day before Doe began his 9th grade year, the Court of Appeals granted that preliminary injunction. The practical effect of that injunction is to invalidate the South Carolina statute at issue in the litigation, allowing Doe to access restrooms in his public school consistent with his gender identity.

On Friday, August 15, 2025, the Court of Appeals issued a lengthy Amended Order ("Order") explaining its rationale for granting Doe's motion for a preliminary injunction. The Order, which we have attached to this letter as an Exhibit, flatly states "*Grimm* remains the law of this Circuit and is thus binding on all the district courts within it." Order at 17. Applying the legal standard for a preliminary injunction, the Court found that Doe had demonstrated a likelihood of success on the merits, as the South Carolina statute at issue was in direct conflict with the Court's ruling in *Grimm*, invalidating an identical restriction on restroom access. Order at 16-17. The Court also found that Doe had demonstrated irreparable harm, observing that "state action infringing on constitutional rights generally constitutes irreparable harm." Order at 17. The Court finally found that the balance of equities supports the injunction, noting that "preventing the State from enforcing a policy that directly contradicts *Grimm* – a prior binding decision of this Court" was clearly in the public interest. Order at 18.

Two concurrences in the Order reinforce the Court's holding. Judge Diaz specifically rebutted the state's argument that you have made in the instant case – that *Skrmetti* abrogated *Grimm*. Judge Diaz observed that "[t]he Court's decision in United States v. *Skrmetti* . . . has little to say about the issues Grimm addressed." Order at 21. He noted that the ban on gender affirming care upheld

in *Skrmetti* differs significantly from the restroom access policy at issue in *Grimm* and did not involve a Title IX claim. Order at 21-22. Accordingly, Judge Diaz concluded that "*Skrmetti* said nothing whatsoever to cause doubt as to the vitality of Grimm's Title IX holding." Order at 22.

Perhaps more significant is Judge Agee's concurrence in *Doe*. Judge Agee dissented in *Grimm* and continues to assert that the decision was wrongly decided. Nonetheless, he concurred in the Court's Order granting the injunction because he recognizes that *Grimm* remains binding authority in the Fourth Circuit. He rejected South Carolina's arguments that the law is "unsettled" and that *Grimm* is factually distinguishable from Doe, writing:

> none of this matters for purposes of deciding the issue presented by Doe's motion for an injunction pending appeal. *Grimm* binds all judges of this Circuit, notwithstanding any expectation that the Supreme Court will adjust, if not overrule, the foundations of *Grimm* in a way that is likely to determine whether Doe will ultimately prevail in this action. **The current law of this Circuit answers the question of whether Doe has satisfied the requirements for obtaining an injunction pending the appeal**.

Order at 29 (emphasis added).

Doe reinforces our position that *Grimm* remains viable post-*Skrmetti* and requires APS to continue to facilitate restroom access for students consistent with their gender identity. The South Carolina statute at issue in *Doe* attempts to do exactly what the proposed Resolution Agreement in the instant matter would require – limit restroom access to students' gender assigned at birth. The Fourth Circuit has invalidated that South Carolina law and rejected the position taken by OCR in the instant investigation. Even Judge Agee, who shares your position on the scope of Title IX and its application to the issue of facility access, agrees that *Grimm* controls, entitling Doe to injunctive relief and access to restrooms that correspond to his gender identity. If APS agreed to the terms in the Resolution Agreement, we would be acting in direct contradiction to *Doe* and *Grimm*, which we simply cannot agree to do.

Any attempt to enforce OCR's demand that the current policy be changed will result in litigation in which APS, like Doe, will ask the Court to enjoin any enforcement activity. In such litigation, we will cite the clear authority that compels the current restroom access policy. The Department of Justice will be limited to the same arguments rejected first in *Grimm* and reaffirmed last week in *Doe* – essentially asking the Court to disregard binding precedent recognized even by the dissenting judge in *Grimm*. While we expect that any litigation in which we seek to enforce these rights will be readily successful given the authority presented herein and in prior correspondence, it would be costly, disruptive, and create great uncertainty among thousands of APS students and families. Accordingly, we ask again that OCR not refer this matter for enforcement action and rather pause this investigation as the Supreme Court considers these important issues in its upcoming term.

Thank you in advance for your consideration. If you have questions or want to schedule time to discuss the matter, please feel free to reach me at the number below.

Sincerely,

/s/ Timothy J. Heaphy

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