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VIA U.S. MAIL AND EMAIL ([rep.bud.hulsey@capitol.tn.gov](mailto:rep.bud.hulsey@capitol.tn.gov))

Hon. Representative Bud Hulsey  
Tennessee General Assembly  
301 6th Avenue North  
Suite 204 War Memorial Bldg.  
Nashville, TN 37243

Re: Proposed legislation relating to transgender students

Representative Hulsey,

I write on behalf of Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”), the nation’s oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender (“LGBT”) people and people living with HIV. Lambda Legal has frequently been counsel of record or *amicus curiae* in cases addressing the protections provided to transgender people under sex discrimination law.<sup>1</sup> We understand from recent public reports that you are considering introducing legislation that would restrict transgender students from accessing restrooms in accordance with their gender identity. This legislation would inevitably subject the state to protracted, expensive litigation, and could not withstand review in the courts under prevailing federal law. As recent investigations by the U.S. Department of Justice (“DOJ”) and Department of Education (“DE”) illustrate, schools that discriminate based on gender identity also risk losing millions of dollars in federal funding. Equally important, the government is uniquely positioned to be a powerful force for or against discrimination, and singling out transgender students in this manner can stigmatize them and invite harassment – a dynamic that has no place in Tennessee schools. We respectfully urge you not to introduce the proposed legislation.

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<sup>1</sup> See, e.g., *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir.) (appeal pending) (*amicus*); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (counsel); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 Fed. App’x 492 (9th Cir. 2009) (*amicus*); *Chavez v. Credit Nation Auto Sales, Inc.*, 2014 U.S. Dist. LEXIS 128762 (N.D. Ga. July 18, 2014) (*amicus*); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (counsel); *Mitchell v. Axcan Scandipharm, Inc.*, 2006 U.S. Dist. LEXIS 6521 (W.D. Pa. Feb. 17, 2006) (*amicus*); *Pickell v. Archuleta*, EEOC Case No. 510-2014-00364X (counsel); *Lawrence v. Archuleta*, EEOC Case No. 510-2014-00396X (counsel).

Everyone has a gender identity, meaning a person’s internal sense of their own sex. The term *transgender* refers to people whose gender identity does not correspond with the sex they were assigned at birth.<sup>2</sup> Medical experts agree that a transgender person’s gender identity should be respected and affirmed in all aspects of life, including restroom use.<sup>3</sup> The federal government has recognized that barring transgender people from using the bathroom according to their gender identity exposes them to potentially serious physical injury or illness.”<sup>4</sup>

All schools have a legal responsibility to respect all students’ gender identity and to not discriminate against students on the basis of gender identity. To do otherwise would violate federal law, expose school districts to legal liability, and endanger the health and welfare of students. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (“Title IX”), and its implementing regulations, 34 C.F.R. § 106.31 *et seq.*, prohibit discrimination on the basis of sex in federally financed education programs and activities. Likewise, Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.* (“Title IV”), prohibits discrimination in public schools against students on the basis of sex. As a result, all students, including transgender students, are protected from sex-based discrimination under Title IX and Title IV. Under the Supremacy Clause of the U.S. Constitution, U.S. Const. art. VI, cl. 2, these federal sources of authority control over any provision of state law that conflicts with those guarantees, as the proposed legislation would.

Because “[t]here is no doubt that ‘if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language,’” *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1981) (brackets omitted), ED and the DOJ have made clear that “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and [the Office of Civil Rights] accepts such complaints for investigation.”<sup>5</sup> Moreover, in the context of Title IX’s applicability to gender identity discrimination with regards to the use of single-sex facilities such

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<sup>2</sup> Am. Psychological Assoc., *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* (2011), available at [www.apa.org/topics/lgbt/transgender.pdf](http://www.apa.org/topics/lgbt/transgender.pdf).

<sup>3</sup> World Professional Assoc. for Transgender Health, *Standards of Care* (2012), available at [http://www.wpath.org/uploaded\\_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf](http://www.wpath.org/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf).

<sup>4</sup> Occupational Safety and Health Admin., *Best Practices, A Guide To Restroom Access for Transgender Workers*, available at [www.osha.gov/Publications/OSHA3795.pdf](http://www.osha.gov/Publications/OSHA3795.pdf).

<sup>5</sup> DE, Office of Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), at 5, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. See also DE, Office of Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (Dec. 1, 2014), at 25 (“Under Title IX, a recipient generally must treat transgender students consistent with their gender identity[.]”), available at <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

as restrooms, the ED Office of Civil Rights (“OCR”) issued a letter on January 7, 2015 making clear that: “The Department’s Title IX regulations permit schools to provide sex-segregated restrooms . . . under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.”<sup>6</sup>

As a result, on multiple occasions, school districts, ED, and DOJ have entered into resolution agreements requiring the school districts to allow transgender students to use the restroom and other single-sex facilities that accord with their gender identity in order to resolve charges of discrimination on the basis of gender identity. For example, on July 24, 2013, DOJ entered into a settlement agreement with the Arcadia Unified School District in California after the school refused to allow a male student who is transgender to use the boys’ restrooms and locker rooms.<sup>7</sup> The agreement made clear that “[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX.”<sup>8</sup> Similarly, on October 14, 2014, OCR approved a resolution agreement with a girl who is transgender and had been subjected to discrimination and gender-based peer harassment in her school district.<sup>9</sup> The agreement memorialized the student’s ability to use sex designated facilities, such as restrooms, “for female students at school . . . consistent with her gender identity.”<sup>10</sup>

Numerous federal courts have agreed that Title IX protects all students, including transgender students, from discrimination based on a perceived failure to conform to gender stereotypes.<sup>11</sup> As recently as March of this year, a federal court held that Section 1557 of the Affordable Care Act, which incorporates Title IX’s prohibition on sex-based discrimination,

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<sup>6</sup> Letter from James A. Ferg-Cadima, Acting Deputy Asst. Sec’y of Policy, Office of Civil Rights, U.S. DE (Jan. 7, 2015), available at <https://genderidentitywatch.files.wordpress.com/2014/11/28-2.pdf>.

<sup>7</sup> Resolution Agreement Between the United States and Arcadia Unified Sch. Dist., DOJ Case No. DJ 169-12C-70, OCR Case No. 09-12-1020 (July 23, 2014), available at [www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf).

<sup>8</sup> Letter of Resolution, Arcadia Unified Sch. Dist., DOJ Case No. DJ 169-12C-70, OCR Case No. 09-12-1020 (July 24, 2013), at 2, available at <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf>.

<sup>9</sup> Resolution Agreement Between the United States and Downey Unified Sch. Dist., OCR Case No. 09-12-1095 (Oct. 14, 2014), available at <http://www2.ed.gov/documents/press-releases/downey-school-districtagreement.pdf>.

<sup>10</sup> *Id.* at 1.

<sup>11</sup> See, e.g., *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151-52 (N.D.N.Y. 2011); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); *Montgomery v. Independent Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

“protects plaintiffs . . . who allege discrimination based on ‘gender identity.’”<sup>12</sup> The adoption of a discriminatory law on the basis of gender identity would also violate Fourteenth Amendment guarantees, based on the law of the circuit in the Sixth Circuit Court of Appeals, which governs Tennessee.<sup>13</sup> Simply put, discrimination on the basis of gender identity is “literally” discrimination on the basis of sex. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008).

Finally, we ask that you listen to the authoritative voices of superintendents, principals, school board members, general counsel, social workers, and other officials from schools and school districts that have adopted formal inclusive policies for their transgender students. They represent a broad cross-section of schools and districts from the Heartland to the Deep South, and coast to coast, and are collectively responsible for the education of more than 1.2 million students annually. As they recently explained in a friend-of-the-court brief submitted to the U.S. Court of Appeals for the Fourth Circuit, they have extensive experience confronting the hypothetical concerns raised by some about privacy and disruption. As their experiences prove, none of those hypothetical fears have been realized; instead, inclusive policies for transgender students have had the effect of not only giving transgender students the same opportunity to thrive in school, but also of fostering a safer and more welcoming learning environment for all students. As one official with Broward County Public Schools in Florida explained,

Students in schools just want to have an environment that is safe and affirming. They want to grow, and learn, and have fun. Research points to the fact that they must feel safe and affirmed to do that. If there’s bias in the school, it makes them less able to learn. But an affirming policy has a positive effect on other students as well. If everyone is taken care of, students see that and they value that.

*Amici Curiae* Brief of School Administrators from California, District of Columbia, Florida, Illinois, Kentucky, Massachusetts, Minnesota, New York, Oregon, Washington, and Wisconsin, Interview with Denise Palazzo (Oct. 3, 2015), available at [http://www.lambdalegal.org/in-court/legal-docs/gg\\_va\\_20151028\\_amici-school-admins](http://www.lambdalegal.org/in-court/legal-docs/gg_va_20151028_amici-school-admins). We urge you to help ensure that all Tennessee students, including transgender students, are valued and respected, and respectfully request that you not introduce the proposed legislation.

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<sup>12</sup> *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 U.S. Dist. LEXIS 31591, \*28 (D. Minn. Mar. 16, 2015).

<sup>13</sup> See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 576-77 (6th Cir. 2004) (holding that transgender plaintiff sufficiently stated constitutional and Title VII sex discrimination claims based on his allegations that he was discriminated against because of his gender non-conforming behavior and appearance), *Glenn*, 663 F.3d at 1317 (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008).

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Very truly yours,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND,  
INC.



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